

# **EQUALITY IN EMPLOYMENT**

**A ROYAL  
COMMISSION  
REPORT**

**RESEARCH STUDIES**

JUDGE ROSALIE SILBERMAN ABELLA  
COMMISSIONER



86-0385/

# **Research Studies of the Commission on Equality in Employment**

**Judge Rosalie Silberman Abella  
Commissioner**

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## PRÉFACE

Le rapport de la Commission sur l'égalité en matière d'emploi, déposé à la Chambre des communes le 20 novembre 1984, fait suite à l'analyse de recherches menées auprès de nombreuses sources. La Commission s'est inspirée des points de vue de plus d'un millier de particuliers et d'une gamme complète de travaux de recherches. Bon nombre des études présentées dans le présent volume ont été un instrument essentiel à la Commission dans la rédaction de ses conclusions.

Ces études, dont la plupart ont été rédigées en 1983, traitent savamment de l'égalité en matière d'emploi dans son sens le plus large. Elles portent sur les aspects culturels, juridiques et économiques de l'égalité dans le contexte du travail et avant l'entrée sur le marché du travail. Les données et les concepts qu'on y trouve ont complété les résultats d'autres études disponibles, et ont été d'un précieux secours à la Commission au moment de l'évaluation de la validité de sa propre démarche et de son analyse.

La coordonnatrice exécutive de la Commission, Bernadette Sulgit, a contribué à préparer les documents en vue de leur publication. Il n'a pas été possible de publier toutes les études menées pour le compte de la Commission ni de publier intégralement toutes les études retenues. Nous nous en excusons auprès des auteurs et les assurons que le fruit de leur travail a été utilisé avec le sens de l'équité le plus recherché.

Juge Rosalie Silberman Abella  
Commissaire

## PREFACE

The Report of the Commission on Equality in Employment, tabled in the House of Commons on November 20, 1984, was the analytical result of researching a variety of sources. Views were drawn from meetings with more than a thousand individuals as well as from a comprehensive research base. Critical to the development of the Report's conclusions were many of the research studies contained in this volume.

These studies, most of which were written in 1983, deal in a scholarly way with equality in employment in its widest sense. They explore the cultural, legal, and economic aspects of the issue in its pre-employment as well as its employment-related dimensions. They provided a factual and conceptual complement to other available research and assisted the Commission invaluablely in assessing the validity of its own approach and analysis.

The Commission's executive coordinator, Bernadette Sulgit, was instrumental in transposing the documents into their published form. We were unable to publish all the studies undertaken for the Commission and to include all portions of those studies we did publish. We apologize to the authors for these omissions and excisions but appeal to their sense of equity in deployment of research.

Judge Rosalie Silberman Abella  
Commissioner



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- Labour Market Aspects of Inequality in Employment and their Application to Crown Corporations. *Morley Gunderson*
- Equity in the Labour Market: The Potential of Affirmative Action. *D. Rhys Phillips*
- Strategies for Establishing Affirmative Action Goals and Timetables. *Edward B. Harvey and John H. Blakey*
- Education and Training: Equal Opportunities or Barriers to Employment? *Lin Buckland*
- Daycare and Equality in Canada. *Kathleen Mahoney*
- A Federal Contract Compliance Program for Equal Employment Opportunities. *Marilyn Leitman*
- Applying Equality to Employment. *Margrit Eichler*
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**PART I**

**THE DIMENSIONS OF EQUALITY**





# LABOUR MARKET ASPECTS OF INEQUALITY IN EMPLOYMENT AND THEIR APPLICATION TO CROWN CORPORATIONS

Morley Gunderson

## Sommaire

En se fondant sur des principes théoriques et des données empiriques, l'auteur examine la question de l'égalité en matière d'emploi dans les sociétés d'État et, d'une façon plus générale, celle de la discrimination et des inégalités en matière d'emploi dans le marché du travail. Les diverses causes de la discrimination sont analysées: préférences discriminatoires; fausses données (discrimination fondée sur les statistiques et méconnaissance systématique); dissonance entre les principes et la conduite et rationalisation des erreurs; sécurité d'emploi de ceux qui exercent la discrimination; le désir de minimiser les frais d'adaptation du milieu de travail; le désir de préserver les pouvoirs acquis, et finalement la discrimination systémique. Les données empiriques sont étudiées pour déterminer l'importance relative des caractéristiques propres aux individus et au marché du travail ainsi que l'importance relative du marché du travail, du foyer et des établissements d'enseignement et de formation.

Différentes lois sur l'égalité de salaire sont examinées, de même que la législation sur l'égalité des chances d'emploi et plus particulièrement celle se rapportant à l'action positive. Sont également analysés les politiques connexes portant sur les horaires souples et le travail à temps partiel, les garderies, les congés parentaux, les programmes de crédits d'impôt, les ressources humaines, le plein emploi, la syndicalisation et la déségrégation professionnelle. L'auteur examine également les conséquences éventuelles des diverses lignes de conduite envisagées et met l'accent sur les facteurs qui favorisent ou empêchent la discrimination, sur les différents genres de marché du travail, sur la conjoncture économique actuelle et son évolution, notamment la «désindustrialisation» et le recours de plus en plus fréquent à la technologie de pointe, sur la déréglementation et la libéralisation du commerce ainsi que sur le retranchement dans les activités du secteur public. L'incidence des diverses mesures législatives à notre portée est examinée à la lumière de différentes études économétriques.

L'auteur analyse plus en détail l'action positive par rapport aux critères d'évaluation des programmes, notamment: les coûts administratifs, la réalisation des objectifs pour ce qui est de l'aide consentie aux groupes cibles tout en évitant que les avantages recherchés profitent aux groupes qui ne se rangent pas dans cette catégorie, la bonne répartition des ressources, les avantages qui n'avilissent pas ceux qui les reçoivent et une flexibilité accrue avec le temps. Enfin, l'auteur décrit les particularités des sociétés d'État et détermine la mesure dans laquelle les différentes politiques s'appliquent à ces sociétés et aussi jusqu'à quel point les lignes directrices de ces sociétés sont valables pour d'autres secteurs de l'économie.

## Summary

This report deals with the issue of equality of employment in crown corporations within the larger theoretical and empirical setting of discrimination and inequality of employment opportunities within the labour market in general. Alternative underlying causal motives for discrimination are discussed: discriminatory preferences; erroneous information (both statistical discrimination and systematic misinformation); cognitive dissonance and rationalizing errors; job security of discriminators; minimizing adjustment costs; preserving class power; and systemic discrimination. The empirical evidence is assessed to determine the relative importance of different personal and labour market characteristics as well as the relative importance of the labour market, the household, and educational and training institutions.

Various forms of equal pay legislation are analysed, as is equal employment opportunity legislation, especially affirmative action, as well as a number of related facilitating policies, including flexible hours and part-time work, daycare and parental leaves, tax-subsidy programs, human capital and full-employment policies, unionization, and policies to break down labour market segmentation. The potential impact of the different policy options is analysed, emphasizing the facilitating or inhibiting effect of the channels through which discrimination operates, different labour market structures, the state of the economy, and expected future developments, notably deindustrialization and the shift to high technology, deregulation and trade liberalization, and retrenchment in public-sector activities. The actual impact of different legislated policy options is then assessed based on a number of econometric studies.

Affirmative action as a policy option is given more extensive analysis with respect to a number of program evaluation criteria including: administrative costs; target efficiency with respect to helping the target group as much as possible without having the benefits spill over to the non-target group; efficiency with respect to the allocation of resources; non-demeaning benefits; and flexibility over time. The peculiarities of crown corporations are then analysed with an emphasis on the relevance of the different policy initiatives to crown corporations as well as the relevance of policy initiatives in that sector to other sectors of the economy.



# LABOUR MARKET ASPECTS OF INEQUALITY IN EMPLOYMENT AND THEIR APPLICATION TO CROWN CORPORATIONS

Morley Gunderson\*

## 1. INTRODUCTION

An investigation of equality of employment in crown corporations requires that this issue be set in the larger context in which it occurs. The purpose of this study is to provide such an analysis, emphasizing what we know—based both on theoretical principles and on empirical evidence—and what we do not know about labour market aspects of discrimination and inequality of employment.

The distinction between discrimination and inequality is important since while discrimination can be an important contributing factor to inequality, there can be considerable inequality without discrimination. Independent of the degree of discrimination, society can prefer and exert political pressure for a reduction in inequality for a variety of reasons: caring for the welfare of others; buying behaviour to avoid conflict; buying "insurance" in case it happens to themselves; utilizing the voting mechanism to further their own ends; increasing the incomes of those who provide the redistribution services; and following a social contract (Gunderson, 1983a, pp. 15-19). The motives may be altruistic or completely selfish or some of both.

Whatever the motives or the rationale behind the desire for a reduction in discrimination and inequality, it will be manifest in political pressure to utilize different policy options to reduce discrimination and inequality. Knowledge of how these policy options can be expected to work, however, requires an understanding of the causal factors at work that give rise to the problems in the first place. It also requires an understanding of how the different policy options can be expected to work as well as how they have *actually* worked in the past or in other jurisdictions.

The broader labour market issues are of current policy concern as evidenced by the fact that the problem of minorities and the policy response of affirmative action were emphasized in two recent task force reports on labour market and skill development issues (Canada, 1981; Canada, undated). The issues are likely to be of even greater future importance as the economy comes out of the recession (and policy responses to reduce discrimination and inequality are discussed as more "affordable") and as the new Canadian Charter of Rights and Freedoms becomes operative. With respect to the four groups specifically mentioned in the mandate to the Commission of Inquiry on Equality in Employment (i.e., women, native people, disabled persons, and visible minorities), the labour market issues are likely to be of even greater importance in the future given the large expected labour force growth of many of these groups (Phillips, 1981, p. 2).

This study begins with an analysis of the underlying causal motives for discrimination (Section 2), emphasizing a number of diverse factors: discriminatory preferences; erroneous information (both statistical discrimination and systematic misinformation); cognitive dissonance and rationalizing errors; job security of discriminators; minimizing adjustment costs; preserving class power; and systemic discrimination. Section 3 discusses the relative importance of different personal and labour market characteristics and the relative importance of discrimination in the labour market, in the household, and in our educational and training institutions.

Legislated policy options are discussed in Section 4, beginning with equal pay—its history and application across jurisdictions and its evolution with respect to such factors as identical work, substantially similar work, the composite approach, the equal value approach, and the possibility of an approach emphasizing proportionate pay for proportionate value. Legislation pertaining to employment decisions is then discussed, including equal employment legislation but, more importantly, affirmative action—its characteristics, rationale, the steps in establishing an affirmative action program and its various forms. Section 5 discusses a broad array of facilitating policies: flexible hours and part-time work; daycare and parental leaves; tax-subsidy policies; "human capital" policies such as education, training, information, job search, and mobility; full employment policies and expansive aggregate demand; unionization; and policies to break down labour market segmentation.

Once the policy options are set out, the potential for their impact is analysed in Section 6, emphasizing such elements as: the channels through which discrimination operates (employers, households, education and training institutions); the effect of different labour market structures (competitive, segmented, non-competitive features, public sector); the state of the economy (recession or expansion); and expected future developments, notably deindustrialization and the shift to high technology, deregulation and trade liberalization, and retrenchment in public-sector activities.

Section 7 assesses both the *theoretically* expected impact of different legislated policy options as well as the *actual* empirical evidence from econometric studies. Section 8 provides a set of evaluation criteria that can be used to evaluate public programs and applies these criteria to assess affirmative action as a policy option. The criteria include: minimize administrative costs; attain target efficiency by helping the target group as much as possible without having the benefits spillover to the non-target group; attain efficiency in the allocation of resources; provide non-demeaning benefits; and attain flexibility over time.

In Section 9 many of these issues are applied to crown corporations to ascertain their relevance in that particular sector, and the relevance for policy initiatives in that sector

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for other sectors. The report concludes with an extensive summary and policy discussion.

## 2. UNDERLYING CAUSAL MOTIVES FOR DISCRIMINATION

Issues of discrimination and inequality of employment in the labour market cannot be viewed in isolation from the other areas where discrimination can occur. Such areas include other markets (e.g., those for housing, credit, and goods and services) as well as our educational, training, and job placement institutions and even from within households themselves. Within the labour market, discrimination can emanate from employers, customers, and co-workers and it can manifest itself on the supply side (e.g., through crowding and segmentation), on the demand side (e.g., through hiring and promotion opportunities), and more directly on the wage determination process.

Economists tend to emphasize that discrimination can be costly for those who discriminate as well as for those who are discriminated against. This is so because those who discriminate by paying a wage lower than the productivity of a worker (e.g., wage discrimination) or by hiring or promoting a less productive worker (e.g., employment opportunity discrimination) are forgoing the opportunity for additional profit by not hiring the most productive workers relative to the wage they are paid. Employers may profit from the fact that they are paying a wage less than the productivity of a discriminated-against worker, but this very profit from such workers should encourage employers to hire more so as to increase their profits. This increased demand for discriminated-against workers should eventually remove any wage or employment discrimination. This basic point, and criticisms of it, will recur in the subsequent discussion on the motives for discrimination.

In whatever form discrimination manifests itself and through whatever channels it operates, it can occur for a variety of fundamental underlying reasons. For policy purposes, in the area of discrimination as in all areas of public policy, it is important to have an understanding of the underlying causal relationships involved. Otherwise one may be treating the symptoms rather than the cause, and it will not be possible to forecast expected future changes (especially if the underlying causal determinants change) or to predict the impact of policy initiatives or to know where and when they are best applied. In essence, sound policy analysis requires theoretical knowledge about the underlying cause and effect relationship as well as empirical evidence on the magnitude of the relationships involved.

Section 3 deals with the latter issue. The purpose of this section is to deal with the underlying causal motives for discrimination, with special emphasis on their policy relevance. The main reasons or causal motives can be categorized as: discriminatory preferences; erroneous information; cognitive dissonance and rationalizing errors; job security; paying wages reflecting alternative opportunities; minimizing adjustment costs; preserving class power; and systemic factors. Each of these will be dealt with in turn.

### Discriminatory Preferences

Discriminatory preferences may arise because certain groups may simply have a preference for some groups and/or an aversion to others. Such preferences may be

exhibited by employers, customers, or co-workers in the labour market, by educators or those responsible for training in our educational or training institutions, and even by parents or spouses within the household. (More will be said about these alternative sources of discrimination later.)

The discrimination may be intentional, as for example if a co-worker refuses to work with a minority-group worker, or it may be unintentional, as for example if a supervisor thoughtlessly assigns females the more menial tasks. It may be overt, as for example if a majority-group worker is promoted ahead of a more productive minority member, or it may be covert, as for example if an employer's search procedure does not extend into the areas where minority groups are prominent.

Such preferences for majority-group workers or aversions to minority-group workers can arise from deep-rooted prejudices and stereotyping that people may be unaware of or that may be fostered by others for their own ends. The stereotypes may also become self-fulfilling as minority groups fall into the role that is expected of them and as the general public attributes negative actions on the part of minorities to their particular minority status, and not to their individual motives. When a crime is committed by a racial minority, for example, the minority group tends to be identified in the media; however, when the crime is committed by a non-minority, that fact is of course not mentioned. In such circumstances it is not difficult to see how stereotypes can form and certain prejudices accumulate.

Discrimination based on preferences for one group over another is the basis of many economic models of discrimination such as Alexis (1972), Arrow (1972, 1973), and Becker (1971). It also appears prominent in the personnel literature on employment interviews. Jain and Sloane (1981, pp. 42-47), for example, discuss some 18 studies, reviewed in Arvey (1979a, 1979b) and designed in a variety of ways to test for biases in job interviews, and they concluded that "females are generally given lower evaluations than men who have identical qualifications" (p. 47).

### Erroneous Information

Discriminatory preferences can also arise because of erroneous information. In that vein it is worth distinguishing two types of erroneous information—that which systematically occurs and that which is based on statistical "averages".

Systematic (not to be confused with systemic, to be discussed later) misinformation exists when the information on minority groups tends to be systematically biased. This may occur, for example, if we fail to properly control for the effect of other intervening variables in presenting gross statistical relationships or if media reports tend to identify minority groups but not majority groups when negative acts are committed. Systematic misinformation may also be the result of biases in job evaluation procedures (Arvey, Passino, and Lounsbury, 1977; Schwab and Wichern, 1983; Treiman and Hartmann, 1981). Such biases may occur when the jobs are analysed and then described in a job description (job analysis or description stage), when the descriptions themselves are subsequently evaluated (job evaluation stage), and when the evaluations are subsequently weighted or rewarded by external wage factors that may be biased.



While such systematic misinformation tends to be found in the personnel literature on job evaluation procedures, as well as in the previously discussed literature on employment interviews and in the socio-psychological literature that emphasizes stereotyping, economists tend to have problems attaching considerable weight to this factor since economic forces would dictate that such costly errors would dissipate in the long run. That is, systematically misjudging a group means that employers are not hiring or promoting the best people and there is not much long-run "survival value" in making such business errors.

In part for these reasons, "statistical theories" of discrimination (e.g., Aigner and Cain, 1972; Lundberg and Startz, 1983; Phelps, 1972; Spence, 1974; Stiglitz, 1973) have emphasized that employers make recruiting and hiring decisions on the basis of the average (or some other measure of "central tendency") performance of the groups rather than on the basis of each individual's performance. Intense individual evaluations are often costly and hence the performance of the individual's reference group may be used as a less costly alternative. Even if "mistakes" are made, in the sense that some better individuals are bypassed, this has to be balanced off against the more costly individual evaluations. An analogy would be when we shop at a supermarket because we think it provides the best average price-quality combination; we may make mistakes on individual items but still be correct on average and it does not pay us to engage in costly search for the best buy in every individual item.

Such statistical discrimination of course can survive in a market economy and in fact it may be efficient for employers. It may even be efficient for individual employees in the sense that it does not pay them to incur the costs to prove that they are in fact different from the group within which they are being judged. While possibly efficient (i.e., the benefits to an individual employer or employee are not worth the costs of changing the procedure), it can certainly be inequitable or unfair to those individuals who are judged on the basis of their group rather than individual performance.

Such may be the case for majority- as well as minority-group workers, since there are obviously "deviations from the norm" within each group. However, to the extent that there is more uncertainty and variation in the expected performance of minority-group workers, then such statistical differentiation may affect minorities disproportionately. For example, there is greater variation in the expected continuity of employment of women than men and hence individual women who expect to have a more continuous career are more likely than men to have to "prove their commitment".

Unlike systematic misinformation, such statistical discrimination will not be removed by policies that provide correct information on the performance of the different groups, at least when that performance is based on the average tendencies of the groups. What is needed is information on the expected performance of each individual and that is much more costly than that of groups. Even if legislation requires that we evaluate people on the basis of their individual rather than group performance, the real resource cost of that procedure does not disappear, albeit it must be evaluated against the social benefits of a less discriminatory evaluation procedure.

### Cognitive Dissonance and Rationalizing Errors

As indicated previously, economic theory argues that when faced with a costly error (e.g., employing majority-group workers at a wage that is higher than that paid to minority-group workers, or not hiring or promoting the best person), there is a strong economic incentive to abandon the procedure that is in error. Thus the economic forces of competition should serve to reduce discrimination, at least in the long run.

Alternative perspectives, notably psychology, have emphasized different responses that parties may make when faced with an error. In particular, cognitive dissonance may set in and the parties begin to rationalize rather than abandon their error (Akerlof and Dickens, 1982; Arrow, 1972). Such rationalization may be couched in a so-called scientific fashion (e.g., biological aspects of racism or sexism) in part to provide a cloak of legitimacy and an aura of sanctity. In addition, the rationalization may take the form of arguments that many policies designed to help minorities may actually harm them—a possibility that may be true, but that may also reflect cognitive dissonance. Obviously the more threatening or blatant the error, the more elaborate the rationalization scheme must become. Also, the more the discriminatory procedure is exposed as being in error, the more the parties may retreat into further rationalization. The process obviously can feed on itself once it gets started (which suggests that policies to reverse the process may also have cumulative effects).

To economists such a process of rationalizing rather than correcting costly errors does not have "survival value", at least in a competitive environment. However, while it may not have much economic survival value it certainly can have psychological survival value and, if it did not have adverse effects on others, it may be a desirable or at least a necessary trait for psychological well-being. Simply put, it may be psychologically healthier to adapt to, ignore, or even rationalize our small errors than to constantly change our behaviour in response to them. It is when the errors become severe or they have adverse consequences for others that the problems arise.

The possibility of cognitive dissonance and rationalizing errors gives rise to a number of policy implications with respect to discrimination and inequality in employment. First, it calls for a healthy scepticism of elaborate rationalization of discriminatory behaviour as being non-discriminatory, but rather based on certain "objective factors". Second, it suggests that once a process is reversed then the reversal may be cumulative as the rationalization works in the other direction. Third, it suggests that policy initiatives that may be in error may be rationalized as correct both by those who are responding to the policy and by those who initiate and enforce it. Clearly the existence of cognitive dissonance may provide a rationale for certain policy initiatives, but it may also provide a rationale for certain checks on policy. It is methodologically unsound to believe that cognitive dissonance could only apply to other parties and not to policy-makers themselves.

### Job Security of Discriminators

An underlying causal motive for discrimination may also emanate from concern over job security on the part of those who discriminate. This would be the case for co-workers and

especially for those whose employment and promotion opportunities may be jeopardized by anti-discrimination policies. Affirmative action policies obviously would pose the greatest threat, since in such circumstances preferential treatment may be given to minorities. However, even policies that are more neutral and that are designed to simply correct the more obvious examples of discrimination can pose a threat to majority-group workers by jeopardizing their otherwise privileged and protected position. Obviously the threat against job security is likely to be greater in times of recession or in already declining sectors and where the policy change is instituted quickly. In that vein, policy changes that are instituted more slowly, while they can be criticized for their slowness, do have the virtue of enabling adjustment to occur through normal attrition or reductions in the flows of new entrants. This in turn can minimize the political opposition from those who otherwise would lose from a more abrupt policy change.

Because threats to job security or promotion opportunities are most likely among those who are good substitutes for those who are assisted by anti-discrimination policies, then the opposition is likely to be strongest among such groups. This may well involve other minorities, hence explaining in part the phenomenon that minorities are not immune to discriminating against each other. It may also involve different disadvantaged groups, such as possibly younger and older workers, the former who may feel the pinch of reduced employment opportunities and the latter who may feel the reduced promotion opportunities or the pressure to retire early.

Concern for job security may also lead some groups to support particular legislative initiatives (such as equal pay legislation) that, by raising the price of minority workers, may cause firms to reduce their demand for such workers, hence increasing the employment opportunities of other substitute workers. In essence such wage-fixing legislation (including minimum wage laws) may reduce what some label as "unfair competition" from those who are willing to work for less.

Many would argue that policy initiatives that improve the opportunities or pay of some need not come at the expense of others. In fact, this is often enshrined in legislation that specifically forbids the lowering of the pay of males, for example, to achieve equal pay between men and women. It is certainly possible that pay increases to some need not mean pay reductions to others (especially in a dynamic sense when one is dealing with rates of increase over time rather than in a static sense where pay levels are involved), and it is certainly the case that increased employment and promotion opportunities to some need not come at the expense of other workers. That is, it is important to avoid the "lump-of-labour fallacy" that assumes there is simply a fixed economic pie and number of jobs to go around.

Nevertheless it is equally important to avoid the wishful thinking that gains for one group need never come at the expense of losses to others. In most circumstances, especially in a stagnant economy, there are only a certain number of employment and promotion opportunities and there is a relatively fixed wage bill that employers can pay; large gains to one group usually imply smaller gains to other groups. Obviously there is nothing wrong with this when the differential

gains reflect a conscious effort to reduce the effects of discrimination. Nevertheless, it is a likely reality that will not disappear through wishful thinking.

This reality has a number of implications for policy initiatives. First, it suggests that policies that are phased in and allow time for adoption are likely to minimize the loss to others and hence their political resistance. Second, it suggests that policy initiatives are also likely to be more successful when the economy is expanding and positions are not so entrenched; it is easier to change relative positions when everyone's absolute position is improving. Third, policies that improve the relative position of some minorities are likely to reduce the relative position of other disadvantaged groups who compete with minorities. Fourth, while the number of employment opportunities and the wage bill are not fixed, they are also not an infinite reservoir, and the political resistance to policy initiatives and the pressure for other ameliorative policies are likely to be in direct proportion to the losses of others. The issue then becomes one of deciding which groups merit the most support.

### **Paying Wages Reflecting Alternative Opportunities**

With the possible exception of statistical discrimination, the previously discussed causal motives for discrimination implied what generally could be considered socially undesirable behaviour on the part of those who discriminate. The situation is more complicated, however, if employers do not overtly discriminate but rather follow the usual profit-maximizing policy of paying simply the lowest wage necessary to attract and retain a given type of worker. For minority groups this may be a low wage reflecting their reduced employment opportunities and their being subject to wage discrimination elsewhere. Employers in such circumstances are simply doing what other employers are doing—paying the lowest wage necessary to attract workers (formally, the opportunity cost or reservation wage of such workers). It certainly may be meritorious for employers in those circumstances to pay such workers a higher wage on the grounds that workers should not be penalized for their reduced opportunities elsewhere, just as it may be meritorious for employers to pay unskilled workers a higher wage on similar grounds. However, it is unlikely to occur just as it is unlikely that most consumers would voluntarily pay higher prices or not buy certain products because they are produced by workers with restricted opportunities elsewhere.

Clearly the underlying motivation in such circumstances is not intentional discrimination, albeit it may involve taking advantage of someone's restricted opportunities. The motivation of employers in such circumstances is essentially no different from the motivation of employers whose specific labour needs are such that they do not hire from the pool of labour with restricted opportunities. Employers in either circumstance will try to pay the lowest wage necessary to attract and retain their required workforces. Both types of employers have the same motivation; they just face different circumstances (i.e., workforces with different alternative opportunities).

From a policy perspective it is probably not expedient to expect employers to voluntarily pay a wage that is higher than the minimum necessary to attract labour. The search for



the lowest price is a common ingredient for staying in business. Rather it seems more sensible to utilize anti-discrimination policies to expand the alternative opportunities of workers and to ensure equal pay and equal employment opportunities within the hiring firm.

### Minimize Adjustment Costs

Even though through discrimination employers may be foregoing the chance to reduce costs even further (as explained at the beginning of this section), they may continue discriminatory practices because of the adjustment costs of moving to the more profitable, non-discriminatory long-run equilibrium. For example, employers that realize they are not hiring or promoting the most productive workers or are paying some workers more than other equally productive ones certainly have an incentive to expand the hiring and promotion of those who are more productive relative to their pay. However this may mean replacing existing high-cost workers with new low-cost workers.

This may have other cost implications for a number of reasons. First, it is not costless to replace workers, especially since there are a number of quasi-fixed costs that are incurred with respect to the recruiting, hiring, training, and the ultimate termination of the existing workforce. In such circumstances firms will want to amortize or spread these quasi-fixed costs over as long a period as possible and hence they will want to retain their existing workforce. (This explains, in part, the willingness of firms to go along with seniority provisions and to use methods of compensation such as pensions and other forms of deferred wages to retain their workforce.) For these reasons firms may prefer to replace their more costly workforce through attrition.

A second cost implication stems from the fact that replacement is likely to be met by resistance. This could come in the form of union pressure or the bringing of "unjust dismissal" cases to court or pressure from the existing workforce that may be reluctant to work with the new workforce or that may have morale problems because of concern over their own possibilities for replacement (legislative protections notwithstanding). Even if such resistance is not justified and simply reflects a desire to protect a privileged position that is otherwise protected by discriminatory practices, it can still occur and have possible cost implications for firms.

Given the desire to avoid these resistance costs and to amortize the quasi-fixed costs by reducing the turnover of their workforce, firms may be reluctant to replace their existing workforce with a new workforce that is otherwise lower paid because of discrimination. In such circumstances discriminatory wage differentials and employment practices may persist for a considerable period of time even in a competitive cost-conscious environment. They will only dissipate in the very long run through attrition and the entry, exit, and location decisions of firms. The underlying motivating factor in these circumstances is not a desire to discriminate per se, but rather a desire to minimize costs, albeit it can lead to the same result in the short run.

If such discrimination is important its dissipation will be assisted by policies that do not require firms to lose their quasi-fixed costs associated with their existing workforce. Obviously an expanding, full-employment economy helps in this regard, since it obviates the need to displace the existing

workforce. New workers and promotions can be accommodated without displacement.

Somewhat paradoxically, equal pay and equal employment opportunity legislation may also help reduce the *resistance* of existing employees *against their employer*, since the decision is somewhat taken out of the employer's hands. The legislation *enables* an employer to hire minority workers without worrying as much about cost implications that may stem from the reactions of their existing workers; there is less point in reacting against the employer since the employer is simply acting according to the law, and for majority-group workers to react against the law may show their true motives. In essence, it is possible for employers to welcome legislation if it reduces resistance to what they want to do in the first place, especially as it imposes relatively uniform costs on all employers, including those who would prefer not to hire minority workers but are pressured to because of legislation.

### Preserve Class Power

Radical and Marxian perspectives on discrimination emphasize the underlying motivation as one that is designed to preserve the dominant position of the capitalist class over the working class in society. They emphasize that it is the *power* of classes in society (not the forces of supply and demand, as emphasized by economists, or the segmented nature of labour markets, as emphasized by sociologists) that is the prime factor in the determination and the distribution of income. Power not only enables groups to establish the "rules of the game" and to redistribute in their favour, but it also enables them to use the instruments of the state to retain power.

According to this perspective, there are basically two tactics that capitalists can use to ensure the suppressed position of minorities. The first is for capitalists to behave as a cohesive group—or, in economic terminology, to act as a cartel. For example, even though it may be in their *individual* interest to hire a minority worker whose wage may be less than that of an equally productive majority worker (the very process of competition that would serve to dissipate discrimination), they would not do so because it is in their *collective* class interest to have a reserve of unemployed or minority workers whose desire for jobs serves to discipline the rest of the workforce. As with any cartel, the group knows that it is in their collective interest to behave as a cartel and not to compete internally with one another, even though one could increase one's individual short-run profits at a given point in time by "cheating" on the cartel. It is for the latter reason that cartels are notoriously unstable and it is for that reason it is questionable whether whole groups of employers could act as a cartel with respect to their employment decisions on minorities.

Nevertheless, the radical and Marxist perspectives emphasize the "club like" nature of big business, with its interlocking directorates, socializing behaviour, "old boy network", and ability to put forth a united front on business interests. Whether such forces are sufficient to maintain a cartel-like behaviour and avoid the competitive hiring of minorities that would dissipate discrimination remains an open question. This "cartel-like" behaviour is also required for discriminatory behaviour to persist in the international trade models of discrimination (e.g., Kruger, 1963) that regard discrimination as

akin to the erection of tariff barriers on the part of majority-group workers.

In the radical and Marxist perspective, a second tactic used by capitalists to suppress minorities involves the process of "divide-and-conquer" (Reich, 1978; Roemer, 1979) to pit minorities against each other, and other workers against minorities, in part to prevent a united working-class front. According to Marxist perspectives, such a united front would inevitably arise out of the increased subjugation of the working class, a process that could be postponed but was inevitable under advanced capitalism. However, if the unity of the working class could be disrupted (e.g., by creating disunity with respect to minorities, by making minor improvements to the conditions of workers, or by co-opting the leadership), then capitalists could postpone their inevitable decline.

The policy implication that flows from this perspective is that change in the area of discrimination as in other areas will only flow from a basic restructuring of the power relationships in society. Such power will not be relinquished voluntarily or easily, and it may have to be achieved by violent means. Minorities and workers in general should see their interests as being part and parcel of the interests of the working class. In this perspective most of the current policy issues can be regarded at best as palliatives designed to stave off more radical changes in the power structure and at worst as policies that may create disharmony in the working class (e.g., by pitting minorities against other workers and by co-opting the leadership).

A milder perspective that does not fully embrace this radical perspective may still emphasize the importance of the underlying power relationships in society, the possibility that businesses can exhibit elements of cartel-like behaviour in their treatment of minorities, and the possibility that certain policy initiatives may be intended mainly to co-opt more fundamental change. These can still be important factors in perspectives that do not regard the preservation of class power as the underlying motivation for discriminatory behaviour.

### Systemic Discrimination

Systemic discrimination is regarded as discrimination that is an *inherent* part of the system, somewhat independent of the underlying motivation of the participants in the system. It can be an *unintended* by-product of the particular socio-economic system and can occur even if individual parties do not intentionally engage in discrimination.

Such discrimination could be consistent with the previously discussed possibilities that employers simply pay the lowest wage necessary to attract and retain their workforce and that this wage may be low for minorities because of their reduced alternatives elsewhere. Also, unintentional discrimination is consistent with the notion that employers use group characteristics as a low-cost proxy for individual characteristics or that they would not discriminate were it not for the adjustment costs of moving to a non-discriminatory equilibrium.

Nevertheless, the concept of systemic discrimination seems to apply to something more than that which is consistent with competitive behaviour in labour markets. It is alleged to result from the application of practices or criteria that often have little relevance to the requirements of the job,

such as word-of-mouth recruitment that replicates the existing composition of the workforce or unnecessary height, weight, education, or experience requirements (Canada, 1981, p. 92; Phillips, 1981). It also reflects the pervasive nature of discrimination on so many aspects of behaviour and its resultant inter-related cumulative effects, as well as the self-fulfilling aspects as people often fall into the roles to which they are assigned. Role-playing, stereotypes, lack of self-confidence, and vicious circles of cumulative causality all become important in systemic discrimination. The search becomes not so much for the ultimate cause; that does not matter much since once discrimination gets started it develops a life of its own. Rather the search becomes more for solutions that will reverse the process; once reversed the problem will take care of itself. The appropriate analogy may be to a disease that feeds upon itself; even if the underlying root cause cannot be dealt with directly, improving some of the secondary effects may reverse the decline and enable the system to take care of itself.

Policy initiatives stemming from systemic discrimination would emphasize reversing the process and not being fundamentally concerned with the root causes. To the extent that the root causes are fundamentally part-and-parcel of the socio-economic system itself, policies to fundamentally change the system would be in order, a view that would also be embraced by radical and Marxist perspectives. In the absence of such fundamental changes, however, policies to reverse the process would be in order. Once that is done, then cumulative effects will build in the other direction as role models get established, stereotypes break down, and self-confidence builds. In that vein, programs such as affirmative action become more attractive because they do not concern themselves so much with what *caused* the problem but rather with rectifying the problem that simply seems to be an inherent part of the system. Once the cumulative effects can be reversed, then the need for affirmative action or any other compensatory programs will "wither away".

While the notion of systemic discrimination can have superficial appeal, it is also somewhat of a nebulous concept in its attribution of the problem to "the system". Socio-economic systems are the results of the interactions of various actors and institutional arrangements, and if policy initiatives are to change the underlying causal relations one must have a theory of cause and effect so that changes can be made to alter the structural underlying determinants of discrimination. If the results of the system seem to be greater than the "sum of the parts", then the interactions that yield this result should be specified. If the socio-economic system yields discrimination and inequalities as a by-product, then the process by which this occurs must be spelled out. As stated at the beginning of this section, in the absence of such knowledge of the underlying causal determinants of discrimination and inequality, policymakers will not be able to treat the causes, to forecast expected future changes, or to predict the expected impact of alternative policy scenarios.

### 3. CONTRIBUTING FACTORS TO INEQUALITY IN EMPLOYMENT

As indicated previously, sound policy analysis requires empirical evidence on the magnitude of discrimination, the main factors contributing to that discrimination (especially those that are subject to a degree of policy control), and the

relative importance of the various contributing factors. Otherwise it is not possible to tell if policy initiatives are required, where they are best initiated, and the extent to which they should be applied.

The purpose of this section is to shed some light on these issues by discussing the relative importance of different personal and labour market characteristics and the relative importance of discrimination in the labour market, in the household, and in our educational and training institutions. Also, the problems in making such overall assessments are discussed. The empirical evidence refers to discrimination on the basis of sex since that is where the bulk of work has been done in Canada. A limited picture of the employment problems, especially unemployment, of other minority groups is given in Clatworthy (1981) for native Canadians and Sampson (1981) for the disabled, although, as pointed out (Canada, 1981, p. 99), there is almost no systematic data collected in Canada with respect to the disabled. In addition to focusing on discrimination on the basis of sex, the treatment in this study is of a summary nature; the different methodological procedures, data sets, and a more systematic analysis and critique of the various studies is given in Gunderson (1980). Other summary reviews of Canadian economic studies include Gunderson (1976a), Agarwal and Jain (1978), and Agarwal (1982).

#### **Existence of Wage and Employment Discrimination**

On the basic question of the existence of wage and employment discrimination, the empirical evidence suggests quite unequivocally that it exists. This is illustrated, for example, in Table 1 taken from Gunderson (1980, p. 5.20; 1982, p. 11), which summarizes some 13 Canadian empirical studies. The gross unadjusted ratio indicates the ratio of female to male earnings unadjusted for various productivity related factors. It is typically around .6 when comparisons are made based on annual earnings as in the Census data and typically around .8 when comparisons are made within the same occupation and establishment.

When adjustments are made to account for differences in the productivity-related factors as indicated in the right-hand side of the table, the net adjusted ratio rises considerably; however, the gap does not disappear. In the studies where the adjusted comparisons are *not* within the same establishment and narrowly-defined occupation, the adjusted ratio tends to be in the neighbourhood of .75 to .85. However, when comparisons are made within the same establishment and narrowly-defined occupation (as is required under equal pay legislation), the adjusted ratio tends to be in the neighborhood of .90 to .95 (Gunderson, 1975, and the three case studies). This suggests that wage discrimination within the same establishment and narrowly-defined occupation is in the neighbourhood of 5 to 10 per cent, indicating that there is a role, but a rather limited one, for equal pay legislation as it is conventionally applied. Similar results to the Canadian ones are found in empirical studies based on U.S. data (as illustrated by the summary of some 21 U.S. studies given in Lloyd and Neimi, 1979, pp. 232-238) as well as in studies from other countries, notably the United Kingdom, Australia, New Zealand, Scandinavia, and countries of the European Economic Community (analysed in Gunderson, 1980, pp. 6.7-6.18).

The empirical evidence also indicates that occupational segregation is a much more important contributing factor to the overall earnings differential than is wage discrimination within the same establishment and narrowly-defined occupation, an empirical result that continues to be confirmed in more recent studies (e.g., Beller, 1982; England, 1982). This is also consistent with a number of job evaluation studies (discussed in Gunderson, 1984) that tend to find that female-dominated occupations tend to be paid about 80 per cent of the pay in male-dominated occupations for the same job evaluation score in the same establishment. This highlights the potential importance for equal employment opportunity policies, including affirmative action, as well as equal pay for work of equal value legislation, which enables comparisons across occupations.

#### **Relative Importance of Contributing Factors**

While it would be useful for policy purposes it is extremely difficult to give a precise estimate of the relative importance of the various factors that contribute to the overall male-female earnings gap, in part because of the different data sets and methodologies, and in part because the contribution of the different factors are not independent of each other and of the other variables that are used to explain the gap. In addition, in the conventional technique that uses multiple regression analysis and decomposes the overall earnings gap into a portion attributable to endowment differences and a portion attributable to wage discrimination, the wage discrimination term cannot be meaningfully decomposed further into a portion due to differences in the regression coefficients and a portion due to unexplained differences in the intercepts, since the value of the intercepts reflects the arbitrary coding of the units of the data (Jones, 1983). This implies that the portion attributed to wage discrimination cannot be decomposed into further component parts, since the relative contribution of a particular variable will depend on the value of the intercept term, which in turn reflects the arbitrary coding of the units for the different variables. Because of these various problems the following statements should be regarded as more suggestive than conclusive on the relative importance of different contributing factors. These statements are based on the empirical results and reviews of other studies contained in Gunderson (1980).

Differences in labour market experience and the continuity and relevance of that experience are important factors in explaining part of the male-female earnings differential. In addition, being married has the opposite effect on earnings for males and females, increasing it for males and decreasing it for females. The debilitating effect on earnings that emanates from being married and having a lack of continuous and uninterrupted experience highlights the importance of differential household responsibilities and perceptions about the impact of marriage.

The economic return to education tends to be higher for females than males for advanced levels of education but not at early levels. This suggests that females can improve their economic position, both absolutely and relative to males, by acquiring more advanced education, although additional education at low levels may do little to improve their position.

The earnings gap tends to be smaller in unionized than non-unionized establishments and in the public as opposed to the private sector (more will be said about this later), and



**TABLE 1**  
**Female/Male Earnings Ratio Unadjusted and Adjusted for Various Productivity-Related Factors, Canada**

| Study                             | Year and Data                                                                     | Gross Unadjusted Ratio <sup>a</sup> | Net Adjusted Ratio   | Productivity Adjustment Factors                                                                                                               |
|-----------------------------------|-----------------------------------------------------------------------------------|-------------------------------------|----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------|
| ONTARIO                           |                                                                                   |                                     |                      |                                                                                                                                               |
| 1. Gunderson (1975)               | Narrowly-defined occupations same establishment 1970 Census                       | 82                                  | 93                   | Human capital via occupation, incentive pay system, union status, industry, region                                                            |
| 2. Robb (1978)                    |                                                                                   | 60                                  | 76                   | Age, marital status, education, training, time worked, occupation, and industry                                                               |
| 3. Gunderson (1980)               | 1970 Census                                                                       | 60                                  | 94<br>76             | As above plus experience<br>Potential experience, marital status, education, training, language, time worked, occupation, industry, residence |
| CASE STUDIES                      |                                                                                   |                                     |                      |                                                                                                                                               |
| 4. Schrank (1977)                 | University faculty 1973/74                                                        | 83                                  | 95                   | Experience, seniority, rank, citizenship, faculty, administrative responsibilities, research output                                           |
| 5. Stelcner (1979)                | University faculty 1976/77                                                        | 91                                  | 94                   | Experience, seniority, department head, having Ph.D.                                                                                          |
| 6. Walmsley, Ohtsu & Verma (1980) | Unnamed organization Saskatchewan, 1980                                           | 80                                  | 87                   | Skill effort, responsibility, working conditions (as measured by job evaluation score)                                                        |
| EARLIER CANADIAN STUDIES          |                                                                                   |                                     |                      |                                                                                                                                               |
| 7. Ostry (1968)                   | 1960 Census                                                                       | 59                                  | 81                   | Age, education, occupation                                                                                                                    |
| 8. Robson & Lapointe (1971)       | University faculty                                                                | 80                                  | 90                   | Age, rank, field, degree, university size and region                                                                                          |
| 9. Holmes (1976)                  | 1967 Survey                                                                       | 49                                  | 56                   | Age, marital status, education, immigration status, time worked, occupation, residence and region                                             |
| RECENT CANADIAN STUDIES           |                                                                                   |                                     |                      |                                                                                                                                               |
| 10. Gunderson (1979)              | 1971 Census                                                                       | 60                                  | 77                   | Potential experience, marital status, education, training, language, time worked, occupation, industry, residence, region                     |
| 11. Shapiro & Stelcner (1980)     | 1971 Census<br>Canada public<br>Canada private<br>Quebec public<br>Quebec private | 65<br>57<br>66<br>56                | 83<br>72<br>87<br>74 | Age, marital status, education, training, language, time worked, occupation, city size and region                                             |
| 12. Stelcner & Shapiro (1980)     | 1971 Census<br>All males and females<br>Single and over 30                        | 60<br>60<br>60                      | 82<br>82<br>82       | As in Shapiro and Stelcner (1980)<br>time worked, occupation, city size and region                                                            |
| 13. Kapsalis (1980)               | 1975 Survey of Consumer Finance                                                   | 61                                  | 87                   | Age, residence, job duration, occupation, region                                                                                              |

Source: Gunderson, 1980. Some studies, such as Boyd and Humphreys (1979) and Kuch and Haessel (1979), were not included since they did not enable the calculation of unadjusted and adjusted ratios.

Note: a. For comparability purposes the ratio for full-time workers was used.

it tends to be smaller when job evaluation schemes are used to provide more objective measures of productivity. Also, the gap appears to be narrowing slightly over time, although there is some contrary evidence on this point, as with many of the other factors.

### **Evaluation Problems**

With respect to virtually every one of the previously mentioned generalizations there are some exceptions in the empirical literature providing evidence working in the opposite direction. That is, these are generalizations and not universal rules. This divergence occurs in part because of differences in the methodologies, data sets, time periods, or countries under examination. However, it also reflects some of the very real evaluation problems that are encountered in this as in most empirical analysis. These evaluation problems in the empirical analysis also imply evaluation problems in the assessment on the part of enforcement agencies for equal pay and equal employment opportunities. A number of these merit discussion for the policy implications they provide.

#### **• Non-wage aspects of compensation**

Fringe benefits and other non-wage aspects of employment create a difficult problem in evaluating the extent of discrimination in employment (Gunderson and Reid, 1981). The compensation of a job consists of both wage and non-wage aspects where the latter includes fringe benefits such as pensions, parental leaves, paid sick leaves, and working conditions. The last component of working conditions should be controlled for when equal pay comparisons are made because the legislative requirements usually specify similar working conditions as a criterion. However, the first components are more difficult to control for and could give rise to competitive pressures for employers to adjust the wage component to compensate for differences in these other components: equal total compensation may require unequal pay for otherwise similar circumstances. For example, to the extent that maternity leaves are a possibility and women have higher absenteeism (in part because of their traditional responsibility for care of anyone else who is ill in the household), there will be competitive cost pressures for their wages to be correspondingly reduced.

The pension issue is more complicated because, relative to men, women can expect to be beneficiaries of pensions for a longer post-retirement period given their longer expected life span. For this reason an "actuarially fair" pension would require larger contributions for females or a lower monetary wage component in the total compensation package. However, working in the opposite direction, women are less likely than men to benefit from pensions because they are less likely to be in jobs providing pension protection (e.g., full-time work), they are more likely to lose their non-vested contribution if they move in and out of the labour force, and their pension benefits being based on earnings may reflect any discrimination in those earnings. In addition to the extent that their pension benefits are based on their earnings in their "final years" near retirement, and to the extent that their wage profile does not rise as fast as that of men in those final years (for reasons to be discussed subsequently), their pension receipts will be correspondingly reduced.

Clearly the question of discrimination in pensions is exceedingly complex, and it is an issue that will likely grow in

the future given the aging of the population, the continued labour force participation of older women, and the trend towards early retirement. The issue is complicated by the fact that in a competitive market environment market wages should adjust to reflect the differential expected benefits, and this is the very thing that makes equal pay evaluations so complicated in such circumstances.

#### **• Deferred compensation**

The compensation issue is further complicated by the fact that competitive market wages need not reflect an individual's contribution to a firm's productivity at every given stage of the individual's life cycle. The competitive equilibrium condition is simply that *expected* compensation over the life cycle equals *expected* productivity and this allows for considerable divergence at any given age. There are also theoretical reasons to suggest that firms will want to pay wages that are below a worker's productivity when they are young and above their productivity when they are older, in part to encourage work incentives (since the employer has an element of discretion over paying the deferred wage) and in part to discourage turnover so as to recoup the quasi-fixed hiring and training costs (Gunderson, 1983b). To the extent that females have greater uncertainty about their expected future stay in the labour force, then they are unlikely to enter into any explicit or implicit contractual arrangement for their compensation to be deferred. They are more likely to be paid a wage that reflects their current rather than past contributions to productivity.

This difference in male-female compensation profiles has a number of implications for assessing equal pay relative to equal productivity. First, even in situations where productivities are equal, non-discriminatory pay differentials could arise with males being paid less than females when they are young and more when older as they receive their deferred wage. (This may explain, in part, the fact that male-female wage differentials are smaller for younger workers.) Second, we would expect deferred compensation in such forms as pensions to be greater for males than females both because they can be part of the deferred wage compensation package and because pensions may be based on one's final year's earnings, which are higher when compensation is deferred. Third, the whole lifetime productivity of males may be shifted upwards somewhat by the fact that deferred wages are possible and this encourages effort and incentives to be promoted so as to obtain the deferred wage. (This should be controlled for, however, when comparisons are made between jobs of the same skill, *effort*, responsibility, and working conditions.)

Clearly non-wage aspects of compensation and deferred wages can complicate equal pay comparisons. It does not make them impossible; however, it does suggest that for this reason they will be more difficult than equal employment opportunity comparisons.

#### **• Unmeasured quality differences**

Other evaluation problems arise because of problems in evaluating the often difficult-to-measure quality differences in such factors as education, training, or experience that may affect earnings differentials. These may be particularly relevant if, for example, the education or training of females is not as labour market oriented as that of males or if their



experience is likely to be uncertain or interrupted. These are also likely to be the case if females expect to face discrimination upon entry into the labour market, since they are then less likely to incur the cost of labour market oriented education or training if it is unlikely to yield a high return.

To a certain extent these quality differences can be accounted for by using narrowly-defined occupation groupings where it is less likely that quality differences within a group would arise; if they did then parties would be assigned to another occupational grouping (e.g., Gunderson, 1975, 1976b). Or they can be controlled for by trying to get better measures of the quality or experience factors. Zabalza and Arrufat (1982), for example, construct a measure of estimated actual experience to use in place of the variable of potential labour market experience that is used in most empirical studies, and they find this corrected measure of experience to have an important impact in explaining a substantial portion of the male-female earnings gap in the United Kingdom. Based on U.S. data, a number of other empirical studies find that a considerable portion of the overall male-female earnings gap can be explained by differences in a number of factors that are conventionally difficult to measure, such as tenure at one's existing job and continuity of experience (Mincer and Polachek, 1978; Mincer and Ofek, 1982), training and turnover (Landes, 1977), immobility and ties to the household (Frank, 1978), education quality (De Tray and Greenberg, 1977), and even tastes and personality factors (Filer, 1983).

In part because of data limitations in Canada, especially with respect to the ready availability of longitudinal panel data tracking the same individuals over time, it has been difficult to provide comparable Canadian estimates. This is particularly the case with respect to the crucial variable of experience in its different dimensions: full-time and part-time experience; the timing and duration of labour force withdrawals; and career advancement and seniority with current employers (Ornstein, 1982, pp. 11-12, 29).

#### • Selection bias

Most empirical studies that have attempted to control for quality factors that are typically difficult to measure tend to find that the overall earnings gap is reduced somewhat by better controlling for such differences, suggesting that the quality of these factors tends to be higher for males. There is an important exception, however, where the bias is likely to work in the other direction. A number of empirical studies based on the 1971 Canadian Census have tried to control for the effect of differential household responsibility, and hence to focus on labour market rather than household discrimination, by restricting their analysis to sub-samples such as never-married males and females over age 30 (e.g., Block, 1982; Kuch and Haessel, 1979; Robb, 1978; Stelcner and Shapiro, 1980, for variants of this). In such comparisons, the adjusted male-female earnings gap is reduced considerably and often disappears.

The problem with this methodology is that it likely introduces a bias in the other direction (i.e., understating the degree of discrimination) because males and females who are never-married and over 30 may systematically differ in terms of unmeasured factors that are correlated with their earnings. For example, females who are over 30 and never-married may be career-oriented whereas males in that staté

may have personality traits that are undesirable for labour market behaviour. In essence one may be comparing a select sample of some of the "best" females with some of the "worst" males; hence, one ought not to be surprised that much of the overall earnings gap disappears. (Formally, this is an econometric problem of sample selection bias due to differences in unobserved heterogeneity.)

#### • Assessment of evaluation problems

The discussion of the evaluation problems was meant to be illustrative of the complexity of the issues that can arise for the statistical measurement of discrimination as well as for assessment of the magnitude of discrimination on the part of enforcement agencies. In general most of the "refinements" in measurement tend to reduce the magnitude of the earnings gap that can be attributed to pure discrimination, at least as it occurs in the labour market. Nevertheless, there are almost always exceptions to every empirical generalization that is made, the biases sometimes work in the opposite direction, and, most importantly, even after the refined adjustments a degree of unequal pay and unequal employment opportunity tends to remain. Also, many of the refinements themselves simply reflect adjustments for factors reflecting possible discrimination elsewhere, notably in the household (with respect to differential responsibilities and hence the amount and quality of experience and absenteeism and turnover) and in educational institutions (and hence differences in the type and labour market orientation of education). For policy purposes this is important, since it suggests that unequal pay and employment opportunities in the labour market may reflect the cumulative effects of discrimination prior to entering the labour market and therefore labour market policies alone cannot eliminate such discrimination. This will be highlighted in the following discussion of the policy alternatives (Section 4) and the potential for the different policy options (Section 5).

### 4. LEGISLATIVE POLICY ALTERNATIVES

Given the previously discussed underlying causal motives for discrimination and the contributing factors to inequality in employment, it is convenient to categorize the policy alternatives into three main groups: (1) equal pay policies, focusing on wages; (2) employment opportunity policies, focusing on employment and promotion opportunities; and (3) facilitating policies that don't directly deal with discrimination but that can have an impact on the wages, employment opportunities, and other aspects of the employment of minorities. Each of these three main categories also has a variety of sub-policies, often reflecting the chronological evolution of legislative initiatives. The legislative options of equal pay and equal employment opportunity are discussed in this section; facilitating policies are discussed in Section 5.

#### Equal Pay Policies

Equal pay legislation was first initiated in Canada in Ontario in 1951, the same year the International Labour Organization adopted the Equal Remuneration Convention No. 100. The Ontario Manpower Commission (1983, Appendix XI) gives a summary table for the various Canadian jurisdictions of the differences in equal pay policies with respect to date of introduction; name of present act and date of most recent revision; concept of equal work; consideration of benefits as part of pay; definition of establishment; exempt

groups; enforcement agency; factors and procedures for determining equity; initiation of investigation; time limit for complaint; confidentiality requirements; restrictions on recovery of wages; penalties; protection from reprisals; right of appeal; and the number of investigations.

#### • History and Jurisdiction

Subsequent to the Ontario initiative, equal pay legislation for males and females within the same establishment has been adopted in all Canadian jurisdictions in the following years: Saskatchewan 1952; the federal jurisdiction 1956; British Columbia 1953; Manitoba 1956; Nova Scotia 1957; Alberta 1957; Prince Edward Island 1959; New Brunswick 1960-61; and Newfoundland 1971 (Ontario, 1983, Appendix XI).

Equal pay legislation generally is embodied in human rights codes (federal jurisdiction, Alberta, British Columbia, New Brunswick, Newfoundland, Northwest Territories, Prince Edward Island, and Quebec) or in labour standards legislation (Manitoba, Nova Scotia, Ontario, Saskatchewan, and the Yukon) (Jain, 1982, p. 511). In Ontario's case the legislation was transferred from the Human Rights Code to the Employment Standards Act in 1969 in part to increase enforcement effectiveness. The Human Rights Commission tended to rely on persuasion and required complaints before investigating, whereas the Employment Standards Branch carries an investigation on a routine as well as complaint basis; the onus for following through on a complaint rests with the Branch rather than the person making the complaint and persons making complaints are protected by anonymity and by strong provisions in the Act to prevent reprisals by employers (Gunderson, 1975, p. 464).

#### • Identical work to substantially similar work

Equal pay policies have undergone, and are continuing to undergo, an interesting evolution with respect to the types of work that can be compared. Although the ILO Convention 100 itself called for the broad interpretation of equal pay for work of equal *value*, most Canadian jurisdictions started off with the narrow interpretation allowing comparisons only when the work performed by men and women is the *same* or *identical*. This narrow interpretation made it difficult if not impossible to enforce the legislation, since minor and usually irrelevant differences could always be found between the jobs.

As pointed out in Cook and Eberts (1976, p. 195, fn. 83) this strict standard of "same work" prevailed from 1953-59 in British Columbia; from 1952-58 in Ontario; from 1956-67 in Nova Scotia; from 1959-68 in Prince Edward Island; and from 1966-74 in the Northwest Territories. A slightly broader standard of "substantially identical" prevailed from 1957-70 in Alberta; from 1956-72 in Manitoba; and from 1956-72 at the federal level. Saskatchewan was the exception during the early years of Canadian equal pay legislation, requiring "comparable" work from 1952-73.

Court interpretations have not always adhered to the narrow definition (Gunderson, 1976c, p. 140). For example, in the Greenacres Nursing Home case, the court interpreted the same work to mean work "of the same nature or kind and the performance of which requires equal skill, effort, and responsibility and which is performed under similar working conditions". The court also determined that comparisons

should be made on the basis of the work actually performed rather than on the nature of the job description or terms of employment. The Riverdale Hospital case also established that jobs are not dissimilar simply because they have different job titles, or education or training requirements, or slightly different job assignments, or because males and females are not interchangeable in all of their tasks.

Along with the courts providing broader interpretations of equal work, the laws themselves have often been changed from requiring the same or identical work to requiring only that the work be similar or substantially similar. In a number of jurisdictions (Ontario, Nova Scotia, New Brunswick, Newfoundland, Prince Edward Island, and Saskatchewan) the legislation also specifies that the similarity of the work is to be evaluated according to such criteria as skill, effort, responsibility, and working conditions (Jain, 1982, p. 511).

#### • Composite approach

Currently there is variation across jurisdictions with respect to the extent to which comparisons according to skill, effort, responsibility, and working conditions require that the jobs be similar in *each and every one* of those respects or only in the *composite* of all these characteristics. Most jurisdictions allow a composite approach, although Ontario, Manitoba, Saskatchewan, and British Columbia require that each component be evaluated separately (Ontario, 1983, Appendix XI, Table 3).

Under most circumstances, the composite interpretation would allow one characteristic to be traded off against another so that, for example, a job that required slightly more skill could still be considered similar to one that required more effort. Such a composite approach, of course, is consistent with the way the labour market values jobs, since two jobs could have very different requirements with respect to each of the components and still pay the same wage if they were valued equally in the composite or totality of the components. In fact the wage paid on any job can be considered the sum total of the "shadow" or "implicit" prices paid for each of the components or tasks that make up the job.

A composite interpretation is basically similar to equal value legislation (where value is defined in terms of skill, effort, responsibility, and working conditions) if there were no further qualifications, such as the one in Ontario's Employment Standards Act that requires comparisons only between "substantially the same kind of work", a phrase that is usually interpreted as within the same occupation. Such qualifiers prevent the composite approach from being similar to an equal value approach.

#### • Equal Value Legislation

The equal value approach, as initially recommended in the ILO Convention 100 and as currently followed in the federal and Quebec jurisdictions (Ontario, 1983, Appendix XI, Table 1), generally is considered to be the broadest interpretation of equal pay legislation since it enables the comparison across disparate jobs or occupations. All that is required is that they have the same value, not that they be identical or even similar in any respect. To be sure, equal value may be easier to establish in jobs that are similar in most respects, but this is not a prerequisite for the determination of equality.

In fact the term "equal value" is somewhat of a misnomer since, in economic parlance at least, it is usually taken to mean the value of *outputs*. However, with respect to equal pay legislation the equality of value is in terms of the composite of the *inputs* of skill, effort, responsibility, and working conditions that constitute a particular job. While evaluating the inputs is certainly not an easy task, it is certainly more tractable than assessing the value of the output, especially when the output is not sold in a market. One wonders if the reaction that seems to prevail against the equal value concept (e.g., Livernash, 1980) and that occurs in part because of the concern that objective non-market measures of value are difficult to establish would be dissipated somewhat if there was a full realization that it is not the output of the job itself that has to be assessed but rather the value of the inputs, and that such assessments are constantly being made as part of the usual personnel function.

The significance of equal value legislation is that it potentially allows for comparisons across different occupations, albeit as with equal pay legislation this is generally still confined to the same establishment. In actual fact, however, the initial cases that have arisen under equal value legislation have involved comparisons that are not too disparate: for example, nurses as compared to health care officers in federal penitentiaries; a female nursing director compared to a male assistant director general; and federal librarians versus historical researchers. There is the question of whether or not these equal value cases, in fact, could have been handled under legislation requiring only that the work be substantially similar. Of course, future cases may, and likely will, broaden the comparison across more disparate groups, since it is likely that a cautious approach was taken in the initial application of the legislation.

One also wonders if the concern over equal value, especially on the part of economists who tend to be concerned with any interference with market forces, would be dissipated somewhat if there were a fuller realization that equal value legislation is in fact consistent with competitive market forces. Basic economic theory dictates that competitive market forces would ensure that wages would reflect the value of a person's contribution to output (more formally, the value of the marginal product of labour), and that individuals who contribute the same composite of skill, effort, and responsibility and who work under the same working conditions in the same establishment, other things equal, would receive the same wages. Thus legislation requiring equal pay for work of equal value in terms of the required skill, effort, responsibility, and working conditions *replicates* rather than *replaces* competitive market forces. It can work against market forces influenced by *discrimination*, but it does not work against *competitive* market forces, and this point is seldom if ever made in the discussion of equal value.

A concern over equal pay legislation that does have substance stems from the difficulty of establishing objective standards of value, independent of market criteria. Conventionally the market establishes value as reflected by the price that is established through the interaction of demand (reflecting the value to consumers) and supply (reflecting the alternative value of resources used in producing commodities). Some may be concerned that the resulting prices reflect frivolous consumer choices or the lack of alternative uses for

some resources; nevertheless, the market does yield a readily observable set of values or prices associated with outputs as well as inputs. Of course, when these prices reflect discrimination then they can be socially unacceptable and hence subject to policy scrutiny. Nevertheless, the search for alternative criteria to establish objective standards of value when market standards are deemed unacceptable becomes difficult.

Job evaluation has been the alternative mechanism, and in fact was specifically recommended by the ILO Convention 100 and it is utilized, for example, in the federal jurisdiction. (Job evaluation procedures in the equal pay area are discussed in Livernash, 1980; Ontario, 1981, 1983, Appendix XII; Schwab, 1980; Treiman and Hartmann, 1981; and Verma and Wallace, 1982.) While job evaluation procedures are utilized extensively in industry, they were designed more for the *ordinal ranking* of similar jobs (e.g., blue-collar or white-collar ones) and not to give *cardinal values* that could be summed to get a surrogate value for the job. Nevertheless, job evaluation procedures can give total point scores for a job even though it is recognized that comparing scores *within* each job factor such as skill, effort, or responsibility is certainly more feasible than comparing the points *across* categories. For example, it is easier to say that a certain task requires more skill than another task, and even to say that twice as much skill may be involved, than it is to say that a specific skill level is "worth" as many points as a specific responsibility level. It is extremely difficult to aggregate scores across the components of jobs (let alone within a component) to arrive at a total point score that reflects some notion of the "objective value" of a job.

While there are these problems with job evaluation it is certainly a procedure that is utilized in private industry, and presumably it will improve if it is used more in the equal value area. Also, the valuation of comparable jobs is a problem that is faced by arbitrators in the public sector, since the most common criterion that tends to be used is the wage in comparable jobs. In such circumstances they must decide on what groups are to be considered comparable, a task made more difficult when different regions or industries are involved—problems that do not arise in the equal-pay-for-work-of-equal-value assessments made within the same establishment. Finally, while there are these acknowledged problems with job evaluation procedures in determining equal value, the real question becomes: what are the alternatives, especially if market values are rejected as reflecting discrimination? It is a bit like Churchill's dictum that democracy may be the worst system...except for all the others.

#### • Proportionate pay for proportionate value

While equal value legislation seems to be regarded as providing the broadest scope for pay comparisons (certainly broader than identical or even substantially similar work), there is something illogical about stopping there. That is, if equal-pay-for-work-of-equal-value is regarded as appropriate and feasible, then proportionate-pay-for-work-of-proportionate-value would seem to be a logical extension. If it is possible to assign point scores to arrive at a norm of value so that jobs of equal points should be given the same pay, then this establishes an implicit or shadow price for those points. For example, if a male job and a female job were each accorded 100 points and it was required that both be paid according



to the male rate of \$6 per hour, then 100 points could be taken to be worth \$6. If, however, the female job were accorded only 80 points but the pay was only half of that of males who were given 100 points, would not the logic of the job evaluation scores dictate that female wages should be 80 rather than 50 per cent of male pay? Clearly such a procedure would greatly widen the scope of comparisons, potentially to all jobs rather than simply to those of equal value.

Its feasibility would depend on the feasibility of job evaluation itself, as well as the extent to which the equating of point scores to wages can apply to proportionate scores. Nevertheless, if equal value is regarded as an appropriate and operational concept, it seems logical to extend this to proportionate-pay-for-proportionate-value. At the very least, the concept deserves some policy discussion.

### Employment Opportunity Policies

While the previously discussed range of equal pay policies work directly on the wages of minorities, equal employment opportunity policies (often termed fair employment policies) operate on the employment opportunities of minorities. As such they can affect a range of areas related to the employment decision, especially recruiting, hiring, promoting, transfers, and termination. These are the main areas that equal employment opportunity legislation focuses upon. Other aspects related to the employability of minorities, such as work hours and training, will be discussed in the subsequent section on facilitating policies.

#### • Equal employment legislation

The prevention of discrimination in the various aspects of employment is embodied in the ILO Discrimination Convention Number 11, ratified by Canada in 1964. As discussed in more detail in Cook and Eberts (1976), equal employment opportunity legislation in Canada is conventionally embodied in the human rights codes of particular jurisdictions. It is usually part of a broader range of policies designed to prevent discrimination in a range of areas including housing, public accommodation, public notices and advertisements, as well as employment. In most jurisdictions the applicability of the legislation to "sex" occurred in the 1960s and 1970s, when sex was added as a relevant factor, along with other grounds such as race, religion, and national origin.

Discrimination in employment is prohibited on grounds of race, national or ethnic origin, colour, sex, marital status, and religion (all jurisdictions); age (most jurisdictions); physical disability (most jurisdictions); pardoned offense (federal); and sexual orientation, language, and mental deficiency (Quebec) (Jain, 1982, p. 513). Generally, the relevant legislation applies to employers, employment agencies, and trade unions.

Enforcement of equal employment legislation usually begins once an individual party has complained, possibly an inhibiting action since it requires knowledge of the availability of the legislation, as well as the ability, resources, and motivation to use it (Cook and Eberts, 1976, p. 180). As with all jurisprudence where the benefits of the award may spill over to other parties (e.g., third parties who are not directly involved but who will experience reduced discrimination as a result of the precedence of the award), but the costs of the procedure are borne completely or disproportionately by

those who lay the charge, there may be insufficient incentives for a particular individual to lay charges. In the jargon of economics, the existence of positive spillover externalities or the public-goods nature of "complaints" may yield a less-than-socially optimal amount of such activity. (This problem is probably most evident in the case of charges such as rape, where the personal costs to the individual complainant can be extremely high; however, it is a general proposition that can apply to the laying of charges, even ones as petty as shop-lifting.)

Once the complaint is made then a lengthy procedure may be involved as the relevant government agent (usually a human rights officer) investigates and tries to reach a settlement by conciliation. If this is not successful then a trial-type hearing is involved and a board of inquiry makes a final decision, with appeal procedures to the regular courts existing in many jurisdictions.

In part because of the length and problems of these procedures, which they document more extensively, Cook and Eberts (1976, p. 182) recommend a more universal application across all jurisdictions of a number of improvements to this process. These include empowering government agencies or third parties to initiate action; applying the award to all relevant employees; and requiring a positive commitment from offending employers to reduce future discrimination as well as redressing for past actions.

#### • Affirmative Action

Affirmative action tends to be regarded at the extreme interventionist end of the spectrum with respect to equal employment opportunity initiatives. It is to equal employment opportunity policies as equal value legislation is to equal pay policies.

#### Characteristics:

As the name implies, affirmative action is a more positive or active form of intervention than equal employment opportunity legislation, which tends to focus on the removal of discriminatory barriers with respect to employment opportunities. Rather than the simple removal of barriers, affirmative action tends to focus on the results (Phillips, 1981), often by specifying targets or even quotas with respect to the employment of minorities. It is a more deliberate and structured approach, involving the setting of goals and timetables that are "significant, measurable, attainable, and planned for specific results" (Jain and Sloane, 1981, p. 101). Since it can involve "favouritism" to the minority group (often only when "other things are equal") it can have elements of reverse discrimination. Such "positive" discrimination is usually allowed under anti-discrimination legislation and this has been upheld in court interpretations.

#### Steps in establishing an affirmative action program:

The design and implementation of an affirmative action program involves a number of stages (Canada, 1981, p. 108; Cook and Eberts, 1976, p. 183; Jain and Sloane, 1981, p. 102; Phillips, 1981, p. 7). It is necessary to establish a data base both internal to the firm (e.g., sex, occupation, salary, experience of the workforce) and external to the firm for comparative purposes (e.g., composition of the population and labour force and the availability of qualified and qualifiable minorities). Internal targets are then specified with

respect to the external comparisons (e.g., attain the same proportion of minority workers internal to the firm as exists in the external population or labour market), and a *timetable* and *strategy* for achieving these objectives are outlined.

#### **Rationale:**

The rationale for affirmative action often stems from the need to compensate for the past history of discrimination (Loury, 1981). The effects of discrimination can be cumulative and self-fulfilling in a variety of ways: minorities may not acquire experience or seniority; some may develop a comparative advantage in household tasks; others may develop the characteristics of the low-wage, dead-end environment in which they feel trapped; and families and communities may pass on undesirable traits intergenerationally. For these reasons it may be necessary to break the vicious cycle in some positive concrete fashion with policies like affirmative action. Once the cumulative vicious cycle is broken then the need for affirmative action should wither away; in that sense, it may be regarded as a temporary necessity that should create the conditions for its own demise.

Affirmative action also seems to be rationalized as a policy that is necessary to combat systemic discrimination (Canada, 1981, p. 108; Phillips, 1981). As discussed previously, systemic discrimination is regarded as an institutional part-and-parcel of the system and it occurs even though the individual actors do not regard themselves as discriminating intentionally. In a sense, it is the unintended by-product of the system. Such unintended discrimination is difficult to eradicate because it does not stem from a conscious decision on the part of the sources of discrimination. Just as affirmative action may be regarded as necessary to compensate for the past history of discrimination, so it may be regarded as necessary to compensate for the effects of current systemic discrimination. In both cases, equality of opportunity may require compensatory policies so that the parties have the same chances or starting point. It is this need to compensate for past privations which may have precluded a fair competition for available opportunities that can exempt affirmative action from its otherwise being in contradiction to basic liberal democratic principles (Beatty, 1983, p. 36). Affirmative action can be regarded as analogous to competitive handicapping in competitions; it is designed to adjust the inputs or starting points so as to attain an equality of probability in attaining the same results. Again, the emphasis is on a deliberate, structured approach to attain specific results.

Affirmative action can also be rationalized as a necessary policy given the segmented nature of labour markets in which minorities operate (more will be said about segmented labour markets later). Such segmentation can render policies such as equal pay and equal employment opportunity legislation ineffective, since they usually have to focus on comparisons within the same occupation and establishments. These may provide little if any pressure to break down the "job ghettos" dominated by minorities. Affirmative action, in contrast, can create incentives for employers to reach into such job ghettos and to break down the barriers of segmentation to achieve their targets. Rather than protecting them from the enforcement of equal pay or equal employment opportunity legislation, such barriers are obstacles to their achieving of their target objectives. And when barriers serve a negative

rather than a positive function for employers, they are more likely to be broken down in a profit-oriented economy.

Lastly, in a world where the political power of competing groups may be regarded as an important input in determining the ultimate economic and social position of the different groups, affirmative action may simply be regarded as an extension of the policies used by minorities to enhance their position. That is, all policies that enhance the otherwise limited power position of minorities will be embraced by them, and granted to them as they exert more political power. Affirmative action in this context can therefore be regarded as simply a logical extension of policy pressure in the employment opportunity area, just as equal value (and perhaps ultimately proportional value) legislation is a logical extension in the equal pay area.

#### **Forms:**

Affirmative action can take on a variety of forms. It can be involuntary, as for example under Executive Order 11246 in the United States (subsequently amended by Executive Order 11375 in 1965 to explicitly include a reference to sex), which requires affirmative action on the part of employers involved in federal contracts. (A summary of the most important aspects of U.S. legislation, administrative fiat, and court decisions in the affirmative action area is given in Welch (1981)). Although the potential of these Executive Orders is substantial, since approximately one-third of the workforce works for employers holding a government contract, the ultimate punishment of cancellation of a contract has not often occurred (Lloyd and Neimi, 1979, p. 291). Affirmative action as part of contract compliance has also occurred in Canada in a number of specific resource mega-projects where governments have signed leasing, financing, or other arrangements with developers.

A form of involuntary affirmative action also occurs under Title VII (the Equal Employment Opportunity title) of the Civil Rights Act of 1964. Although affirmative action plans are not specifically required under Title VII (as they are under the Executive Orders governing contract compliance), they may be required as part of a conciliated or litigated settlement between a firm and the EEO Commission (Beller, 1979, p. 306). Thus the threat of an ultimately imposed quota can be used to get firms to "voluntarily" comply with the regular anti-discrimination provisions.

Affirmative action can also be voluntary, as for example in a number of large Canadian businesses as well as in the federal and Ontario public sectors (Jain and Sloane, 1981, p. 105; Phillips, 1981, pp. 37-43). In fact, recent surveys indicate that approximately 45 per cent of Ontario employers claim to have some affirmative action activities, although only about 11 per cent had a formal affirmative action program with goals and timetables to measure progress (Ontario, 1983, Table 40. Figures are averages from two surveys).

Voluntary affirmative action is also encouraged by a number of federal and provincial agencies (Ontario, 1983, Chapter 3 for a fuller discussion). At the federal level, responsibility for affirmative action was given to the Canada Employment and Immigration Commission (CEIC) in 1978. To assist the target group of women, natives, and the physically disabled,



the CEIC administers an affirmative action strategy promoting the concept of affirmative action and assisting in the development of affirmative action plans. To assist the target group of women only, it also administers the Federal Contracts Program to encourage crown corporations and businesses benefitting from government contracts to adopt affirmative action. Provinces such as Ontario also have services to encourage and facilitate affirmative action.

### 5. FACILITATING POLICY OPTIONS

In addition to equal pay and equal employment opportunity legislation, a third broad grouping of policies could be termed facilitating policies. They are designed to facilitate the employability of minorities so that equal pay and equal employment opportunities are a natural by-product, perhaps ultimately not requiring legislative intervention.

#### Flexible Hours and Part-time Work

Given the conventional importance of household responsibilities for women and the additional physical burdens placed on the handicapped, flexible work arrangements and part-time work become potentially important components of their job environment. For women, this is illustrated by their large and growing involvement in part-time work—work that is often non-union, low paid, and concentrated in a few occupations and industries that do not provide upward mobility (Canada, 1983; White, 1983). Part-time and flexible working arrangements are also becoming more prominent for older workers who are seeking a phased retirement and for those who want to continue their education, often on a recurring basis throughout their lifetime. Work-sharing arrangements (Meltz, Reid, and Swartz, 1981) may also become more prevalent in response to our increased demand for leisure time and the inability of the economy to provide jobs for everyone in the face of mass unemployment.

To a large extent the availability of such arrangements as flexible working hours and part-time employment will emerge in response to the demands of the parties wanting such arrangements. The appropriate role of government with respect to such policies is threefold.

First, it is necessary to ensure that discrimination is not prevalent with respect to such factors. For example, if there is discrimination against part-time workers (evidence of which is presented in Reid and Swartz, 1982, p. 81), then this has consequences in its own right, but it also has consequences for minority workers who may disproportionately work part-time.

Second, it is necessary for governments to ensure that well-intended legislative barriers do not exist that would discourage the private parties from otherwise establishing their own best working time arrangements. For example, legislation that requires a fixed payment per employee or for which payments are not fully prorated on an hourly basis (e.g., because there is an earnings ceiling beyond which payments do not increase) discourages employers from utilizing part-time workers (Canada, 1981, p. 110, 1983, Chapter 6; Reid and Swartz, 1982).

Third, governments may want to more actively encourage such arrangements as part-and-parcel of an overall policy to encourage the employment opportunities of minorities who may disproportionately benefit from such arrangements. For example, such arrangements could be part of the strategy

used to achieve affirmative action targets or they could be utilized by governments internally to ascertain the pros and cons of the policies and to establish models for the private sector to emulate.

It must be remembered, however, that such policies as flexible working arrangements and part-time work can have costs to employers that have to be traded-off against their benefits. Such costs can be associated with such factors as: scheduling and coordination; the payment of fringe benefits and employer contributions that are not fully prorated; the administrative costs of fringe benefits; and the need to spread the quasi-fixed costs of recruiting, hiring, training, and termination over as long a period as possible for a given employee. (Cost simulations for the administrative costs and the inability to fully prorate fringe benefits and their implications for the employment of part-time workers are given in Canada (1983, Chapter 6) and Reid and Swartz (1982).) To the extent that these costs are real, competitive economic theory implies that employers who provide the benefits of flexible working hours or part-time arrangements for their employees will be able to pay a lower wage in return for providing such desired working conditions. Indeed, in a profit-oriented economy this is a motivation behind the provision of all such arrangements.

This has important policy implications since it suggests that some of the lower wage associated with such arrangements may reflect the competitive compensating wage the worker gives up in return for desired working conditions, including those pertaining to the hours one works. Such compensating wages may fall disproportionately on minority workers who disproportionately value these characteristics. They are not discriminatory wages from the point of view of the employer, who pays the lower wage to compensate for the cost of the more flexible work arrangements. However, it could be considered discriminatory, or at least unfair, that some minority workers should be in the position, for example, because of household responsibilities or physical disability, to have to pay (by accepting a lower wage) for such working conditions.

#### Daycare and Parental Leaves

Given the potential importance of differential household responsibilities between the sexes, policies that ease those benefits or share them more equitably should facilitate equality in employment. Since most of the differential household responsibilities are associated with the care of children, and since the presence of children, especially of pre-school age, is the strongest factor inhibiting the labour force participation of females (Gunderson, 1977, p. 459), then policies to facilitate daycare or parental leaves should facilitate equality in employment. (A number of such childcare policies and their impact on women's employment are discussed in Ontario, 1983.)

Such policies can facilitate equality in employment in a number of ways: by facilitating the labour force participation of females; by enabling them to work full-time as opposed to part-time; by expanding their choice of jobs beyond those that provide proximity to their household; by reducing their absenteeism (much of which is associated with care of children if they are ill or not at school); and by reducing their career interruptions and withdrawals from the labour force

which prevent them from acquiring continuous work experience. It is hard to imagine any set of policies that would facilitate equality of employment in so many dimensions.

Unfortunately such policies are extremely expensive. State-subsidized, quality daycare is extremely expensive, and the subsidy is likely to be regressive (go proportionately more to high-income families, where both husband and wife are likely to be working because of the high income they can command). There is also an element of unfair treatment (termed horizontal inequity) against couples who decide not to have children or who choose to care for their own children.

State-supported daycare is often defended on the grounds that the caring for children should, in part at least, be a collective responsibility, and that universal access to daycare is simply a logical extension of universal access to public education; if the education of children at the age of five and beyond should be publicly supported, why not for those of age four, or three, or two? Subsidized daycare is also advocated on the grounds that even if it has a number of drawbacks, pragmatically it is such an important policy to facilitate equality in employment that this simply outweighs its disadvantages.

Arguments against state-supported daycare evolve around its expense, the regressive nature of the subsidy, and the inequality to those who don't utilize the service. In addition, there is concern that the notion of collective responsibility for the care of children is inappropriate in an area where individuals have considerable choice with respect to their decisions, where institutional care may be a poor substitute for family care, and where reducing the cost of having children may lead to larger family sizes in an era where population control is considered desirable.

Obviously this is a sensitive policy issue and one that will not be resolved without considerable policy debate. To a certain extent facilitating policies such as daycare and parental leaves will evolve in response to the changing demands from families where both husband and wife work in the labour market. Employers themselves may provide daycare facilities or locate in the proximity of existing arrangements and they may agree, especially under the pressures of collective bargaining, to such arrangements as parental leave or paid maternity leave. In these circumstances, however, competitive market forces would dictate that, other things equal, they could pay a lower wage than other employers who did not provide such desirable job characteristics. To the extent that the competition for those arrangements, most notably daycare, would be greatest among women then these arrangements would reduce the wages of women. Few if any things are provided "for nothing" in a market-oriented economy, albeit payments may be subtle.

At a minimum, government policy in this area should ensure that other government-imposed barriers do not exist that would inhibit private market arrangements from providing such services. Such barriers could include "excessive" regulation of daycare facilities, ceilings on the limit of tax deductibility for daycare, and policies that discourage the part-time work of husbands, as for example when fringe benefits are not prorated or are based on a per employee and not per hour basis. Unfortunately many of these so-called barriers are ones that serve other purposes so that, again, sensitive policy trade-offs will be involved.

### Tax-Subsidy Options

Tax or subsidy options other than those associated with daycare are also obviously possible. (The Ontario Manpower Commission (1983, Appendix X) and Canada (1981, Chapter 8) discuss a number of subsidized or government-sponsored employment programs that exist to facilitate the employment of minorities.) The problem with such programs, however, is that by giving preferential treatment to one group they can be reducing the opportunities of other groups, and while this may be socially acceptable if the other groups are advantaged, obvious problems exist if the other groups are also disadvantaged. As an illustration, in Ontario, in response to the problems of youth unemployment, there are some 44 special government programs or services created to help young people find jobs (Gunderson, 1981, p. 31). Such programs operate on the supply side of the market (education, information, training), on the demand side (wage subsidies, employment tax credits, job creation), and on the matching of supply and demand.

To the extent that these programs are successful for their target group—youths—they can obviously reduce the employment opportunities of other groups that are substitutes for youths, and these groups could include females, older workers, and others who may be in a disadvantaged position. Is the answer then to provide subsidized programs for all such groups or to be more selective in the subsidies, recognizing that the displacement is likely to be of other minorities? As a minimum, it is important to recognize that specific subsidy programs are likely to create internal substitutions among minority groups themselves, and this must be assessed against the fact that some minorities may have enhanced opportunities relative to more advantaged groups.

### Human Capital Policies

Human capital policies involve decisions to invest in such things as education, training, information, job search, and mobility, all of which can be costly but which should lead to future economic returns, as well as possibly consumption benefits. Policy initiatives can affect such decisions, as for example if minorities are streamed into certain education or training programs, or if the human capital formation is subsidized. (The extent and impact of streaming as well as the availability of subsidized education and training programs is discussed in Canada, 1981, Chapter 9; Ontario, 1983; Canada, undated; and Swan, 1981.)

There is concern that human capital policies may not be of much benefit to minorities, since discrimination and lack of opportunities would prevent them from getting higher earnings from their "investment". However, this ignores two facts: first, the income forgone or opportunity cost of the investment would also be smaller, reflecting their low income; and, second, the relevant measure of efficiency to apply to the investment is "value added", or what it does to improve the position of the person. While minorities may not earn much even if they have invested in human capital they may earn even less without the human capital, and even a small increase in income can be a substantial *relative* improvement when one starts from a small base. Furthermore, we simply don't know if the "value added" in terms of productivity improvement emanating from the increased human capital of a disadvantaged worker would be greater or less than from an advantaged worker. If anything, given the lower level of

human capital of minority groups and their under-representation in the skilled trades and professions (Canada, undated, Chapter 11), it is more likely that they are on the "increasing portion of their learning curve" and not subject to the decreasing returns associated with higher levels of human capital. In addition, their inability to finance costly human capital formation out of savings or borrowing means that minority groups are likely to have larger "unexploited margins" or potential to improve their economic position through human capital formation.

In essence, increased human capital formation is certainly a potential avenue for the improvement of the economic status of minorities. Policies to subsidize their human capital formation, of course, can be costly and, as with all differential subsidies, they run the risk of placing other deserving groups at a relative disadvantage. At a minimum, it would certainly be appropriate for governments to remove the barriers that may inhibit minorities from acquiring their desired amount of human capital. Such barriers could include the streaming of minorities into certain types of human capital formation, and the inability to gain access to credit to finance costly human capital formation.

#### **Full Employment and Expansive Aggregate Demand**

In general there is a presumption that many legislative policy initiatives are facilitated, and indeed may even be made unnecessary, by an expansive economy. It is certainly easier to be equitable and even redistribute income when the size of the economic pie is growing, since increasing the share to minority groups is unlikely to reduce the income and employment opportunities of majority groups, even if their share of the growing income is reduced. Conversely, when the economy is stagnating, perhaps because of a permanent reduction in growth or even a temporary cyclical decline, positions become entrenched and what one party gains usually comes at the expense of another party.

In a growing, full employment economy discrimination itself may dissipate as employers seek new sources of labour supply and as they may re-evaluate their conventional hiring and wage policies. As starkly phrased by one employer: "We'd be doing a lot more in the area of affirmative action for women if the labour market were tight. But since we can pick and choose, we don't find it necessary to go out of our way to increase women in our workforce" (Fretz and Hayman, 1973, p. 136). The restrictive practices of some crafts and unions may also be more likely to dissipate in tight labour markets (Ashenfelter, 1970, p. 41).

Once given the opportunity to be employed for a period of time, minority workers may acquire the on-the-job experience and training that is necessary for sustained employment at a higher wage. Their presence on the job may also help break down discriminatory stereotypes. Even if there is no discrimination, minority workers who lack skill and training, who are the last hired and first fired, and who are often associated with poverty groups may benefit disproportionately from an expanding economy that tends to be associated with reduced occupational wage differences and increased opportunities for employment and full-time work (Gunderson, 1981, pp. 96-98).

To a certain extent there are countervailing forces at work that can operate in a subtle fashion to affect the income position of minority workers in expansive times. Married women in particular have exhibited considerable flexibility in entering or leaving the labour market depending on economic conditions. Specifically, when the economy is expanding they tend to enter the labour market in response to the increased job opportunities, and this tends to offset any tendency to leave the labour market because their spouse is now more likely to have a job (the reverse of the conventional "discouraged" and "added worker" effect associated with cyclical declines). This means that in expansionary times there will be a large influx of workers who may compete for the jobs conventionally held by minority groups (especially since these married women are likely to have experienced skill obsolescence associated with their earlier labour force withdrawal). This influx in turn may serve to contain the wage increases that would otherwise go to the less skilled minority workers. In essence, the "reserve army" of household labour may inhibit the wage increases and promotion opportunities of minority workers that otherwise would occur in expansionary times. Clearly the expansion can increase the employment opportunities of minorities who otherwise would remain in the household; however, this may not show up as a measurable improvement for those already in the labour force. This may explain in part, for example, the evidence (based on a limited number of occupations in Ontario) that male-female wage differentials did not narrow during periods of prosperity and reduced unemployment (Gunderson, 1976b, p. 67).

#### **Break Down Labour Market Segmentation**

It can be argued that neither sustained aggregate demand policies nor human capital formation are likely to be of benefit to minorities as long as they are segregated into jobs whereby they cannot use the human capital or where it is not rewarded (Canada, 1981, p. 92). This has often been associated with the notion of segmented labour markets (to be expanded upon later), whereby the labour market is segmented into non-competing groups with minorities relegated to the low-wage, dead-end jobs that hold little prospect for upward mobility.

Those who believe in the notion of segmented labour markets have generally advocated two broad sets of policy initiatives. The first is to break down the barriers that give rise to the segmentation. This is easier said than done, however, since many of these barriers are ones that are associated with union protection, the internal labour market policies of large corporations with their tendency to promote from within, and perhaps deep-rooted customs and traditions. In addition, many of these barriers do serve a protective function, providing employment stability and a degree of due-process for those who are fortunate enough to be in the protected sector. Where the protection comes from discriminatory customs and traditions, however, policies to reduce stereotyping or to provide correct information that may change attitudes toward minorities can help break down such discriminatory barriers. In that vein, equal employment opportunity laws, including affirmative action initiatives, may help minorities get a foothold in the protected sector and, once in, their performance may help break down traditional stereotypes and misinformation on their expected performance. This is



enhanced if they attain positions of authority and can influence hiring and other personnel decisions. Their performance itself may be enhanced by the fact that they are in a work environment that now provides upward mobility and relevant on-the-job training and experience, and they have the pressure of a "role model"—a pressure that could enhance, but could also interfere with, performance.

In addition to breaking down the barriers that give rise to segmentation, those who emphasize the notion of segmented labour markets also emphasize the importance of policy initiatives that *extend*, usually through legislation, the benefits of the protected sector to those (often minorities) who are relegated to the unprotected sector. The main legislative vehicle for extending such protection is through minimum wage and employment standards legislation (including occupational health and safety laws) to provide what are deemed to be minimal standards with respect to such things as wages, hours of work, termination benefits, and working conditions. Equal pay legislation is also a way of "extending" the benefits of male wages to female wages; however, its scope in this area is limited by the fact that comparisons are within the same establishment and, usually, within the same occupation. Since the main aspects of segmentation are across establishments (e.g., between low-wage and high-wage firms or industries) and across occupations (e.g., between low-wage, dead-end jobs and high-wage jobs with upward mobility) then equal pay legislation has limited scope, at least with respect to extending the benefits of the protected to the unprotected sector.

### Unionization

Increased unionization of minorities potentially can facilitate their receiving equality of employment in a number of ways. First, unions tend to raise the wages and job security of their members above the competitive norm; hence, being part of the unionized workforce would enable minorities to receive this benefit. To the extent that this higher wage fixing in the unionized sector reduces some employment opportunities in that sector (as employers substitute away from high-wage union labour and as some may even go out of business, given the higher labour costs), then some of the displaced labour may go to the non-union sector, and this "spillover" of excess labour supply may reduce wages in the non-union sector. If minorities are part of that non-union sector their wages may be further depressed by this spillover effect from the unionized sector. By becoming part of the unionized sector, minorities may also avoid this negative spillover effect on their wage.

To the extent that unions, with their emphasis on seniority and, in the case of craft unions, with their entry restrictions, are part of the barriers that lead to segmented labour markets (Cohen, 1981, p. 14), then unionization of minorities would enable them to become part of the protected higher wage sector. That is, becoming protected by the barriers is an obvious way around reducing their otherwise adverse impact.

Internally, within unions, minorities could be discriminated against just as they could be in the larger society as a whole. Being democratic institutions of "collective voice", unions will respond to the preferences of the majority of their members (more formally, the median union voter) and this could lead to discrimination against minorities within the union. In

essence, the union could decide to distribute its "rents" or wage gains disproportionately to its majority members and to exclude its minority members from the benefits of unionism.

Currently in North America, however, unions tend to reflect egalitarian motives more than society at large. This is evident, for example, by their reduction of wage dispersion among union members—a result that is consistent with their middle-wage majority voting to redistribute from high-wage members to low-wage ones (an observation that is also consistent with the fact that high-wage skilled workers often want to form their own bargaining unit along craft lines rather than being part of a large industrial unit where their interests may be submerged or out-voted by the majority interests).

The fact that unions represent the preferences of the median union voter is in contrast to the emphasis on the market as a mechanism for regulating the employment environment. The market would reflect the preferences of those workers who are highly mobile, well-informed about market opportunities, and have job opportunities elsewhere (i.e., workers at the "margin of decision"). These are unlikely to be minority workers, who are less mobile (e.g., tied to the household in the case of women or disabled or to reserves in the case of some native Canadians), who are often ill-informed about market opportunities, and who have restricted opportunities elsewhere. In such circumstances, minorities are likely to be better served by democratic institutional arrangements (such as unions) with egalitarian preferences, than by competitive market forces which are likely to better serve the already advantaged.

This is not to deny the distinct possibility that democratic institutions in other circumstances could foster discrimination and inequality and serve simply as vehicles for institutionalizing the preferences of society at large. As pointed out by Jain and Sloane (1981, p. 188) in their comprehensive review of the legislation and jurisprudence on trade unions and minorities in Canada, the United States, and Britain: "There is evidence that unions have excluded minority workers from membership, rationed apprenticeships to members of the majority group, failed to adequately represent minority workers who have obtained membership, enforced discriminatory seniority systems in collusion with employers, and on occasion operated segregated locals and branches." In such circumstances minorities are likely to be better served by competitive market forces because of their emphasis on impersonal market transactions. In essence, the impact of unions on discrimination and inequality may depend on the particular circumstances and times and therefore differ across cases. Hence it is necessary to appeal to the empirical evidence to ascertain the actual impact of unions on measures of discrimination and inequality.

Mention was already made of the fact that unions tend to reduce wage dispersion of their members and that this was likely to help minorities disproportionately. In addition, there is some more direct evidence to suggest that unions reduce wage discrimination. Ontario data analysed in Gunderson (1975, p. 467), for example, indicate that: "The male-female wage differential in unionized establishments is 10 percentage points smaller than in non-unionized establishments. This represents almost half of the average differential of 22 percentage points. Whether they do so to ensure minority rights of females or to safeguard male jobs from low-wage female



competition, unions are effective in bargaining for equal pay."

However, as pointed out by Jain and Sloane (1981, Chapter 6) in their comprehensive review of union impact studies and discrimination, this conclusion seems to apply to Canadian and British unions but not to those in the United States, where unions seemed to have improved the position of blacks relative to whites but not females relative to males. They indicate that the effects are relatively small and differ considerably by type of union and region and that the empirical evidence in the United States, while more abundant, is by no means conclusive. In essence, this confirms the notion that the union impact on discrimination can work in either direction and that this impact will vary in different times and circumstances.

Unions could also serve a potentially important function in monitoring legislative initiatives in the equal pay or equal employment opportunity areas. Unions are at the job site, they have access to information (or this access can be bargained for), they have mechanisms (e.g., grievance procedures) for addressing the complaints of their workers, and they can collectively represent the concerns of individual workers and prevent reprisals against those who complain.

This collective representation of individual concerns is important because it helps to get around the previously discussed "public goods problem of complaints". That is, in situations where the benefits of an individual's action or complaint spill over to other parties and there is no market mechanism for those who benefit to collectively compensate those whose action created the spillover benefits, then there is insufficient monetary incentive for the individuals to engage in costly activities the (non-appropriable) benefits of which go to others. For example, an *individual* may be reluctant to lodge a discrimination complaint knowing that the private individual costs could be substantial (including employer reprisals) and the individual benefits small (involving a small wage gain for that individual). To the extent that the wage gain would go to all workers who were discriminated against, the total or collective benefits to them may be substantial. However, there may be no easy market mechanism for them to reimburse the individual complainant for the benefits they receive; therefore, there may be insufficient monetary incentives for such grievances. Hence, there may be a rationale for collective mechanisms such as class-action suits or complaints being advanced by an employment standards agency or a human rights commission or a union. In that vein unions serve to collectively assess and share the costs of actions that can benefit a number of its members.

Arguing that unions can potentially serve the interests of minority workers and encouraging unionization in such sectors can be two different things. This is so because such minorities often have a lower propensity to unionize, perhaps because their occupations or industries tend to be less unionized, or they tend to be employed in small firms or at work sites that are difficult to organize, or they don't expect to be in the labour market for a sufficiently long time to appropriate the benefits of a costly organizing drive, or they are socialized against militant, aggressive action. Whatever the reasons, they may pose barriers that are hard to overcome. This is evidenced by the fact that the propensity to unionize is lower for women than men and that even when

unionized they *tend* not to hold the key executive offices that may influence internal union trade-offs, although there has been some improvement in this area in recent years (Jain and Sloane, 1981, p. 156; White, 1980).

Probably the main policy initiatives in this area could come from the procedures whereby unions are certified, since here there is an element of policy control. This means, for example, that policies should try to facilitate (or at a minimum, reduce barriers that inhibit) the union certification of groups that can represent the interests of minority workers. Certification procedures that break down craft lines (and hence that facilitate egalitarian wage policies within the union), and that do not require an excessive amount of the industry to be organized before certification is granted, are obvious examples of such facilitating certification procedures. Guaranteeing minority rights within unions so that their basic rights cannot be traded-off by majority voters in the internal union trade-offs could also facilitate equality of employment. In more general terms, policies that are conducive to unionization are likely to be policies that will facilitate equality of employment, at least in the current Canadian situation.

## 6. POTENTIAL FOR POLICY OPTIONS

The previous discussion of the array of policy options has at times alluded to the conditions under which some policies can be expected to be more successful than others. The purpose of this section is to treat that issue more systematically by examining the channels through which the different policies operate, and the extent to which the viability of the policy options depend on the nature of the labour market, the state of the economy, and expected future developments.

### Channels through which Policies Operate

Reflecting the different forms and sources of discrimination as well as the variety of underlying motives for discrimination (as discussed in Section 2), it is not surprising that the array of policy options (as discussed in Sections 4 and 5) can be expected to have an impact through a variety of channels. For example, the fact that discrimination can emanate from employers, customers, and co-workers (for similar or different reasons) suggests the appropriateness of policy responses that work on all three groups. Similarly, the fact that discrimination can occur in the household and in our educational institutions as well as in the labour market, and that they are interrelated in that our educational and household decisions both affect and are affected by our labour market behaviour, suggests the appropriateness of policy responses that affect all three sectors. From a policy perspective the key question, however, becomes: is there any reason to believe that focusing on any one group (e.g., employers, customers, or co-workers) or any one sector (e.g., the labour market, educational institutions, or the household) is likely to be more successful than focusing on any other group or sector?

#### • Employers and the labour market

Conventional anti-discrimination policies have tended to focus on the labour market and on employers as the main source of discrimination in the labour market. While this may be important there are a number of reasons why this emphasis may be somewhat misguided, or at least why policymakers may want to re-evaluate such an emphasis. First, competitive forces, at least where they prevail, should ensure that

employers themselves are not a major source of discrimination, in that discrimination would mean that they are forgoing profits by not hiring or promoting the most productive person or that they could be hiring equally productive minorities at a lower wage. Employers are in business to make a profit, and hence have a financial incentive to avoid such costly mistakes. This is certainly less so with respect to households or educational institutions, the survival of which does not depend upon their ability to avoid costly mistakes.

Second, for practical purposes, most legislative initiatives with respect to employers are restricted to affecting policies within the same establishment, and this reduces the scope of such initiatives from dealing with occupational segregation across establishments or the segregation of minorities into low-wage establishments. Third, without a basic change in attitudes or objective information, employers that are devious enough to discriminate are likely to be devious enough to avoid the legislation, perhaps in ways that are ultimately harmful to minorities. They may, for example, give instructions to employment agencies not to refer members of minority groups for job interviews (Ontario, 1982, p. 1). Fourth, there is a possibility that enforcement agencies may concentrate their efforts on employers for whom the publicity value of enforcement is greatest or for whom enforcement costs may be smallest. This could be the case in firms that are most likely to cooperate with legislative initiatives, and such firms are likely to be those that discriminate the least, if at all; intransigent employers may be left alone because enforcement may be more difficult. This gives rise to the possibility that those who discriminate the least and cooperate the most are hardest hit by policy initiatives, and the additional cost to them may reduce the growth of the very firms that should expand, at least because of their being employers that discriminate the least. For these various reasons, the emphasis on the labour market and employers as being the primary source of discrimination may need some re-evaluation.

#### • Household as a source of discrimination

Just as there may be an overemphasis on employers and the labour market, there may be an underemphasis on the household as a source of discrimination or at least of inequality in employment. For some, talking about the household as a source of discrimination may seem anomalous, since it implies that the unit that we tend to think of as the basic decision-making unit would discriminate against itself by providing an inequality of opportunities to its own members. In reality, however, the issue is more complicated.

Certainly many households were formed in an earlier period where the increased labour force participation of females was not foreseen. Faced with the now unanticipated circumstances there may be a reluctance on the part of husbands to change the "implicit contract", with its more conventional division of labour, and there may be a reluctance on the part of either or both parties to dissolve the contract (albeit such changes are occurring rapidly in response to the new circumstances). This reluctance to change the contract may be fostered by the fact that other institutional arrangements (e.g., part-time work for both parties, daycare arrangements, parental leaves) have not yet responded to the changing circumstances. In such circumstances women may be left with a Hobson's choice of participating equally in the labour market

or of preserving a marriage, even if it is one that is based on an inequality of opportunity with respect to labour market participation. The choice will be particularly difficult for those women who have "made the longest investment in marital skills relative to labour market skills" (Cain, 1983, p. 11). For some the choice will be easy, for others it will be difficult; in either circumstance it can have a detrimental effect on their labour market performance since, even when marriages are dissolved, women are likely to retain primary responsibility for the care of children.

The household may also be a primary source of inequality of employment opportunities because of unequal "bargaining power" of the parties within the household. The conventional perspective (at least as dealt with by economists) of joint decision-making within the household assumes that both husband and wife have a say in household decisions. For many households this may simply not be the case, and husbands' decisions may dominate. This may be fostered by discrimination that wives in these circumstances face in their alternatives with respect to such factors as labour market work, or the receipt of credit to re-establish themselves.

Lastly, the household may be a primary source of inequality of employment because its survival does not depend on its ability to avoid costly discriminatory errors. It is simply under less pressure to rectify such costly practices, and hence they are more likely to persist.

If the household is a potentially important source of discrimination, or at least of inequality of employment opportunities, what are the resulting policy implications? Conventionally we think of private decision-making within the household as being an area in which legislative initiatives should be relied upon only as a last resort. This may well be appropriate. Nevertheless, there can still be reason for *facilitating* policies that enable the parties to make joint decisions that facilitate equality of employment opportunities. Such facilitating policies have been discussed in Section 4 and include daycare, parental leaves, flexible hours, and part-time work. There is also room for policies that may redress imbalances in what could be termed the "bargaining relationship" between the parties within households. Policies that enhance the freedom of women to choose alternatives and to reduce their financial dependence on the household include non-discriminatory access to credit, more liberal abortion and divorce laws, as well as provisions for equality of settlement and support.

We tend to think of divorce settlements that divide the family assets in half as being equitable, and they certainly are relative to ones that are based on the past monetary contribution of the parties and where the housewives' services are not fully valued. Nevertheless, if both parties are to start at the same foothold at the end of the settlement, then a greater-than-50-per-cent settlement for the wife would seem equitable because she, in all likelihood, will have a lower expected future earnings stream reflecting her past specialization in household rather than labour market tasks. That is, equality of opportunity may require compensatory treatment. If affirmative action has a rationale in the labour market to compensate for past privations, does it not have a rationale in matters of family law?

### • Education and training institutions

Much of what was said in the previous discussion about the household as a potentially important channel for policy options also applies to our education and training institutions. Their often non-profit nature means that they are under less pressure than employers in the labour market to rectify discriminatory errors, and the aging of the teaching workforce and the reduced entry of younger teachers may mean that established discriminatory practices stay entrenched and are not challenged by new ideas associated with the infusion of younger teachers.

Attempting to redress discriminatory practices at the early level of our educational system is particularly important for a number of reasons. First, since it is done early it can have cumulative effects that build over time and hence minimize the need to subsequently (e.g., in the labour market) try to overcompensate to redress the past cumulative effects. Second, such policies do not leave the minority groups with a subsequent stigma that they must be assisted subsequently by policy initiatives, even though such initiatives may be designed to simply redress the past history of discrimination. Third, policies in our educational institutions are likely to have an effect on all aspects of subsequent behaviour and hence may break down discriminatory barriers within the household as well as across establishments and across occupations—these being areas that are hard to otherwise penetrate with conventional policy options. Fourth, policies in our educational institutions may be important in changing the fundamental attitudes, stereotypes, and prejudices that are the underlying causes or motivating factors behind discrimination, and these may be more important and long lasting than subsequent labour market policies such as equal pay and equal employment opportunity legislation that tend to work at the symptoms rather than the causes.

In essence, the reduction of discrimination and inequality of employment will require policy initiatives in the household and in our educational institutions as well as more directly in the labour market. In fact, the former policies may be more important in treating the underlying causes rather than the symptoms and in attaining longer lasting results that don't require remedial treatment that otherwise may have a stigma. At the very least, labour market policies should not be regarded in isolation of these other policies.

### Nature of the Labour Market and Viability of Policy Options

Whether or not the household or our educational institutions are more viable channels for policy than is the labour market, the viability of policy options in the labour market itself will depend on how the labour market is perceived to function. In that vein, it is useful to make a number of distinctions, such as between neo-classical and segmented perspectives and between the private and public sectors.

### • Neo-classical competitive perspective

The conventional neo-classical economic perspective views wage and employment determination in the labour market as essentially reflecting the interaction of profit-maximizing employers and utility-maximizing workers subject to the constraints they face including risk, uncertainty, transaction costs, non-competitive conditions, and legislative constraints. The range of these realistic constraints is important,

since it is often the case that the competitive economic paradigm is dismissed as being unrealistic because it does not take into account such an array of "real world constraints". In point of fact, however, much of labour market analysis deals precisely with the expected impact of such constraints, and some of the newer work deals with why the constraints arise in the first place.

### Implications for discrimination and inequality:

If one accepts the paradigm that the labour market responds to competitive pressures, what are the implications of this view for the existence of discrimination and inequality of employment? First and foremost it suggests that discrimination should dissipate under competitive pressures, as employers would find it advantageous to hire more people whose wage was below their productivity or whose wage was less than that of equally productive people. This increased demand for such labour should serve to increase their wage and this process would continue until their wage reflected their productivity. The only types of "discrimination" that would persist would include: statistical discrimination, as employers may still find it less costly to judge individuals on the basis of the average characteristics of their group (even if that means making a few costly errors); discrimination that may reflect the adjustment costs of moving to the long-run non-discriminatory state; and that which may reflect the fact that employers may tend to pay workers the lowest wage necessary to attract workers and this may reflect the reduced opportunities of such workers due to discrimination elsewhere.

While competitive forces may dissipate discrimination, they certainly need not dissipate inequality in employment opportunities; in fact, such inequality is likely to be an unfortunate by-product of an efficiently functioning economy. Wage disparities, for example, are the market's way of signaling a need for a reallocation of labour. In the neo-classical economic perspective, low wages are largely the result of individuals having a low embodiment of productive characteristics such as education, training, experience, mobility, and information. These characteristics, termed "human capital" because they involve costly investments undertaken for future returns in the form of higher expected earnings, are prime determinants of individual earnings.

The neo-classical economic perspective emphasizes that the low earnings of minorities may in part at least reflect their low embodiment of productive characteristics that are valued in the labour market. This in turn may reflect a "rational choice" on the part of minorities not to incur the human capital necessary to acquire the characteristics or not to enter occupations where skill depreciation associated with labour force withdrawal would matter (Johnson and Stafford, 1974; McDowell, 1982; Mincer and Ofek, 1982; Mincer and Polachek, 1974; Sandell and Shapiro, 1980; Polachek, 1974, 1975a,b, 1979), or it may reflect discrimination in the acquisition of these characteristics. Females, for example, may have less on-the-job training and labour market experience than males, and their experience may be discontinuous and depreciated. This may reflect "rational choice" if they choose a mixture of labour market and household activities, or it may reflect discrimination because of an unequal division of labour within the household or because of their being



streamed into educational or training programs that are not labour market oriented.

#### **Implications for policy:**

What are the implications of the neo-classical economic perspective for policy initiatives? First, it suggests an emphasis on the acquisition of human capital as a way of increasing earnings. Second, it suggests that fostering the forces of competition should help dissipate discrimination, although it may exacerbate inequality in earnings. Discrimination is more likely to come from non-profit sectors or from institutional arrangements that protect people from competition. Third, legislative initiatives can have an impact by increasing the cost of discriminating or appearing to discriminate; however, firms will also respond by trying to evade the legislation if it is profitable to do so. Fourth, equal pay legislation will reduce the employment and hence training opportunities for women as firms substitute away from the more expensive workers; however, equal employment opportunity legislation will increase employment opportunities and, by increasing the demand for females, this will also increase female wages.

#### **• Segmented labour market perspective**

The segmented labour market perspective emphasizes that labour markets are segmented into non-competing groups. The primary or core labour market consists of high-wage stable jobs with good working conditions and chances for promotion and the accumulation of relevant work experience. The jobs are often protected by unions or professional associations or by administrative rules associated with internal labour markets which provide promotion from within and a degree of protection from the vicissitudes of external competitive market forces.

In contrast, the secondary or peripheral labour market has the opposite characteristics with low-wage, unattractive dead-end jobs that provide little protection from market fluctuations and little chance for promotion or the accumulation of relevant experience or training. Absenteeism and turnover are high in part because of the unattractive nature of the work, and once in the secondary labour market workers may develop the characteristics of that market, and this in turn makes it difficult for them to advance.

#### **Implications for discrimination and inequality:**

Needless-to-say minority groups are relegated to the secondary labour market because discrimination and a lack of skills may prevent their entry into the protected sector. Once in the secondary market they will receive little relevant training or experience and they may begin to assimilate the characteristics of other workers in that market, perhaps having high absenteeism and turnover and exhibiting little motivation. In this situation, causality works from low wages and poor working conditions to high absenteeism and turnover, rather than vice-versa, as emphasized by the neo-classical competitive paradigm. In the segmented perspective the "cause" of the problem tends to be associated with the characteristics of the jobs that people occupy, not with the human capital or other characteristics of the workforce. In fact, acquiring additional human capital will do little good since it isn't rewarded much in the secondary labour market and it does not enable one to escape from the secondary to the primary labour market.

A further important implication of the segmented labour market analysis is that the crowding of minority groups into certain occupations will lower their productivity in those occupations (by virtue of the economic principle of diminishing marginal productivity as more inputs are added, holding other factors constant). This means that even if they are paid a non-discriminatory wage, in the sense that their wage is equal to their contribution to productivity, that wage is lower than it otherwise would be in the absence of such crowdings into certain jobs.

This crowding aspect of segmentation was emphasized in the early writings of Fawcett (1918) and Edgeworth (1922) and in the more recent work by Bergmann (1971, 1974). The relationship between discrimination and the dual and segmented labour market perspective in an economic context is emphasized more generally in Cussel, Director, and Doctors (1975); Flanagan (1973a,b) and Zellner (1972); and in a sociological context in Canadian work by Boyd and Humphreys (1979) and Ornstein (1982). Jain and Sloane (1981, pp. 36-55) provide a comprehensive review, especially with respect to internal labour markets and personnel policy.

There have been few Canadian empirical studies done specifically on the relationship between discrimination and the segmentation of labour markets into core and peripheral segments. However, Boyd and Humphreys (1979) do not find segmentation to be a major factor in explaining the income gap. This somewhat puzzling result may occur in part because they utilize a "Blissen point" occupational prestige ranking, which reflects perceived prestige and social standing, and this may place a large number of jobs that are conventionally labelled as "women's work" into the primary or core labour market (Gunderson, 1980, p. 5.15).

#### **Implications for policy:**

As discussed in Section 4, the segmented labour market perspective tends to emphasize policies to reduce the barriers that prevent entry from the secondary to the primary labour market. The emphasis tends to be on the characteristics of the jobs (e.g., on getting minority workers into certain industries or occupations) and not on the characteristics of the workers themselves (e.g., their education or training). Equal employment opportunity legislation and especially its variant of affirmative action is particularly enhanced in this perspective, because it can be regarded as a way of compensating for the cumulative effects of the persistent segmentation.

To the extent that it is simply unfeasible to break down the barriers, or perhaps undesirable to do so because they provide a desirable degree of protection to those who are fortunate enough to be protected by them, then the policy emphasis becomes one of *extending* the benefits of the protected to the non-protected sector. As discussed in Section 4, this can be done through wage fixing and labour standards legislation, including equal pay policies; however, the scope of the latter will be severely limited by the fact that it applies only to within the same establishment and (usually) occupation, and the main segmentation occurs across establishments and occupations. Facilitating policies (e.g., day-care, flexible working arrangements) could help mobility from the secondary to the primary sector; however, with the possible exception of increased unionization, the extent to which they are simply palliatives remains of concern.



### • Competitive versus non-competitive features

Even if one does not take the extreme perspective of a completely segmented labour market, there are certain non-competitive features of markets that can have an important impact on the extent of discrimination and on policy alternatives to combat discrimination. In that vein it is worth distinguishing between non-competitive features of the product market (e.g., monopoly and regulation) that can have a derived impact on the labour market, and non-competitive features of the labour market itself, such as monopsony and unions.

#### *Monopoly and regulation:*

Monopolistic sectors may have monopoly rents or profits and/or be subject to regulation, and these aspects can have important implications for discriminatory behaviour. Monopoly rents can be used for any purpose, such as the furtherance of inefficient labour market practices (Alcian and Kessel, 1962), including discrimination, and they can be distributed disproportionately to majority-group workers, especially if they can "extract the rents" through organizations such as unions. Even if minority workers are paid a competitive wage equal to the wage in their next-best-alternative activity, they may be paid less than those who get a disproportionate share of the monopoly rents.

In contrast, monopolies may want to appear as model employers because of a concern with their public image, either because they will appear before regulatory boards or because they fear the possibility of regulation should they fall under public scrutiny. In such circumstances they may be reluctant to engage in discriminatory practices, and they may in fact "buy" labour peace by paying some of their monopoly rents to workers. Also, while it is true that monopoly rents can be used for any purposes, it is likely that they will be used in procedures that will ultimately help protect those rents from being dissipated by competition, rather than being used in a capricious or even random fashion. Thus it is more likely the rents will be used in lobbying procedures to prevent regulation or at least control it, so that it is more costly for new firms to enter, or it will be used in "predatory" price wars to deter new entrants. Unless the usage of costly inefficient discriminatory procedures can deter new firms from entering into the industry and dissipating the monopoly profits, it is difficult to see why monopolistic and/or regulated sectors should discriminate more than competitive sectors.

Clearly, theoretical considerations do not suggest an unambiguous relationship between non-competitive behaviour in the product market and discrimination in the labour market; hence, one must appeal to the empirical evidence. Unfortunately, the evidence itself is conflicting, with more discrimination being found in monopolistic sectors in studies by Becker (1971), Haessel and Palmer (1978), and Medoff (1980), and the opposite in studies by Fujii and Trapani (1978), Johnson (1978), and Oster (1975). To a large extent these differences may reflect different data sets and methodologies, but they may also reflect the fact that monopoly rents can be used for any purposes and hence we may expect differences in different situations and periods of time.

#### *Monopsony power of employers:*

While non-competitive features such as monopoly in the product market can have an indirect effect on discrimination in the labour market, other non-competitive features can directly affect the labour market itself. For example, some firms—termed monopsonists—can be so large relative to the size of the local labour that they can influence the wage at which they hire labour—they are wage-setters not wage-takers. Because of their influence over wages, they have to raise wages in order to attract additional labour. For purposes of internal equity they also have to pay this higher wage rate to their existing workforce, and this causes them to hire less labour than they would if they behaved competitively and thereby to pay a wage that is less than the value of the productivity generated by the last additional worker.

Such monopsonistic behaviour on the part of firms has implications for discriminatory behaviour in the labour market in two main ways. First, if minority groups are disproportionately hired by monopsonists, then their wages and employment opportunities will be restricted accordingly. This is potentially most important for females who, because of their restricted mobility and ties to the household, may be restricted to only a single or few employers. In fact, the limited empirical evidence of monopsony is in teaching and nursing occupations, both of which are predominantly female (Gunderson, 1980, p. 179).

Second, monopsonists may try to differentiate their otherwise homogeneous workforce so as to pay each worker or perhaps groups of workers only their reservation wage (i.e., minimum wage at which they would come to that firm) rather than the competitive wage necessary to attract additional workers. (Formally, they will try to extract the "seller's surplus", defined as wage paid above one's reservation wage or next-best-alternative wage.) To the extent that they can use minority status as a way of differentiating their otherwise homogeneous workforce, then this would give rise to minority workers being paid less than other workers of comparable skills. For this to persist, however, the monopsonist must be able to segment its workforce into non-competing groups so as to pay each worker or group of workers only their reservation wage.

An interesting and potentially important policy implication of monopsony is that wage fixing either through legislation (e.g., minimum wages, equal pay) or unions can actually increase both wages and employment opportunities (Gunderson, 1980, pp. 174-178). This paradoxical result, which is in sharp contrast to that predicted by competitive economic theory, occurs because by being subject to the new constraint of having to pay a fixed wage for a given type of labour the monopsonist no longer restricts its hiring because of having to raise wages to attract additional workers. This raises the possibility that equal pay legislation, for example, could actually increase the employment possibilities as well as wages of women.

In addition, policies to increase such factors as the mobility and job opportunities of minorities and to reduce their ties to particular locations, such as the household, should help to reduce the monopsony power of firms. Lastly, unions can be especially important in getting wage gains for their members from monopsonistic employers because they are not as restricted in their wage demands by the possibility of an

adverse employment effect, and they can ensure that their members who are equally productive are paid the same wage rather than their reservation wage or minimum wage at which they would work for that employer.

As discussed previously in Section 4, unions can be a potentially important factor not only in monopsonistic labour markets but also in labour markets where firms are otherwise competitive buyers of labour. Their potential is further enhanced by the fact that they can be an important vehicle for the monitoring and expediting of legislative initiatives.

#### • Public versus private sector

The potential for policy options can also depend on whether one is dealing with public- or private-sector labour markets and whether the private-sector ones are competitive or non-competitive. For purposes of anti-discrimination legislation the key distinction between the public and private sectors is that in the public sector the profit constraint that motivates the private sector is replaced by an ultimate political constraint. This means that public-sector labour markets will be ultimately responsive to political pressures that may be affected only partly by cost considerations.

Political pressures will reflect the preferences of voters, especially those who can tip the scales in favour of one party or the other. They can also reflect the intensity of preferences, although here the mechanism is more imperfect since individuals may be reluctant to reveal that intensity if they are required to pay for it through contributions of time or money; they are likely to try to go along as a "free-rider", knowing that their individual contribution is unlikely to tip the scales in the direction they prefer. Log-rolling on issues may also occur as groups agree to back other groups in return for support on other issues.

The upshot of the political mechanism is that it will reflect voter preferences in varying degrees of imperfection. Such preferences could be discriminatory, as evidenced by extremes like apartheid, slavery, and segregation; in such circumstances the political process was used to subject groups. In other circumstances, however, the political process can be used to ameliorate discrimination, as in the current thrust of legislated initiatives. The point is that the political process can exacerbate or ameliorate the impact of discriminatory preferences. Hence one cannot determine *a priori* whether discrimination will be less in public- or private-sector labour markets.

Empirical evidence, however, suggests that while there appears to be a discriminatory male-female wage differential in public-sector labour markets it is considerably smaller than that which prevails in the private sector in Canada (Boyd and Humphreys, 1979; Gunderson, 1979b, p. 484, 1980, p. A2.19; Shapiro and Steclner, 1980). This may reflect in part the fact that the economic rent or pure wage advantage with public-sector employment is estimated as slightly higher (i.e., respectively 8.6 and 6.2 per cent) for females than males in Canada (Gunderson, 1979a, p. 237). In essence, while it is possible that discriminatory preferences that prevail in society could manifest themselves more in the public than private sector (in large part because there is less cost pressure to dissipate inefficient discriminatory practices), the empirical evidence suggests that wage discrimination at least is less in the public than private sector. The political pressures against

discrimination seem to outweigh those that would utilize public-sector institutions to foster discrimination. Based on U.S. data, additional empirical support for the proposition that discrimination is less in the public than private sectors is found in Fuchs (1971); Long (1976); Johnson (1978) and Johnson and Stafford (1974); Hirsch and Leppel (1982), and Smith (1976, 1977), although Borjas (1978) finds evidence of considerable discrimination in the Department of Health, Education and Welfare, the department responsible for the administration of much anti-discrimination legislation.

The likelihood that discrimination is less in the public than private sectors is an important point because non-interventionists would tend to argue that minority groups are better off in a pure market economy (where profit maximizing would dissipate inefficient discrimination) than with state intervention, since the latter could be used by the majority to foster discrimination. While this is certainly a possibility (and there are historical and comparative examples, where it is obviously the case), it does not appear to be the current case in Canada. Perhaps the "bottom line" test of this proposition would be to allow the minority groups themselves to decide if they would prefer the state intervention. Surely they are closest to the problem, and even if they did make a mistake it is better that they make it rather than having it made for them by someone else.

The previous discussion suggesting that state intervention can and does help minorities in our current context probably applies more to females than to other minorities, in part because females constitute a larger voting block and hence can exert political pressure. In addition, since as a group they are not committed to a particular political ideology they can be influential in decisions that can "tip the balance of power"; that is, they are as likely as any group to be voters at the "margin of decision" and representative of the median voter that can tip the scales.

This is in contrast to their position in the labour market, where their immobility and ties to the household mean that their threat of mobility is insufficient for them to command a high market wage. This immobility is emphasized in monopsony models of discrimination (e.g., Gordon and Morton, 1974; Gunderson, 1980, pp. 171-174; Madden, 1972), which rely upon the wage elasticity of labour supply to the firm to be less for females than males. In such circumstances females are less likely to be workers at the "margin of decision" to whose preferences the market must respond. In essence females are more likely to be marginal voters than marginal workers (both taken to mean at the margin of decision and thus responsive in their respective voting or mobility behaviour) and hence their preferences are more likely to elicit responses from the political than the economic market place.

#### State of Economy and Viability of Policy Options

The viability of policy initiatives depends not only on how the labour market functions but also on the state of the economy, both with respect to its long-run growth pattern and its short-run cyclical fluctuations. As discussed earlier (in Section 5, under Full Employment and Expansive Aggregate Demand) an expanding, full-employment economy may obviate the need for policy initiatives to reduce discrimination or inequalities in employment as wage differentials tend to narrow, as employers seek new sources of labour supply and re-

evaluate their conventional hiring and wage policies, and as the restrictive practices of craft unions may dissipate. Even short-run cyclical expansion can have more permanent effects as stereotypes can break down and minorities acquire experience and on-the-job training. The increased mobility and flow of workers may also help break down the segmentation of labour markets as well as the monopsony power of some employers.

In addition, as discussed previously (in Section 2 under Job Security of Discriminators), it is likely that the threats that legislative initiatives may have on job security of others will be minimized in expanding sectors or periods, and this in turn will minimize the political resistance to such policies. This is so in the case of equal employment opportunity policies because the job security of existing workers will be less threatened as many of the changes can occur through attrition and new hirings and even the location decisions of new firms. It is certainly also easier to apply equal pay policies in expanding times, when relative wages are in a state of flux and when the wages of all groups are expanding. In essence, it is easier to achieve equal pay by changing the relative rate of increase of wages than by simply changing the levels of wages; it is easier for some to lose in a relative rather than an absolute sense. Also, in an expanding economy equal pay laws are less likely to result in an adverse employment effect as firms substitute away from the more expensive labour. This possibility (i.e., movement along a given demand curve) is likely to be offset by the overall increase in employment opportunities (i.e., movement of the demand curve) associated with the expansion.

Facilitating policies are also likely to be more possible in expanding periods. Flexible hours and work arrangements are more likely to occur so as to facilitate the entry of workers needed in the labour market. Most importantly, an expanding economy means that firms are less likely to be put out of business by the cost increases associated with new policy initiatives. Even in situations where some firms were able to stay in business only because of discriminatory practices, there may be a reluctance on the part of policymakers to enforce policies that would tip the scales in the direction of their going out of business. The attitude may be that a job with discrimination may be better than no job, at least until the economy improves sufficiently to absorb any cost increases associated with legislative initiatives.

Clearly it is both an economic and political reality that legislative initiatives in the area of discrimination and inequality are likely to meet with less resistance and more success in expanding periods or sectors of the economy. This may seem unfortunate, since it suggests that basic rights are things that we can try to ensure more when they "can be afforded". Nevertheless there are real resource costs involved in enforcing and complying with legislative initiatives, and these are likely to be better absorbed in an expanding economy. Both expedience and the attaining of long-run objectives may thereby suggest a strategy that focuses on the expanding sectors and cyclical phases of the economy.

#### **Expected Future Developments and Viability of Policy Options**

The future potential for the viability of different policy options depends in part on expected future developments with respect to the elements of the environment in which the

policy options would operate. In some circumstances the environmental changes will change the *need* for different types of policy options, in other circumstances they will change the *efficacy* of the option itself. Among the most important environmental changes are deindustrialization and the shift to high technology, deregulation and trade liberalization, and retrenchment in public-sector activities.

#### **• Deindustrialization and shift to high technology**

The shift of industry away from the "smokestack" blue-collar manufacturing sector and into white-collar sectors, including "high-tech" industries, can have a dramatic effect on the demands for different types of workers. Whereas the heavy-industry sectors such as auto and steel require semi-skilled blue-collar workers, the new high-technology sectors will likely require a more bi-modal distribution of skills, with high-skilled, white-collar, professional-type workers being required to develop, maintain, and operate the new technology (often associated with computers and "robotization" on the assembly lines) and less-skilled white-collar workers being required to do the routine operations and to handle the expanded service sector.

In general such a shift in technology provides the *potential* for the expanded opportunities of minorities, especially for those for whom the physical strength requirement (Sampson, 1981) and adverse working conditions of the old "smokestack" industries were a barrier. However, the shift also provides the potential for more *segmentation* associated with the new bi-modal distribution of skills (i.e., skilled and unskilled) versus the old emphasis on semi-skilled blue-collar work. The danger is that minorities will be relegated to the routine unskilled jobs or to the low-wage service sector that services the new high technology, and not to jobs relating to the development and operation of the technology itself. To the extent that the new technology implies new and changing skill requirements, this may be particularly difficult for females to the extent that their skill acquisition and obsolescence continues to be affected by the uncertainty and the career interruption associated with household tasks.

This is compounded by the fact that they are the group that will be most affected by office automation (Canada, 1981, p. 94; Menzies, 1981; Zeman, 1979, p. 44). Even here, however, the effects are likely to be mixed as office automation can reduce the demand for conventional office skills but increase the demand for the new skills. This is clearly indicated, for example, in the Ottawa area, where the decline in the demand for conventional public-sector office work is being displaced by the demand for micro-electronic and computer-related occupations (Communicado Associates, 1982). The new office automation also may enable a number of the tasks to be done at home, with inter-related communication to a central office, thereby providing for the potential rebirth of the "cottage industry". This could facilitate the employment opportunities of groups who are otherwise tied to the household such as women or the physically disabled (Sampson, 1981).

These possibilities suggest the importance of policy initiatives that will facilitate the *adaptation* of minorities to the new technology, especially education and retraining programs that are geared in that direction. They also suggest the importance of equal employment opportunity policies to ensure that the new jobs are open to minorities so that new



high-tech "job ghettos" do not form. In general these will probably be more important than equal pay policies, since it is access to the new job that will be crucial; once in, it is unlikely that blatant unequal pay can sustain itself for long. In addition, any form of wage-fixing policy may prevent minority groups from getting jobs that provide training or relevant experience in return for the lower wage.

The *monitoring* of legislated initiatives will also be affected in an indeterminate fashion. On the one hand, objective measures of output will be more easily measured and this may facilitate equal pay policies. On the other hand, unionization is less likely to be as prominent in these new sectors, and hence their monitoring and enforcement capabilities are lost. In addition, the contracting out of work to the household (i.e., the new cottage industry) will make monitoring difficult; however, presumably it will be less necessary because contracting-out will only be feasible where objective measures of output are possible.

#### • Deregulation and trade liberalization

Especially as (or if) the economy comes out of the world recession there is likely to be increased pressure for deregulation and trade liberalization. While such policies provide efficiency gains there will also be losers, namely those who were earlier protected by regulation or trade barriers. The extent to which minority groups will be disproportionately affected will depend on their distribution across those affected sectors and the extent to which they as workers benefited by the protection.

In general they are unlikely to be disproportionately involved in sectors that will be most affected by deregulation, such as transportation, communication, and utilities. The concession bargaining and wage cuts that have followed the deregulation in trucking and airlines in the United States, for example, have occurred in the relatively well-paid unionized workforces that have not been dominated by minorities. In addition, to the extent that the segregation of labour markets has prevented minorities from receiving the benefits of protectionism, it is unlikely that their wages were artificially high in the first place. It is more likely, in fact, that their job opportunities will increase as jobs open up from the competitive expansion of the otherwise protected sectors. As consumers, of course, they may also benefit from the lower prices associated with the removal of protectionism.

Minorities will be affected through the removal of trade protection in sectors such as textiles and some light manufacturing. In all likelihood, however, compensation payments will exist, the greater efficiency of the removal of protection providing the means for the compensation. This may in fact provide an opportunity for such minorities to leave these otherwise low-wage sectors. In addition, to the extent that deregulation is successful in the product market, it may extend to the labour market, in which case legislative policy initiatives themselves may come under attack. Efforts to reduce the extent of government intervention and regulation in the economy may well extend to policy initiatives to reduce the degree of discrimination in the economy.

#### • Retrenchment in public-sector activities

Deregulation and the reduction of protective trade barriers are part and parcel of the current trend in retrenchment in public-sector activities; all are part of the process of trying to

reduce the degree of government intervention in the economy and to move towards a more market oriented economy. To the extent that these trends continue (and they do not seem to be as firmly established in Canada as in the United States and Britain), it is the reduction in public employment that will probably have the most adverse effect on minorities.

The public sector has been a significant source of employment opportunities and, as documented earlier, the degree of discrimination is probably less in the public- as opposed to the private-sector labour market. It is not only the curbing of the growth of the public sector but also the selective application of wage controls in that sector that will inhibit the opportunities of minorities both for employment and for wage increases. Just as with a declining private-sector economy so will a declining and controlled public-sector economy make it harder for legislative initiatives to have an effect; concerns that gains for one group will come at the expense of others will become paramount when there is "only so much to go around".

### 7. ASSESSMENT OF IMPACT OF POLICY OPTIONS

Given the variety of policy options as discussed in Sections 4 and 5, and the potential for these policy options as discussed in Section 6, it is important to have an analysis of the impact of these policies. This is particularly the case since there were factors, discussed especially in Section 6, that could be at work to offset or reinforce the impact of policy initiatives. The purpose of this section is to assess the available empirical evidence that exists on the impact of the legislation and to discuss some of the methodological problems involved in analysing this impact.

This review is limited in scope in three main ways: it focuses on the legislative initiatives, including equal pay and various forms of equal employment opportunity, but not on facilitating policies, the impact of some of which were discussed in Section 6; it focuses on the impact on wages and employment opportunity and not on other possibly important policy outcomes, such as costs; and it focuses on econometric studies and not on qualitative or other assessments that may be important. In spite of this limited scope, such an analysis of econometric evaluations of the wage and employment impact of legislative initiatives can be an important input—along with qualitative assessments and experiences of the parties—in evaluating the effectiveness of such policies.

Econometric studies are particularly important for a number of reasons: they enable one to ascertain the impact of the policy when other variables are held constant, and hence they minimize the possibility of attributing the effect of these other factors to the policy changes; they indicate the quantitative effect of the policy changes and the extent to which its success can depend on the existence of other factors and how it may be changing over time; they indicate the extent to which the effect of the policy simply may be due to chance as opposed to the policy change; and by being explicit about the methodology and data employed, they are open to scrutiny and are less subject to subjective errors. Unfortunately the methodologies and statistical procedures themselves are often quite complex, hence making them difficult to scrutinize, and they do not always lead to the same conclusions. In spite of this some generalizations do emerge and can be put forth with varying degrees of confidence. Before



doing this some theoretical issues will be discussed about the *expected*, as opposed to the actual, impact of legislative initiatives.

### **Theoretically Expected Impact**

In general, legislative initiatives such as equal pay and equal employment opportunities can be expected to have an impact in their intended direction, that is, respectively, to narrow discriminatory wage differentials and to reduce discrimination in employment opportunities. This is so irrespective of whether discrimination emanates from employers, co-workers, or customers and whether it occurs for reasons of prejudice, misinformation, cognitive dissonance, job protection, minimizing adjustment costs, preserving class power, or any other reasons.

#### **• Reasons for expected reduction in discrimination**

From an economic perspective, such legislation increases the expected costs of discriminatory activity by an amount depending on the probability of being caught times the expected fine if caught. The probability of being caught in turn is the product of the probability of being investigated times the probability of being apprehended if investigated. This highlights the fact that enforcement agencies may want to alter these various components of the expected cost depending on the benefits of the alternatives in terms of reducing discriminatory behaviour and depending on the costs of the alternative enforcement mechanisms. For example, if it is costly to apprehend offenders, it may make economic sense to devote resources to ensuring that the guilty are convicted and to have a high fine serve as the deterrent to others.

The expected cost of discriminatory activity could also include any "image" cost that may be involved, associated with employers or others being branded as discriminating groups. Such image costs may vary by sector, for example, being higher in the public or regulated sectors that come under public scrutiny, or in large firms concerned about their "brand-name" image.

Faced with these higher expected costs if they discriminate, employers will engage in less of the costly activity. Even if the ultimate source of the discrimination is from customers or co-workers, employers still have an economic incentive to reduce the amount of discrimination as it is manifest in their employment policies. They will also have an economic incentive to shift the higher expected cost of discrimination to the group from which the discrimination emanates, since employers ultimately have an economic incentive to see it reduced in order to avoid the expected penalty and image cost. For example, even if the discrimination emanated from co-workers, employers would still have an economic incentive to reduce the amount of discrimination that gets manifest in their particular employment environment, and they therefore have an incentive to get co-workers to discriminate less and to perhaps replace those who do, in spite of the previously discussed transaction costs associated with such changes.

This is part-and-parcel of the more general economic proposition that for efficiency reasons it is not so important *where* ultimate responsibility for an action lies, as opposed to being sure that responsibility gets established somewhere.

Once established, the responsible parties will have an incentive to determine where the changes are best made to ensure that the policy gets carried out. For reasons of equity or fairness, of course, it may be better to put responsibility on the source of the discrimination. However, this is not a prerequisite for ensuring that policy gets carried out.

#### **• Expected effect if no discrimination**

Even if there were no discrimination in the system, such legislation would still narrow the wage and employment opportunity gap between minority and other workers. This is so because employers would still have an economic incentive to avoid the expected penalty even if it is a mistaken penalty. Employers would want a larger "margin-for-error" to avoid such costly mistakes happening to them. This in turn has implications for inequality, even if that inequality does not emanate from discrimination, since minority groups would benefit disproportionately as employers increase their wages and/or employment opportunity to reduce the likelihood of incurring discrimination charges, even if such charges were unfounded. In that vein there is some consolation in the fact that even if an anti-discrimination policy were erroneously applied in areas where the source of the problem was not discrimination, it is likely to reduce the inequality of income and employment opportunities experienced by minorities.

#### **• Indirect impacts on reducing gap**

Legislative initiatives may also have indirect impacts that can reduce discrimination or inequality in employment. Increased employment opportunities may serve to break down stereotypes and misinformation as minorities break into otherwise segmented markets. Especially if they enter into positions where they can influence hiring and compensation decisions, minorities may be able to reduce discriminatory practices against other minorities.

The legislated outcomes may also set in motion other practices that reinforce the outcomes. Higher wages emanating from equal pay, for example, may increase the productivity of minorities both because they themselves feel more fairly treated and because employers may upgrade them for their new higher wage positions. The productivity increase is unlikely to be as large as the wage increase (if it was, then profit-maximizing firms would have voluntarily paid the higher wage to increase productivity); however, it may offset some of the cost increase otherwise associated with the wage increase.

#### **• Complementarity of equal pay and equal employment opportunity legislation**

Equal employment opportunity legislation can also increase the wages as well as the employment opportunities of minorities both because of the increased demand for minority workers associated with their increased employment opportunities and because of the possibly more continuous and permanent employment that can have positive consequences for wages.

This positive effect of equal employment opportunity legislation on the wages of minorities is in contrast to the likely negative effect that equal pay policies will have on the employment opportunities of minorities. Faced with higher

wage costs of minorities, unless there are off-setting productivity improvements or corrections of misinformation, employers are likely to reduce their demand for minority workers. Obviously this cannot be overt, and it would be illegal according to equal employment opportunity law; however, the process may be subtle. Firms may reduce their hiring of new minorities so as to avoid potential future equal pay cases, and it may be difficult to prove discrimination in such situations where employers are hiring from a pool of otherwise homogeneous, unskilled labour without a proven track record. (Affirmative action with targets or even quotas may be more effective in such situations.) In addition, to avoid potential future equal pay cases, firms may contract-out some work, or completely segregate certain working groups, or try to filter out potential future trouble makers.

Adjustment processes may be subtle and difficult to prove as discriminatory. These examples are meant to illustrate how equal pay legislation can reduce the employment opportunities of minorities, unlike equal employment opportunity legislation, which is likely to increase the wages of minorities.

In that vein, equal pay legislation may be less necessary or even unnecessary when there is effective equal employment opportunity legislation. This challenges the conventional wisdom that they are complementary policies with equal pay necessary to prevent employers from simply reducing the wages of minorities they are compelled to hire, and equal employment opportunity legislation necessary to prevent employers from not hiring minorities as a result of equal pay. The latter may be exceedingly difficult to enforce and the former may be redundant since market forces would dictate a move towards equal pay if equal employment opportunity legislation were enforced. The policies may be more alternatives or substitutes than complements, at least insofar as effective equal opportunity legislation may be an alternative to equal pay.

This also highlights the difficulty of isolating the effectiveness of legislative initiatives such as equal pay and equal employment opportunity legislation when they are both going on at the same time. The equal employment opportunity legislation, for example, may simply be offsetting the potential adverse employment effects of equal pay legislation. It may appear to be ineffective in that employment opportunities are not expanding; however, they may have been much worse were it not for the offsetting effect of the legislation.

#### • Other negative effects of legislation

Equal pay legislation also has the potential disadvantage that by raising the wages of minorities it may reduce their chances to take on lower wage jobs that may offer training or upgrading possibilities that could enhance their future earnings and employment opportunities. This is unlikely to be of major importance, however, since minority workers could always ignore the equal pay issue if it was to their long-run advantage to do so.

Of potentially greater importance is the possibility that legislative policy initiatives of any sort are likely to have cost implications for employers, and these cost implications mean that some firms may go out of business and others will raise their prices which in turn will lower the demand for their output. In either case the employment opportunities of minorities

may be reduced, and this in turn could lead to wage reductions—thereby having the opposite effects from those intended. This may be an entirely appropriate market response, since those firms that discriminate the most are likely to go out of business and customers will have to pay more for products that are produced under discriminatory employment practices; nevertheless, the end result could be reduced wages and employment opportunities for minorities.

In essence it is theoretically possible that equal pay or equal employment opportunity legislation could affect the wages and employment opportunity of minorities in either direction. Having a policy in existence, however, and devoting enforcement resources to make it effective may be two different things. For these various reasons it is necessary to examine the empirical evidence so as to ascertain the actual as opposed to theoretically expected impact of legislated initiatives.

#### Empirical Evidence on Actual Impact

Table 2 provides a summary of 19 econometric studies evaluating the impact of various forms of anti-discrimination legislation, mainly in the United States. Most of the studies examine the impact of the U.S. federal Equal Employment Opportunity (EEO) legislation involving both Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972, and the federal contract compliance program emanating from Executive Order 11246 and its amendments, the latter involving affirmative action initiatives. By necessity such a summary tabulation focuses on the main results that can be generalized from each study; exceptions, qualifications, specific details, and the full range of results must be obtained from the studies themselves. Subject to these caveats, a number of generalizations emerge.

First, the results are inconclusive: some show gains, others losses; some are significant, others are insignificant. Second, although there is this considerable variation, the earlier studies tended to indicate no significant gains; that is, either the gains were insignificant or actual losses were involved. Third, some of the more recent studies (and by being recent they can incorporate the best methodological techniques of the earlier studies as well as a longer adjustment period) do show some gains to minorities as a result of the legislation, although they are often small or statistically insignificant. Fourth, the U.S. legislative initiatives, when they were successful, seem to have been more helpful for blacks, especially black males, than for white females. Fifth, the studies based on Canadian equal pay legislation (Gunderson, 1975, 1976b) that employ different data sets and methodologies (respectively cross section versus time series analysis) find no significant impact of the legislation, and this is confirmed in a more recent analysis involving improved statistical procedures (spline functions) to test for the impact of the legislation (Gunderson, 1983c).

Although not shown in the summary table, a number of the studies provide additional information on other factors related to the success or failure of such legislation. For example, Beller (1982) indicates that between 1967 and 1974 the various aspects of the U.S. EEO legislation narrowed by 6.6 per cent the sex differential in the probability of being employed in a "male" occupation. While both the equal employment opportunity provisions of Title VII and the affirmative action aspects of contract compliance were important, most of the

**TABLE 2**  
**Econometric Studies of the Effect of Anti-Discrimination Legislation<sup>a</sup>**

| Study                             | Country          | Estimation                  | Date Year <sup>b</sup>      | Legislation                           | Dependent Variable            | Group <sup>c</sup>  | Legislative Effect <sup>d</sup> |
|-----------------------------------|------------------|-----------------------------|-----------------------------|---------------------------------------|-------------------------------|---------------------|---------------------------------|
| Landes (1968)                     | U.S.             | OLS                         | 1960                        | State fair Employment 1964 EEO        | weekly earnings               | black/white males   | insig. gain                     |
| Ashenfelter (1970)                | U.S.             | OLS                         | 1950-66                     |                                       | annual earnings               | black/white females | insig.                          |
| Freeman (1973)                    | U.S.             | OLS                         | 1947-71                     | 1964 EEO                              | annual earnings               | black/white males   | insig. sig. gain                |
| Vrooman (1974a)                   | U.S.             | OLS                         | 1948-71 <sup>e</sup>        | 1964 EEO                              | annual earnings               | black/white females | sig. gain                       |
| Gunderson (1975)                  | Canada (Ontario) | OLS                         | firms 1968, 1969            | Equal Pay                             | hourly wages                  | black/white males   | sig. gains                      |
| Gunderson (1976b)                 | Canada (Ontario) | OLS                         | 1946-71                     | Equal Pay                             | hourly wages                  | female/male         | insig.                          |
| Ashenfelter and Heckman (1976)    | U.S.             | OLS                         | matched firms 1966 and 1970 | Fed. Contract Compliance              | employment, occup. position   | black/white males   | sig. gain                       |
| Goldstein and Smith (1976)        | U.S.             | OLS                         | matched firms 1970 and 1972 | Fed. Contract Compliance              | wage and employment shares    | black males         | sig. gain                       |
| Heckman and Wolpin (1976)         | U.S. (Chicago)   | 2SLS <sup>f</sup>           | matched firms 1970-73       | Fed. Contract Compliance <sup>g</sup> | employment                    | black females       | insig. gain                     |
| Beller (1978)                     | U.S.             | OLS                         | 1967-74                     | 1964 EEO                              | weekly earnings               | white males         | sig. gain                       |
| Butler and Heckman (1977)         | U.S.             | 2SLS <sup>h</sup>           | 1949-74                     | 1964 EEO                              | annual earnings               | black/white females | insig.                          |
| Beller (1978)                     | U.S.             | GLS, RLS, 2SLS <sup>i</sup> | matched firms 1966 and 1970 | 1964 EEO                              | employment, wages             | black/white males   | insig.                          |
| Beller (1979)                     | U.S.             | OLS                         | 1968, 1972, 1975            | 1964 EEO                              | weekly earnings               | females/males       | insig. losses                   |
| Beller (1980)                     | U.S.             | OLS                         | 1968-74                     | 1964 EEO                              | weekly earnings               | females/males       | insig. gain                     |
| Chipin, Curran and Parsley (1980) | Britain          | OLS                         | 1949-75                     | Equal Pay                             | hourly wages                  | females/males       | small gain                      |
| Beller (1982)                     | U.S.             | OLS                         | 1967, 1971, 1974            | 1964 EEO                              | prob. of being in male occup. | females/males       | sig. gain                       |
| Leonard (1984a)                   | U.S.             | OLS                         | matched firms 1966, 1978    | 1964 EEO                              | employment                    | blacks              | 6.6% gain 1967-74               |
| Leonard (1984b)                   | U.S.             | OLS                         | 1978                        | Fed. Contract Compliance              | wages                         | white females       | sig. gains                      |
| Leonard (1984c)                   | U.S.             | WLS                         | 1974, 1980                  | Fed. Contract Compliance              | employment                    | nonwhite males      | sig. gains                      |
|                                   |                  |                             |                             |                                       |                               | black males         | sig. gains                      |
|                                   |                  |                             |                             |                                       |                               | black females       | sig. gains                      |
|                                   |                  |                             |                             |                                       |                               | white females       | ambiguous                       |

Source: Updated from Gunderson (1983c).

Notes: a. Refers to published studies that use econometric techniques specifically to test the impact of legislation.

b. Data periods, e.g., 1950-66, imply time series analysis of that period.

c. Groups analysed relative to another group are denoted, for example, by black/white.

d. When groups are analysed relative to other groups, the term "gains" implies that the legislation improved the economic position (dependent variable) of the minority group relative to the majority group. "Sig." denotes statistically significant and "insig." denotes statistically insignificant.

e. Based on Current Population Survey; similar results were obtained from the Continuous Work History data for 1957-69, and the results persisted over time when updated in Vrooman (1974b) for males.

f. To correct for the possibility that contract awards and reviews may be endogenous.

g. Results presented here are total short run effects for awards only from their Table 3; the results for reviews are generally statistically insignificant or quantitatively smaller and the long-run results magnify the effects. Their results also indicate that the minority gains are confined to blue-collar occupations and that minority employment increases the probability of receiving a contract but has no effect on the probability of a compliance review.

h. To account for changes in the relative supplies of blacks and whites that may occur in response to transfer programs.

i. GLS to correct for heteroskedasticity. RLS to restrict the coefficient on the linear or quadratic enforcement term to zero; 2SLS to account for the possibility that enforcement measures are a function of discrimination.

j. Most attributed to incomes policy rather than equal pay.



narrowing in occupational segregation came from the former, simply because the contract compliance aspects did not affect a large portion of the labour force. The overall effect of the legislation on reducing occupational segregation comes about both because females are more likely to enter male occupations and males are less likely to enter them after the legislation. Strengthening and extending the legislation tends to make it more effective (as evidenced by the stronger effect of Title VII provisions after the 1972 amendments), and the recession probably makes it less effective (as evidenced by the erosion of the effect of affirmative action in contract compliance after 1971). With respect to the enforcement features themselves, increasing the probability of paying a penalty if found in violation had a stronger effect on reducing segregation than did increasing the probability of being apprehended; that is, ensuring a successful settlement once the party was found in violation was more important than increasing the number of investigations so as to apprehend more parties in violation of the law.

In an examination of the wage effects of Title VII, Beller (1979) also finds a similar stronger effect of ensuring that charges are settled, as opposed to simply being made. Also much of the effect of the legislation on narrowing the male-female earnings gap comes about because of a reduction in male earnings as opposed to an increase in female earnings, and while the overall earnings gap did not decrease over the period it would have increased were it not for the legislation, albeit the overall effect of the legislation on the earnings gap was statistically insignificant. The fact that the legislation may have halted an otherwise worsening trend is also found in the British analysis by Chipin, Curran, and Parsley (1980), although they attribute most of the narrowing of the male-female earnings gap to the incomes policy rather than the anti-discrimination legislation.

In a time series analysis of both the wage and employment provisions of EEO, Beller (1978) also finds that the employment provisions increased both the wages and employment opportunities of minorities but that the wage provisions reduced both employment opportunities and wages. This highlights the possible alternative as opposed to complementary nature of equal pay and equal employment opportunity legislation, since the latter may improve both the wages and employment of minorities.

Leonard's (1984c) more recent work also confirms that legislative initiatives are more effective when they are aggressively enforced and when the economy is expanding as opposed to being in a recession. His study also indicates that affirmative action has improved both the employment opportunities and occupational upgrading of minorities, in contrast to earlier studies by Ashenfelter and Heckman (1976), Goldstein and Smith (1976), and Heckman and Wolpin (1976), which tended to find that the new job opportunities for minorities were concentrated at the lower end of the occupational distribution.

The results of Goldstein and Smith (1976) and Heckman and Wolpin (1976) also indicate how legislative initiatives can have differential impacts *within* minority groups. For example, the affirmative action aspects of the federal contract compliance program tended to benefit black males often at the expense of females, in part because such initiatives at that time focused on race as opposed to sex discrimination.

In summary, the econometric studies of the impact of existing anti-discrimination policies show mixed results. Certainly they cannot be taken as showing that the legislated policy initiatives have significantly improved the labour market position of minorities, although some of the more recent studies have shown some improvement. There is also some limited evidence to suggest other generalizations: any effect that legislation has on narrowing the gap in male-female wages and employment opportunities comes about both because the situation of females improves and males deteriorates; strengthening and extending the legislation and having an expansive economy tends to make the legislation more effective; ensuring that offenders pay a penalty is a more important deterrent than simply apprehending more offenders; even when legislation is effective this is often manifest in it being able to halt a worsening trend; equal employment opportunity provisions may improve the wages and employment opportunities of minorities while equal pay is likely to reduce their employment opportunities; and policies to help one group of minorities may adversely affect other minorities. More research would have to be done before taking these generalizations as anything but tentative ones.

#### Methodological Issues and Research Needs on Evaluations

Some of the methodological problems in the econometric evaluation procedures have already been discussed. Prime among them is the need to control for the effect of numerous intervening variables before attributing changes in wage and employment patterns to legislative changes. For example, Butler and Heckman (1977) indicate that the significant effect that Freeman (1973) found for EEO legislation in narrowing discriminatory differentials disappears when one controls for the reduced minority labour force participation associated with the increased welfare and unemployment insurance expenditures that occurred at the same time. This reduced labour force participation of minorities increased their wages both because they were now in more scarce supply and because those who left the labour force were likely to be those with the lowest skills and those who remained were the more select group of skilled minorities with higher productivity and hence wages.

The problem of disentangling the separate effects of equal pay and equal employment opportunity were previously indicated. For example, when both policies are instituted, equal employment opportunity legislation may simply be offsetting the adverse employment effects that otherwise would have emanated from equal pay policies.

The evaluation problems are compounded by the fact that exogenous changes such as a large influx of married women or youths into the labour force may be depressing the wages of minorities and hence widening the earnings gap. This could occur both because of a surplus supply effect, as the glut of labour supply depresses wages, and because of a compositional effect, as the new entrants are likely to be the least skilled, hence lowering the average wages of minorities as their low wages get included in the average. Even if the overall earnings gap does not decrease, legislative initiatives may still have been successful in preventing a further widening of the gap.

The evaluation issue is even more complicated because of the fact that successful legislative initiatives may lead to



influxes into the labour force of minority groups who otherwise would have remained out of the labour force because of the discrimination. Their influx itself may depress the wages of those minorities already in the labour force. This process is a bit like the one where an accurate economic forecast, for example of a crucial shortage, is likely to create the supply responses that will prove the forecast to be wrong. It may have been a good *ex ante* forecast, even though *ex post* it is wrong. Similarly, a policy may be good even if it does little to improve the position of those in the labour market it was designed to help; it may have expanded the opportunities of those who otherwise would never have entered the labour market.

In attributing any causal effect to legislative changes it is also important to recognize that the legislation itself or features of it may be affected by the existence of the phenomenon it is trying to explain. (Formally, in econometrics this is a problem in that the legislation itself may be endogenous— Influenced by variables within the system—rather than exogenously determined from outside the system.) For example, jurisdictions that institute and enforce substantial legislative initiatives may be the sorts of jurisdictions that would utilize other unobserved procedures to combat discrimination, and it may be these procedures rather than the legislation that causes the change. In addition, the instituting and enforcement of the legislation itself may be a function of the earnings or discrimination gap it is designed to reduce; that is, it is the magnitude of the gap that causes the legislative response, which in turn is designed to reduce the gap. This creates statistical problems in sorting out cause and effect in such simultaneous relationships.

This is illustrated in the study by Heckman and Woipin (1976) on the effect that contract compliance has on the employment of minorities. They argue that one cannot simply compare the discriminatory behaviour of firms that receive government contracts (and hence are subject to contract compliance) with those that do not receive government contracts, and from this infer the effect of contract compliance, since the awarding of government contracts itself depends on the past discriminatory behaviour of firms, with those with a good affirmative action program being more likely to get a government contract. In such circumstances one could erroneously attribute the lower discriminatory behaviour of those firms under the contract compliance program to the program, whereas in fact the program itself may not alter their behaviour. That is, causality could work in the direction of less discrimination leading to the awarding of government contracts (and hence being subject to contract compliance) rather than, or in addition to, the contract compliance program reducing the incentive to discriminate. Even if the program had no effect on reducing discrimination it would appear to have an effect because of the way government contracts are awarded. Obviously this award process is likely to induce further non-discriminatory behaviour, but that need not be the case for the legislation to appear to have an effect.

With respect to the Canadian empirical studies, the research needs are many before we can make generalizations about the actual impact of the legislated policies. The existing studies are based only on Ontario's experience with

changes in its equal pay legislation. The cross section analysis (Gunderson 1975) is based only on the year before and after a legislative change, and sufficient time may not have passed for the legislative change to be effective. The time series analyses (Gunderson, 1976b, 1983c) are based on a limited number of occupations and it is difficult to tell how representative are the results. Clearly more research, including that on other jurisdictions, would be warranted. Until that time we are left with the conclusion that the Canadian evidence does not indicate the equal pay legislative changes to have had an impact on narrowing male-female wage differentials, and that this conclusion is not at variance with that found in many U.S. studies.

## 8. EVALUATION CRITERIA TO ASSESS AFFIRMATIVE ACTION

As with so many policy issues there are clearly a large number of trade-offs involved in evaluating the different policy options in the area of employment discrimination legislation. In order to assess these trade-offs and the viability of the different policies, it is desirable to have a set of criteria that the different options can be evaluated against to see if they are achieving their objectives in terms of these criteria, and to see how they may affect other objectives. Such a set of program evaluation criteria have been discussed in Gunderson (1983a, Chapter 9) in the context of income redistribution policies; in this section they will be applied to affirmative action programs. The criteria include: minimizing administrative costs; attaining target efficiency; attaining allocative efficiency; providing non-demeaning benefits; and attaining flexibility over time.

### Minimize Administrative Costs

Whatever the objectives of a program it is desirable that these objectives be attained in a fashion that minimizes the administrative costs of attaining them. Otherwise there is the danger that the real resource costs of operating a program will overwhelm the benefits of the program, a danger that is particularly acute when bureaucratic structures (often staffed by well-paid professionals) that administer programs can establish a life of their own.

Affirmative action programs are ones that probably do not involve substantial administrative costs, at least from the point of view of the government administration of programs. It is a policy where once the targets are set it is the internal responsibility of employers as to how these targets are best achieved. Government administrative costs may be involved in voluntary affirmative action programs, which require continuous contact with employers; however, this is minimized by concentrating on a few large employers whose policies are likely to have spillover benefits in that they are emulated by other employers. In addition, the fact that the prime responsibility for attaining the targets rests with the employers means that they will incur some administrative costs in achieving the targets, but those are associated with their normal personnel function which is simply redirected. Also, their administrative costs may be offset somewhat by the fact that they can now use the attainment of their target as an inexpensive and readily available criteria in their personnel decision. Just as "statistical discrimination" provided an inexpensive criterion because employers could use group

characteristics rather than individual evaluations, so would group targets be an inexpensive criterion.

The one area where administrative expenses may be involved is in setting up the affirmative action program with its goals and methods and timetable for achieving the goals. This may be compounded in situations such as with contract compliance, where elaborate reporting mechanisms may be involved. The extent to which this "bureaucratic red-tape" imposes substantial administrative costs is an open question.

Applying the policy to crown corporations is likely to involve smaller administrative costs than in regular private-sector corporations, since the former are likely to be more cooperative given their closer connection with the ultimate political process from which the directives emanate. It is not simply a matter of internal decision-making and monitoring, as with government departments, but the decision-making process is also usually not as adversarial with respect to government policy decrees, as is often the case in the private sector.

### Attaining Target Efficiency

Target efficiency is attained when as many of the target group are helped as much as possible without having the benefits spill over into the hands of the non-target group. The target group, for example, could be females, the handicapped, native people, and other visible minorities in the labour market. Target efficiency is an indication of the ability of the program to assist and concentrate its benefits on the target group that it is designed to assist. In that vein there are two aspects of target efficiency—horizontal and vertical.

#### • Horizontal efficiency

Horizontal efficiency refers to the extent to which a program can benefit *all* members of the target group and benefit them *sufficiently*. It focuses on the benefits *within* the target group. A program designed to remove a discriminatory gap in wages and employment opportunities, for example, would be horizontally efficient if it *completely* removed that gap for *each and every* person in the target group. If it only helped some it could be considered horizontally inequitable in that it did not provide for an "equal treatment of equals"; the benefits would not be shared equitably within the target group. This aspect of horizontal inequity is exacerbated if those few who are assisted receive a substantial amount of assistance. Even if the program helped all equally, but it did not do much to close the discriminatory gap in wages and employment, it would fall short of horizontal efficiency in its ability to help all *sufficiently*. Only if it helped everyone in the target group *sufficiently* would it be completely horizontally efficient.

In general we tend to think of programs as being fairer if the limited benefits that are available are distributed in proportion to the needs of the recipients or, in the absence of such information, equally among the recipient target group. There are at least two situations, however, when those criteria may be challenged. First, if concentrating the benefits has symbolic or spillover benefits to others in the target group, then this must be considered even if they don't share equally in the direct benefits. Second, what may be *ex post* unfair after the fact may still be *ex ante* fair before the fact if each in the target group had an equal *chance* of receiving the concentrated benefits, even though they may not end up with an equal share.

In general, affirmative action programs have the potential to be horizontally efficient. They have the potential to benefit most individuals in the target group because of their broad applicability and the fact that their scope is not restricted by requirements for comparisons only within the same establishment; in fact, targets will be set in relation to external factors such as the proportion of the minority group in the relevant population or labour market. Their scope in terms of number of people affected, of course, will be limited if the programs are restricted to larger establishments or to only certain sectors such as government departments or crown corporations.

In terms of the dimension of assisting the target group sufficiently the *potential* for affirmative action is also fairly substantial since it can close both the wage and employment opportunity gap (unlike equal pay, which is likely to exacerbate the employment gap as it closes the wage gap). In addition, *theoretically* at least, the targets could be specified in terms of closing as much of the gap as is deemed desirable. In actual fact, of course, it is unlikely that any one policy will be relied upon to close the gap, so it is unlikely that affirmative action would be fully horizontally efficient in the sense of sufficiently helping the target group so that there is no more policy concern.

There is somewhat of a trade-off involved in the decision as to whether or not to focus affirmative action on a smaller number of select situations in the hope of closing the gap completely in those situations or to disperse efforts more broadly even if that means not closing as much of the gap. The latter may be horizontally more equitable in that it spreads the benefits more equitably over the target group. However, the former policy of focusing efforts on more select cases may have greater symbolic importance, especially if it becomes emulated by other firms. It may also create more anomalies that other firms will feel more pressure to correct in their own employment practices. (This argument for a more concentrated albeit less equitable policy is analogous to the argument for unbalanced growth in the economic development literature; the imbalance may set up its own forces that, in rectifying the imbalance, may be conducive to further growth.)

There is one further and important way in which affirmative action—and in fact any anti-discrimination legislation—has elements of horizontal equity, and that refers to the equal treatment of the *firm* being subject to the legislation. A uniform legislative standard prevents some firms from having a cost advantage by virtue of the fact that they can pay lower wages or keep their minority workers in low-wage jobs. It is for this reason that some employers may welcome a uniformly and impartially applied standard that subjects both them and their competitors to the same standard and in fact prevents their competitors who discriminate more from having an "unfair" cost advantage. Such employers may be reluctant to change their *individual* hiring practices but they may be willing to *collectively* do so as a group, through the acceptance of uniform legislated standards.

#### • Vertical efficiency

Vertical efficiency refers to the extent to which the benefits of a program stay concentrated in the target group without spilling over into the hands of the non-target group, hence dissipating the benefits. There are three important dimensions to vertical efficiency: the number of people who receive

spillover benefits; the magnitude of the spillover to each person; and the extent to which those in the non-target group are close to being in the target group. In general the spillovers are more acceptable if they are evenly spread over a larger number in the non-target group, if the magnitude to each person is small, and if recipients in the non-target group are only marginally different from those in the target group. For example, the spillovers from affirmative action would be more acceptable if they were spread over a large number in the non-target group rather than being concentrated in the hands of a small number of non-needy; if the spillovers were small in magnitude; and if the non-needy who received them were only marginally different from the minorities to whom they were targeted.

Affirmative action programs are generally vertically efficient since the target groups are well-defined and can be explicitly focused upon. The main way in which non-target groups can benefit is if the wage and employment opportunities of some are complementary to those of the target group and hence have to be improved along with those of the target group. In most circumstances and in the aggregate, however, they will be substitutes and they will lose because of the reduced hiring and promotion opportunities available to them. Unfortunately, the group that will lose the most is likely to be those who are only marginally different from the minority group, since they are likely to be the best substitutes.

In general, however, affirmative action programs are likely to be fairly target efficient in terms of both horizontal and vertical efficiency. This occurs in large part because the programs do involve targets which, by definition, enable them to focus on the target groups. There may be debate as to whether these are the appropriate targets for policy initiatives; however, once the targets are established, affirmative action can be fairly efficient in the focusing of benefits on the target groups.

#### Attain Allocative Efficiency

In addition to the concepts of administrative and target efficiency, there is a third concept of efficiency—allocative efficiency—emphasized by economists. This concept refers to the efficient allocation of resources to their most productive uses. In general, programs are preferred if they minimize distortions that may otherwise prevent the market from efficiently allocating resources so as to get maximum output from the economy's resources. It is for this reason that economists tend to prefer interventionist policies that remove market imperfections and distortions rather than add to them.

The extent to which affirmative action tends to interfere with the efficient allocation of resources is a complex issue. Economists tend to emphasize that any programs that interfere with the ability of employers to utilize their labour resources in the most productive fashion would interfere with allocative efficiency. On the grounds that there is not much long-run survival value in making costly errors in a competitive market environment, economists tend to downplay any notion that employers who discriminate are making mistakes and not hiring or promoting the right people. They would further downplay any notion that by setting targets and timetables an affirmative action program is really "helping" employers do something that is in their own best interests; if that were so, then informing rather than compelling them should be enough. In this perspective, legislative intervention

is likely to interfere with the efficient allocation of resources, and affirmative action, being a strong form of intervention, is likely to interfere more substantially than milder forms such as equal employment opportunity legislation.

This concern rests on the presumption that pure discrimination in the labour market itself (as opposed to in our educational institutions or households) could not be a substantial force in competitive markets, since it would be an inefficient practice not to hire or promote the "best" people. Clearly this is the crux of the debate. If pure discrimination cannot be substantial in a competitive economy then affirmative action, as with other legislative initiatives, will lead to inefficiencies in the allocation of resources. However, if pure discrimination can exist in labour markets, perhaps because of non-competitive factors, then affirmative action need not lead to allocative inefficiencies. One's belief in the possible allocative inefficiencies of affirmative action depends upon one's perception of how labour markets operate, as was discussed more extensively in Section 6.

#### Provide Non-Demeaning Benefits

For programs that assist certain groups it is also desirable to have the benefits provided in a non-demeaning fashion so that there is not a social stigma associated with receiving the assistance. Such stigmas can destroy the self-respect of the recipients, stereotype them as a recipient group, and set them apart from others. This in turn can foster behaviour that keeps them in the group that requires assistance.

Affirmative action can have such an effect at the group level, since recipients may be branded as receiving their job or promotion only because of the affirmative action program, not having "made it on their own". The stronger the affirmative action (e.g., if it extends into reverse discrimination, involves quotas, and is involuntary) the greater the likelihood this will occur. In contrast, if the program is voluntary, involves targets, and is more in the way of assistance, then the possibility of a stigma is less. However, in such circumstances the program is also less likely to be as effective in assisting the target group, illustrating the trade-offs that are always involved in such issues.

It is also the case that affirmative action programs, as with all programs that augment the demand for minorities, have the virtue that this improves both their wages and employment opportunities in an impersonal fashion through the market. That is, they will not receive the benefit *directly*, as if they were given a transfer payment, but rather *indirectly* because employers will be competing more for their services. This in turn gives the recipients a degree of market power, and this may be a desirable way for them to receive benefits in a society that emphasizes worth as it is reflected in one's labour market position.

In essence, this *indirect* way of receiving the benefits of a policy intervention may be less demeaning than more *direct* ways of assistance. At least it sets up competition for one's services, and this can have other desirable side-effects as well as positive wage effects.

#### Flexibility Over Time

A final desirable feature of an assistance program is that it be flexible so that it can adapt to the needs of the time, expanding if the needs increase and contracting if the needs dissipate. This is particularly important since, once they are



established with bureaucracies in place, programs can generate a life of their own. Those involved in administering the programs often have a vested interest in having them grow and expand.

It is an unfortunate fact of bureaucratic life that rewards are often based on the size of the bureaucracy that one can create rather than on the ability to take care of the problem and "work oneself out of a job". This potentially creates the perverse incentive structure to magnify and expand the problem rather than to take care of it. In most cases this is unlikely to be intentional, but it could be an unintentional by-product of being immersed in dealing with the problem, and perhaps in not putting it in the perspective of other problems.

Affirmative action, as with any anti-discrimination or most any other policy initiative, runs this risk. However, it is minimized by three important factors. First, affirmative action generally relies on the internal responsibility of the employers to carry out the actual administration of the program as part of its usual on-going personnel function; only a minimal amount of new government bureaucratic structure is required. Second, flexibility is attained because the program involves targets and timetables and these can be negotiated, geared to the specific circumstances of each case (albeit at slightly higher administrative costs), and increased or slowed down as the needs change. Third, it is likely that issues of discrimination and especially inequality (even if there is no discrimination) will be with us for some time, and hence there is little immediate "danger" that the need may dissipate. However, it can change its form, as the needs of some groups become more pressing than others. This highlights the importance of having affirmative action and other programs that deal with both discrimination and inequality, and that deal with a number of minority and disadvantaged groups.

The application of affirmative action to crown corporations also provides a degree of flexibility, since it is easier to experiment and change directions in that sector than in the pure private sector. Those aspects that are successful can then be more easily extended to the private sector, subject to the reservation that there may be differential responses in the private sector as opposed to the quasi-public sector of crown corporations. (More will be said about this in Section 9.)

## 9. RELEVANCE TO CROWN CORPORATIONS

Given the previously discussed information on the extent and forms of discrimination and the policy alternatives for dealing with discrimination, a key question becomes: what is the relevance of these issues to crown corporations? More specifically, is there anything unique to crown corporations that would make the more general issues more applicable or less applicable to crown corporations? Would policy alternatives focusing on crown corporations have more general applicability, especially to the private sector? Is there anything about the characteristics of crown corporations that would make the degree of discrimination and employment inequality different than in other sectors?

These questions are related to the more general issues raised in the Privy Council report on crown corporations:

*To what extent should Crown corporations be used as instruments of public policy when the*

*pursuit of policy objectives may detract from the financial performance of such corporations? How can increased responsiveness to public policy be reconciled with the arm's-length relationship which the theory of public enterprise requires government, ministers and Parliament to maintain with Crown corporations? Since public policy is defined by Parliament and the government of the day, how can managements of Crown corporations be held responsible for overall corporate performance if many of the general policies which they are expected to pursue are developed outside of their corporations? (Privy Council, 1977, p. 7).*

These issues are important given the size and scope of crown corporations. Citing evidence from the Lambert Commission on financial management and accountability, and from other sources, Trebilcock and Prichard (1983, p. 3) indicate that there are more than 300 federal government-related corporations employing more than 200,000 people, about as many as the 300,000 employees in government departments. In some sectors such as transportation, communications, and utilities, government enterprises employ roughly one-quarter of the workforce of these industries. At the provincial level there are approximately 200 crown corporations.

Clearly the issues are important. Before dealing with them, however, the concept of a crown corporation must be more precisely delineated, and its characteristics spelled out.

### Definitional Issues

The precise definition of a crown corporation has been a matter of considerable debate. Part VIII of the Financial Administration Act (FAA), which provides for financial control and accountability of crown corporations, defines a crown corporation as one "that is ultimately accountable through a Minister, to Parliament for the conduct of its affairs." Crown corporations are then classified in the Act by function and degree of independence from Parliament into three groups: departmental, agency, and proprietary. (Distinctions among these groups are discussed, for example, in Langford 1979, the Privy Council report 1977, and Trebilcock and Prichard 1983.)

The *departmental* corporations most closely represent normal government departments and are involved in administrative, supervisory, or regulatory services of a governmental nature. In addition, their administrative structure more closely represents that of a government department than a private corporation in that the board, council, or commission does not play the role of collegial manager. Also, the responsible minister has the same degree of management control and policy direction over a departmental corporation as over the minister's own government department (Langford, 1979, p. 224).

*Agency* crown corporations are one step further removed from direct government control and closer to private-sector commercial corporations than are departmental corporations. As defined by the FAA, agency crown corporations "are responsible for the management of trading or service operations on a quasi-commercial basis". That is, it can buy and sell services through the market but it is not expected to



make a profit and its losses can be covered by general revenues.

A *proprietary crown corporation* most closely resembles a private-sector corporation in that, according to the FAA, it is "ordinarily required to conduct its operations without appropriations". In addition, proprietary crown corporations more closely represent private corporations than government departments in terms of administrative structure and management style. In particular, in proprietary corporations governments need only approve the capital budgets not the operating budgets, so that day-to-day operations are in the hands of management (Privy Council, 1977, p. 15).

This legal definition (according to the FAA) and its distinction according to functional area (according to closeness to a government department or private corporation) is useful in that it provides three interrelated characteristics of crown corporations: they are ultimately responsible through a minister to Parliament; they fall in between conventional government departments and private-sector corporations; and they have varying degrees of expectation with respect to making a profit as opposed to relying on general revenues. However, this strict legal definition has proved inadequate for a number of reasons.

First, it does not encompass a number of "unscheduled crown corporations" (e.g., Canadair, de Havilland), which are for the most part not distinguishable from those listed in the FAA schedules, and it does not encompass a number of subsidiaries of government crown corporations (Langford, 1979, p. 245). Second, the FAA definition as being ultimately responsible through a minister is vague, because it could imply that the minister merely acts as a messenger or has responsibility for the conduct of the corporation, and, in fact, varying degrees of ministerial control are exercised in different crown corporations (Ashley and Smails, 1965, p. 3).

Alternative definitions have been suggested. For example, Ashley and Smails (1965, p. 3) state that "in Canada, a Crown corporation is an institution with corporate form brought into existence by action of the Government of Canada to serve a public function". Langford (1979, p. 243) defined a crown corporation as a "wholly owned, semi-autonomous agency of government organized under the corporate form to perform a task or group of related tasks in the national interest". The Lambert Commission (Canada, 1979, p. 439) defined a crown corporation as having the following characteristics: established by an act of government; tasks akin to private-sector entrepreneurial undertakings in a market setting; wholly owned by government; board collectively is assigned care and management of the corporation as in the private sector; separate employer, outside the Public Service Employment Act; and minister may give direction. This array of different definitions and characteristics of crown corporations has led some analysts to suggest the "difficulty of embarking upon a definition without having determined in advance the purpose for which it is required" and that "a different definition...employing different criteria, may well be appropriate in each context" (Trebilcock and Prichard, 1983, pp. 14-15).

For our purposes of examining aspects of discrimination and inequality of employment and their application to crown corporations, these definitional issues suggest a number of characteristics of crown corporations that are important.

Knowing these characteristics can provide some insight into whether the experience of crown corporations, including their response to policy initiatives such as affirmative action, may be representative of experiences in other sectors, especially in the private sector. Before delineating these characteristics and their implications, however, it is also useful to deal with the issue of why governments choose to establish crown corporations in the first place, rather than use other instruments such as taxes, subsidies, loans, grants, regulation, or procurement.

### **Why Crown Corporations as an Instrument of Intervention**

Trebilcock and Prichard (1983) deal with the issue of why crown corporations arise first by dealing with the issue of why there is public ownership (as opposed to simply private-sector regulation or subsidies) and, second, by analysing why crown corporations are used as an instrument as opposed to government departments, once public ownership is decided upon. Their analysis of these issues shed considerable light on some characteristics of crown corporations (and ultimately on the relevance of these characteristics for issues of discrimination and equality of employment).

#### **• Why public ownership versus private-sector regulation?**

On the issue of why public ownership as opposed to simply regulating private-sector activity, Trebilcock and Prichard emphasize a number of factors: reducing monitoring and information costs, since there would be *self* monitoring with respect to government regulations; facilitating coordination by internalizing coordination costs, especially if there are multiple policy objectives; providing a way around the legal or constitutional limitations of substitute instruments (e.g., ownership and self-regulation through directives may be the only way a particular jurisdiction can regulate if it otherwise does not have regulatory jurisdiction); providing low visibility taxation by cross-subsidizing some activities with others that are profitable; satisfying of certain symbolic, ideological, or security objectives such as involved with domestic ownership and security of supplies; the taking over of firms that are bailed out by governments on the grounds of being entitled to the possible profits in return for having subsidized the downside risk; and achieving the flexibility that is involved in self-regulation when private-sector regulation is difficult if one has to specify all contingencies in an uncertain and evolving situation. On the last point, Trebilcock and Prichard (1983, p.31) state: "the ability of a government to reverse policy decisions effectuated through a Crown corporation in a low-visibility, informal, incremental way minimizes the political costs associated with more public and determinate acknowledgements of governmental error".

Governmental ownership may also be a preferred instrument to private-sector regulation in situations of monopoly. Monopoly may be artificially "contrived" or it may be "natural" in the sense that economies of scale are so large relative to the demand that the industry can sustain only one firm. In order to determine whether groups are behaving monopolistically or whether subsidies or preferential treatment are necessary, government ownership of at least one firm in the industry may be desirable to provide a "window to the industry". Even in the case of a natural monopoly, whereby the

industry can sustain only one firm, government ownership and internal self-regulation may be preferred to regulating the monopolist.

As against these arguments in favour of public ownership, the main arguments against public ownership hinge upon the incentive problems created by the fact that there can be an attenuation between one's productivity and expected income. The absence of a profit constraint can deter the cost conscious behaviour that is necessary for survival in the private sector. This also applies to entrepreneurial activity since, unlike in the private sector, the entrepreneur is not the residual claimant, receiving any excess of returns over costs.

#### • Why crown corporations versus government departments?

If the issue of public versus private ownership is decided upon in favour of public ownership, then the question becomes: why is the instrument of crown corporations used as opposed to government departments? Trebilcock and Prichard (1983) advance a number of reasons for the choice of crown corporations as opposed to a government department, and these reasons can provide some insight as to why crown corporations may be chosen to advance policy initiatives, and the lessons we can learn about the relevance of these initiatives to other sectors of the economy.

Crown corporations may be utilized instead of government departments since the bureaucratic rule-making procedures of government departments focusing on inputs is not necessary when marketable outputs are being sold. That is, there is a presupposition that whenever it is possible to utilize market procedures that involve a valuation of outputs (as through a crown corporation), then these are preferred to bureaucratic procedures that emphasize inputs (as through a government department). However, even though crown corporations usually do produce a marketable output, and hence can be subject to market tests, they also presumably serve a political function and hence market and political criteria can become inextricably mixed. To cite Trebilcock and Prichard (1983, p. 37):

*To the extent that Crown corporations are providers of goods or services in market settings, there are obvious advantages to emphasizing output measures of productivity rather than input measures; thus the case for removing such activities from the normal departmental setting. However, one must assume that to a greater or lesser extent every Crown corporation is intended to maximize some set of policy objectives in addition to, and indeed in opposition to, profits. If this were not so, it is difficult to conceive of any reason for a Crown corporation to exist. In relation to these non-market objectives, as in the case of bureaucratic objectives, output measures of effectiveness will be very difficult to specify. To the extent that a Crown corporation is expected to engage in any substantial balancing of market and non-market objectives, the intended joint output may be difficult to specify and measure. Thus, politically uneasy, and conceptually untidy, compromises*

*between input and output measures of the value of a Crown corporation's activities seem unavoidable.*

The upshot of this unavoidable mixture of economic and political functions of crown corporations is that their performance should be evaluated in relation to their ability to achieve both objectives in the most effective fashion possible.

Since crown corporations are one step further removed than are governmental departments from the executives of governments, this distancing may help avoid political intrusion and undue political pressures. In addition, it may enable the crown corporation to engage in normal commercial activities (e.g., salary competition for executives, advertising) that may be potentially awkward for government departments. This political distancing may also enable governments to take selective responsibility, claiming credit for positive results and disavowing responsibilities for negative results of crown corporations, an activity that is not possible when direct departmental responsibility is involved.

Crown corporations may also be preferred over government departments for symbolic or ideological reasons. That is, they are an instrument of government intervention that does not give the appearance of direct government involvement in market activities. They may represent an uneasy compromise on the part of governments that are reluctant to let the market run its course (with minor regulatory tinkering) but are also reluctant to intervene directly by bringing the activity under direct control of a government department.

Against these rationales for a crown corporation over a government department once intervention is decided upon is the overriding issue of the government having less control over the monitoring of non-economic objectives in a crown corporation as opposed to a government department. With the distancing of responsibility comes the distancing of control, and it is the balancing of these factors that will determine whether the instrument of intervention will be a crown corporation (with less government control and responsibility) or a government department (with more control but more responsibility). Where direct control is not so crucial and/or direct responsibility can be politically hazardous, crown corporations will be the likely instrument of government intervention.

#### Characteristics of Crown Corporations and Implications for Policy

These rationales for government intervention and choice of a crown corporation as an instrument of intervention suggest that crown corporations will have a number of characteristics that can have important implications for the relevance of policy initiatives in this area.

##### • Political objectives

First, crown corporations usually exist to serve political and non-economic functions as well as to meet certain market or economic objectives. As indicated by the Privy Council (1977, p. 21), "without exception such corporations were established by the Government of Canada to achieve broad policy objectives ... the pursuit of commercial goals was never intended to override the broad social, cultural or economic goals that Crown corporations were established to pursue", or Ashley and Smalls (1965, p. 9), "they are brought into being by a government which determines the

purpose to be served, the form of administration, and the composition of management; they serve a public function".

This means that crown corporations are legitimate areas to engage in experimentation with respect to policy initiatives that may conflict with market objectives; such conflict is already an inherent part of the operation of crown corporations. Crown corporations also may provide a way for governments to extend their jurisdiction. For example, if the federal government extends its policies to its crown corporations that exist throughout the provinces, then provincial governments may feel pressured to follow suit given the proximity of employees in their jurisdiction to the employees of crown corporations. Also, a minimum of political risks in policy experimentation may be involved, since the government may take credit if the policies are successful and distance themselves from the policies if they are failures. This suggests, however, that governments may take undue risks with respect to crown corporations and that they may become laboratories for experimental government policies.

#### • Non-profit nature

The fact that crown corporations are non-profit oriented in varying degrees also means that their performance must be judged against their mixture of political and market oriented economic objectives. If politically motivated policy initiatives conflict with the ability of the organization to make a profit, then this must be considered in the assessment of the services of the organization. This means, for example, that those responsible for running the organization should be evaluated according to their ability to meet the legislative initiatives (e.g., affirmative action targets) as well as their economic objectives, both in the most effective way. The appropriate weight to attach to these two objectives, especially if they conflict, is a delicate issue (Sexty, 1978, p. 10). However, it is one that should be articulated by those who will be evaluating the performance of crown corporations (Kristjanson, 1968, p. 458), otherwise those responsible for running the organization will have difficulties in establishing appropriate priorities.

The non-profit nature of many crown corporations also means that the cost of interventionist policies may be hidden or cross-subsidized by the profitable activities. The crown corporation is unlikely to go out of business because of legislated cost pressures, as may be the case with private-sector firms. However, while this may minimize the political opposition it can be hazardous, especially in the long run, to use crown corporations as a vehicle for hiding the cost of certain policy initiatives. If such policy initiatives are desirable for social reasons, then it may be more sensible to make the costs explicit, and to allow their political acceptability to be based on full knowledge of the benefits and costs.

#### • Hybrid between government department and private companies

The fact that crown corporations are a hybrid between government departments and private corporations does make them a logical candidate for policy experimentation and the extension of policy into the private sector. Their day-to-day operation is often sufficiently similar to private corporations so that it is possible to gauge reactions and adjustments that may be indicative of private-sector responses. Also, the monitoring and coordination costs are likely to be

minimized, since the internal incentive structure fosters cooperation with the policy objectives, assuming of course that the parties will be evaluated according to their ability to achieve the policy objectives as well as the economic ones.

These very factors remind us, however, that the response of crown corporations is not likely to be completely representative of the expected response in the private sector. In the latter sector the "bottom line" motive is usually profits, and this means that there may be attempts to thwart public policy initiatives to the extent that they conflict with profits. The economic response to a legislative change is to adjust so that at the margin, the cost of adjusting to the legislation is just equal to the expected cost of not adjusting, where the latter depends on the probability of being caught times the expected value of the fine if caught plus any other non-pecuniary costs associated with avoiding the legislation. This means that the private-sector parties, to a degree at least, will trade off the cost of compliance with the cost of avoidance. Hence their "success" may be judged by their ability to avoid and circumvent the legislation, and this may make its effectiveness less in the private sector than in crown corporations, especially to the extent that rewards in the latter sector may depend in part on achieving legislative objectives.

Again, by being in the spectrum between private corporations and government departments, crown corporations also fall in between those two organizational forms in terms of their expected response to government policy initiatives. The responses are unlikely to be as ready as in government departments with complete internal monitoring and cooperation and direct government responsibility; but they are unlikely to be as evasive as in the private sector, to the extent that they conflict with profit motives. In that vein, they are a logical forum for extending policy initiatives from the pure public sector to the pure private sector, albeit it must be recognized that their response is likely to be in between the responses of the pure public and private sectors.

#### • Size and industrial and occupational characteristics

Two further characteristics of crown corporations may have implications for the application of policy initiatives: they tend to be large and, while they engage in a diversity of activities, they tend to be concentrated in certain sectors, notably transportation, communications, utilities, finance, and trade (Irvine, 1971, p.556; Trebilcock and Prichard, 1983, p.3), which in turn tend to employ a large number of white-collar (both clerical and professional) employees. This means that their extent of inequality in employment and their response to policy initiatives is likely to be more representative of large corporations in similar sectors.

In theory, we would expect large companies to discriminate less to the extent that they rely on more formal personnel and job evaluation procedures, and they may be more responsive to legislative initiatives because of their public visibility and because enforcement agencies find it easier to deal with large corporations with established and formal personnel structures. Also, the publicity and spillover value of enforcement is higher in large corporations that tend to set wage patterns. For example, a formal affirmative action program with targets, procedures, and a timetable is more likely to be possible in large corporations, and it is more likely to be emulated by smaller firms. Confirming these theoretical



expectations, some limited empirical evidence also indicates that discriminatory male-female wage differentials tend to be significantly smaller in larger establishments (Gunderson, 1975, p. 468).

With respect to the extent of inequality in employment and the likely response to legislative initiatives across industrial sectors, the theoretical expectation and empirical evidence is more complicated. On the one hand, the fact that firms in the non-profit and regulated sectors do not face as binding a profit constraint means that they may indulge their preferences for non-economic objectives (Alcian and Kessel, 1962), including costly discriminatory policies that would otherwise dissipate in a more cost-conscious competitive environment. Monopolistic profits or "rents", for example, may be used to pay excessive wages to majority group workers so that unequal pay can prevail even if minority workers are paid their "competitive wage" equal to what they could earn in their next-best-alternative activity; minorities simply do not share in the monopoly rents. This can be compounded if minorities tend not to be involved in institutional arrangements such as unions that can facilitate the appropriation of rents for workers.

On the other hand, firms in the non-profit and regulated sectors where crown corporations are prevalent may discriminate less because of a sensitivity to their public image. Also, they may be less concerned about the cost consequences of deviating from their usual personnel policies, which may involve unintentional discrimination. Empirically, the transportation, communications, and utilities sector does have the highest female/male earnings ratio of all industries (Gunderson, 1976c, p. 124), suggesting that discrimination against females, at least, may be less in those sectors where crown corporations tend to exist.

With respect to the substantial proportion of professional and white-collar workers that prevail in crown corporations, the ratio of female/male earnings tends to be slightly lower at the management and professional level and slightly higher at the clerical level (Gunderson, 1976c, p. 124). As with the inter-industry variations, however, the differences are not great so that it is unlikely that their experience would be unrepresentative of the experience of workers in general.

#### • Relevance of special characteristics

Overall, it is unlikely that the size and industry and occupational characteristics of crown corporations are likely to have profound implications for the applicability of legislative initiatives to crown corporations and the representative nature of their responses to the private sector. Certainly there are a sufficient number of private-sector corporations with similar such characteristics, so that the crown corporations would not be a "sterile laboratory" bearing no resemblance to the corporate realities of the private sector. In addition, the relevant factors work in opposite directions. Crown corporations may be an unrepresentative environment in that their size and political image may facilitate equality of employment policies. However, the fact that they already probably discriminate less suggests that there may be less scope for changes to emanate from policy initiatives. In essence, policy initiatives focusing on crown corporations will have some relevance to expected responses in the private sector, although the general applicability of those responses must be tempered somewhat by the particular characteristics of

crown corporations. They are neither a perfect nor a sterile laboratory for policy experimentation and initiatives.

## 10. SUMMARY AND POLICY DISCUSSION

Concern over discrimination and inequality and pressure for policy initiatives is likely to increase in the near future as the economy comes out of the recession and as minority groups make up a disproportionate share of the new growth in employment in the 1980s. For policy purposes it is important to have an understanding of the underlying causes and motives for discriminatory behaviour; otherwise one may be treating the symptoms rather than the causes and it is difficult to forecast expected future changes (especially if the underlying causal determinants change) or to predict the impact of policy initiatives or to know where and when they are best applied.

### Underlying Causal Motives for Discrimination

Discrimination may arise because of preferences on the part of employers, customers, or co-workers as well as from households or education and training institutions. It may also arise because of systematic misinformation (evidence of which is found in the personnel literature on employment interviews and job evaluation procedures, as well as the socio-psychological literature) or because of statistical discrimination as employers use low-cost screening procedures that judge individuals on the basis of the average characteristics of their group. While economists emphasize that costly mistakes or preferences should dissipate in the long run under the forces of competition (and hence discrimination emanating from these underlying causes should dissipate), the psychological literature emphasizes that when faced with such "costly errors" the parties may elaborately rationalize rather than abandon them.

Discrimination may also reflect the concerns of other groups for their job security and promotion opportunity as well as protection of their wages from low-wage competition. Employers also may simply pay the lowest wage necessary to attract and retain their labour force, and such a wage may be low for minorities, reflecting their lack of opportunities elsewhere. In addition, employers may be reluctant to replace their existing high-wage workforce with a lower-wage or more productive minority workforce because of the adjustment costs associated with the new quasi-fixed hiring and training costs as well as the costs of resistance associated with the existing workforce.

Radical and Marxist perspectives have also emphasized the underlying motive of preserving the power of the dominant capitalist class largely through cohesive, group, "cartel-like" behaviour as a social class, and through trying to "divide-and-conquer" the working class by pitting minorities against each other and other workers. Lastly, the concept of systemic discrimination has been explained as an inherent and unintended by-product of the system, somewhat independent of the underlying motivation of the participants in the system. It results from the application of practices or criteria that have little relevance for the job and it reflects the pervasive nature of discrimination with its interrelated, cumulative, and self-fulfilling effects.



### Empirical Evidence on Male-Female Earning Differences

With respect to the empirical evidence on the magnitude of discrimination and the factors affecting that magnitude, a number of generalizations can be made, mainly with respect to male-female earnings differentials, since that is where most of the empirical work has been conducted in Canada. The overall ratio of female to male gross unadjusted earnings is typically around .6, and when adjustments are made for a variety of factors such as differences in experience, education, training, and the broad industry and occupation categories, the adjusted ratio rises roughly to between .75 and .85. When comparisons are made within the same establishment and narrowly-defined occupation (as required under equal pay legislation), the adjusted ratio tends to be more in the neighbourhood of .90 to .95. Clearly occupational segregation is a much more important contributing factor to the overall earnings differential than is wage discrimination in the same establishment and narrowly-defined occupation.

Differences in labour market experience and the continuity and relevance of that experience are important factors in explaining part of the male-female earnings differential. Also, being married, other things equal, increases the earnings of males and decreases that of females, indicating the differential effect of household responsibilities. The economic returns to education tend to be higher for females than males for advanced levels of education but not at early levels. Also, the earnings gap tends to be smaller in unionized as opposed to non-unionized establishments, in the public as opposed to the private sector, and in situations where job evaluation schemes are used to provide more objective measures of productivity. Also, the gap appears to be narrowing slightly over time.

For almost all of these generalizations, however, there are exceptions in the empirical literature reflecting the data and methodological differences and evaluation problems. Items that are particularly difficult to evaluate include: non-wage aspects of compensation (e.g., pension, paid leave, and working conditions); deferred compensation; unmeasured quality differences (e.g., type of education and training and the continuity and type of experience); and sample-selection biases. In general, the empirical studies find that the pure earnings gap is narrowed further when it is possible to control for differences in such difficult-to-measure factors as: tenure at one's existing job and continuity of experience; training and turnover; immobility and ties to the household; education quality; and even tastes and personality factors. The real issue, however, becomes one of ascertaining the extent to which differences in these factors themselves reflect discrimination, perhaps prior to entering the labour market.

In general, the empirical studies also find that when comparisons are made between never-married males and females over a certain age (to control for differences in unmeasured factors associated with marital status) the earnings gap is also reduced dramatically; however, such studies suffer from severe sample-selection bias problems, because comparisons are being made between what may be the "best" females and "worst" males in terms of their unobserved productivity characteristics.

Although there are these considerable differences in methodology and results with respect to the degree of discrimination, it seems safe to say that there is evidence on the existence of at least some discrimination (and certainly considerable inequality) in wages and employment opportunities. Hence there is a rationale for policy initiatives.

### Legislative Policy Initiatives

Labour market policy initiatives in this area have generally involved equal pay and equal employment opportunity legislation in various forms, as well as policies to facilitate the labour market adaptation and improved position of minorities. Equal pay policies have undergone, and are continuing to undergo, an interesting evolution with respect to the types of work that can be compared. The interpretation can (and has in different jurisdictions) range from requiring identical work, to substantially similar work, to a composite approach that looks at the totality of the work in terms of skill, effort, responsibility, and working conditions, and finally to equal value legislation, with proportionate-pay-for-proportionate-value being a future possibility.

Equal value legislation (as exists only in the federal and Quebec jurisdictions) has been a significant move because it enables comparisons across different occupational groups, and hence enables equal pay legislation to deal with occupational segregation. It is also consistent with competitive market forces which would dictate that people be paid a wage equal to the value of their contribution to output. However, it does require a non-market valuation of the inputs (not outputs) into a job and this can be extremely difficult, job evaluation techniques notwithstanding.

Equal employment opportunity legislation has also undergone an evolution, with affirmative action being the current thrust of new initiatives. Affirmative action is an active, structured, and deliberate form of intervention focusing on results. It usually involves the setting of targets and a timetable and strategy for achieving the targets and an internal and external data base for setting targets and evaluating progress. It has been rationalized as a policy that is necessary to compensate for the past history and the cumulative effects of discrimination that emanate from so many different sources. It is particularly appealing to those who feel that systemic discrimination and segmented labour markets are important because they tend to defy the effects of other policy initiatives.

### Facilitating Policy Options

Policy initiatives can also facilitate the adaptation and improved position of minorities in the labour market. Flexible hours, part-time work, daycare, and parental leaves are particularly important for minorities who are tied to the household. While these facilitating policies will certainly emerge in response to an increased demand for them, governments can also ensure that barriers do not exist to otherwise prevent the facilitating policies from emerging in the private sector. Government-sponsored or subsidized training and employment programs can also assist minorities; however, by focusing on one group such assistance can also reduce opportunities for others, and this trade-off must be recognized. Education, training, information, job search, and mobility programs can also be used to assist minorities although we have little direct evidence on the extent to which

the returns on such investments (i.e., benefits relative to costs) are positive or greater for minority workers as opposed to others.

A full employment, expanding economy is likely to benefit minorities disproportionately because of the increased opportunity for employment and full-time work and the narrowing of occupational wage differentials. It is also likely to facilitate policy initiatives that otherwise may have adverse effects on minorities or other groups; the resistance of others especially is lessened when their own jobs are secure and income rising.

Breaking down the barriers that give rise to labour market segmentation is also likely to assist minorities; however, this can be difficult since many of the barriers are ones associated with union protection, the internal labour market policies of large corporations, and perhaps deep-rooted customs and traditions. In addition, it may not be desirable since many of these barriers serve a protective function providing employment stability and a degree of due-process for those who are fortunate enough to be protected. For this reason, there has been support for both affirmative action (as a way of providing a "foothold" for minorities into the protected sector) and policies to extend the benefits of the protected to the unprotected sector (e.g., labour standards and wage-fixing legislation). Equal pay legislation, however, would have limited scope because of the requirement of comparisons only within the same establishment and, usually, within the same occupation.

Unions may assist minorities by providing wage gains and job security, by narrowing wage dispersion, and by monitoring and helping to enforce legislative initiatives. Being a political institution responding to the collective wishes of their members, unions could also exacerbate discrimination by excluding minorities or failing to represent their interests and by rationing apprenticeship and emphasizing seniority. To the extent that unions do improve the position of minorities they could be encouraged through certification procedures and policies to establish the bargaining units along industrial rather than craft lines.

### Potential for Policy Options

The potential for policy options directed at employers in the labour market may be limited by a number of factors: competitive forces should ensure that employers are not a major source of discrimination; the practical requirement of comparisons within establishments limits the scope of legislated initiatives; without a basic change in attitudes, employers that want to are likely to be able to evade the legislation in subtle ways; this in turn leads to the danger that enforcement agencies may concentrate their efforts on the more "cooperative" employers who should be the least penalized.

The household may be a potentially more important source of discrimination for females because males may be reluctant to change their roles in response to changing circumstances, there may be unequal "bargaining power" between the parties, and the survival of the household need not depend upon its ability to avoid costly discriminatory errors. An unequal division of labour in the household is likely to develop (which can have crucial implications for labour market behaviour) and females are likely to develop a competitive advantage in household as opposed to labour market tasks. The latter

may be "efficient" from the point of view of household "wealth maximization"; however, it can be inequitable and risky for females should they subsequently be required to engage in labour market activities.

To the extent that the household is an important source of discrimination, the appropriate policy responses would include policies that facilitate a more equitable sharing of household responsibilities (e.g., daycare, parental leaves, and flexible hours) as well as those that enable women to make more choices about their role in the household and that reduce their dependence on it. Reducing discriminatory practices in our educational institutions can also be extremely important to prevent the beginning of cumulative discrimination and to change fundamental attitudes, stereotyping, and role-playing.

The potential for policy options also depends on our perception of how labour markets function. Competitive forces would likely exacerbate inequality but they should dissipate most types of discrimination. The neo-classical economic perspective emphasizes the acquisition of human capital as a way of increasing earnings and that legislative initiatives (while they may be inefficient) should reduce the amount of discrimination by increasing its cost or "price". The legislation may also reduce the employment opportunities of minorities as some employers may go out of business or reduce their output because of the cost increases or they may substitute away from minority workers that become more expensive.

The segmented labour market perspective emphasizes the characteristics of the jobs and not of workers and that the crowding of workers into certain jobs can lower their wages and hence productivity, giving rise to discrimination even if people are paid a wage according to their productivity. The segmentation perspective emphasizes affirmative action policies as a way of getting minorities into the protected sector.

Fostering competition, by reducing monopoly and regulatory protection that enables firms to "spend their rents" on costly discriminatory practices, may also help dissipate discrimination. So may wage-fixing legislation, including equal pay legislation, in markets dominated by monopsonistic employers. In such circumstances, wage fixing may actually increase both wages and employment opportunities.

Since public-sector labour markets are under a political rather than profit constraint, the degree of discrimination can be greater or less than in the private sector, although the empirical evidence indicates that the latter currently prevails. This suggests that the decline in public-sector growth, the imposition of wage controls, and the general retrenchment that is going on in the public sector will disproportionately affect minorities.

Other future changes will have a more ambiguous effect. The deindustrialization and shift to high technology will disproportionately affect females, creating more of a skilled-unskilled dichotomy which may further enhance segregation but which also provides a potential to be a part of the "high-tech revolution". Physical strength requirements will become even less important, and some work may be more easily conducted out of the household. These possible future developments suggest the importance of policies to facilitate the adaptation of minorities to the new job requirements and to

ensure that they have an equal opportunity to obtain the new jobs.

### Impact of Policy Options

Theoretically, legislated policies such as equal pay and equal employment opportunities should respectively raise the wages and employment opportunities of females irrespective of whether discrimination emanates from employers, co-workers, or customers and for whatever reason it arises and even whether discrimination exists or not. Indirect effects may also reinforce this impact as stereotypes and misinformation break down.

Conventional equal pay and equal employment opportunity legislation are regarded as substitutes, since equal pay ensures that women who are hired and promoted are not done so at discriminatory wages and equal employment opportunity ensures that employers will not simply lay-off females in response to their higher wages. This ignores the fact, however, that while equal pay may reduce the employment opportunities of females, equal employment opportunity should increase their employment opportunities, and this should also increase their wages as employers compete for their services.

Legislative initiatives may have unintended adverse impacts on minorities, especially if the associated cost increases force some firms out of business or reduce their output and if the employment opportunities of other minorities get reduced. In addition, policies can be legislated but not enforced and hence have little or no impact.

The econometric studies of the impact of legislated policies, mainly from the United States, yield inconclusive results with respect to improving the wages and employment position of minorities albeit the more recent studies are tending to show some gains for minorities. A limited number of Canadian studies find no significant effect of equal pay legislation in narrowing the male-female wage differential. Other tentative conclusions include: when discriminatory gaps were reduced because of legislation it was both because females gained and males lost; strengthening and extending the legislation and having an expansive economy tends to make it more effective; ensuring that offenders pay a penalty is a more important deterrent than simply charging more offenders; even when legislation is effective this is often manifest in it being able to halt a worsening trend; equal employment opportunity provisions may improve the wages and employment of minorities while equal pay is likely to reduce their employment opportunities; and policies to help one group of minorities may adversely affect other minorities. Methodological problems with many of the studies, however, make it difficult to regard these conclusions as anything but tentative.

### Evaluation Criteria Applied to Affirmative Action

While there are some important exceptions, affirmative action programs generally "score" reasonably high when evaluated according to a number of program evaluation criteria.

Affirmative action programs are unlikely to involve substantial administrative costs, especially to governments, and they have the potential for flexibility since they rely on the internal responsibility of employers for their administration and the targets and timetables can be adapted to particular times and cases.

Affirmative action programs are also likely to be fairly target efficient because by focusing on specific target groups the benefits are likely to be concentrated on those groups without spilling over to the non-target groups (vertical efficiency), and they have the potential to help as many in the target group as much as possible (horizontal efficiency) simply by changing the targets and timetables. The fact that the targets are related to criteria that are external to the firm also broadens the scope of affirmative action beyond comparisons within the establishment (as is required by equal pay and equal employment opportunity legislation). Also, the uniform and impartial application of affirmative action, as with most legislative initiatives, has the positive feature of being applied across all competitors, hence removing any unfair cost advantage associated with those that can pay lower wages and segregate their workforce into low pay jobs by discriminating. The main element of target inefficiency that occurs does so because those who are most likely to be displaced or adversely affected by the affirmative action initiatives are those who themselves are marginally similar to those who are assisted, since they are likely to be the best substitutes.

In spite of the possibility that affirmative action may be "doing for employers what they should be doing for themselves" it is likely to interfere with their efficient allocation of resources. The cost implications of this may result in higher prices and hence reduced output, and some firms may be put out of business—both of which could reduce the employment opportunities of minorities in the long run. This could be offset somewhat by the more select and flexible application of the policies, by non-competitive market conditions, or by redistributions among groups. The extent of the allocative inefficiency associated with affirmative action also depends on one's perception of how efficient labour markets are in the first place and the role of discrimination.

Affirmative action programs may also have a stigma associated with their benefits to the extent that people are "labelled" as having benefitted from the program. This must be traded-off, however, against the fact that by increasing the demand for the services of certain groups, affirmative action increases the competition for their services, and this fact of being "sought after" rather than rejected on the basis of group characteristics is certainly a non-demeaning aspect.

Clearly affirmative action, as with all policies, has its pros and cons with respect to these various policy evaluation criteria. In addition, various trade-offs are inevitably involved since the attaining of one objective (e.g., horizontal efficiency by helping as many in the target group by as much as possible) often conflicts with others (e.g., administrative costs and allocative inefficiencies are likely to increase). The key policy issue is one of deciding the relative importance of the different policy objectives, so that sensible decisions can be made with respect to the trade-offs involved.

### Relevance to Crown Corporations

The applicability of policy initiatives in the area of discrimination and inequality to the arena of crown corporations is important because federally at least there are about as many employees in crown corporations as in government departments. The different types of crown corporations (departmental, agency, and proprietary) also bridge the spectrum



between government department and private-sector corporations.

An analysis of the rationale for government intervention to establish crown corporations and the choice of a crown corporation as an instrument of intervention suggests a number of characteristics that can have important implications for the relevance of policy initiatives in this area. The fact that crown corporations serve both political and economic functions suggests that crown corporations are a legitimate arena for policy experimentation that may conflict with market objectives. They may also provide a medium to extend pressure to other jurisdictions to make similar changes and they may involve a minimum of political risks, a factor that can have other adverse consequences. The performance of crown corporations, however, must be judged against their mixture of economic and non-economic objectives, and care must be taken to ensure that the cost of undesirable initiatives are not simply hidden, given the non-profit nature of crown corporations.

Crown corporations are a hybrid between government departments and private companies and they are usually large and tend to be concentrated in the sectors of transportation, communications, utilities, finance, and trade. These

characteristics mean that their response to policy initiatives may not be representative of expected private-sector responses. However, these responses are likely to yield some information.

Certainly there are a sufficient number of private-sector corporations with similar such characteristics, so that the crown corporations would not be a "sterile laboratory" bearing no resemblance to the corporate realities of the private sector. In addition, the relevant factors work in opposite directions. Crown corporations may be an unrepresentative environment in that their size and political nature may facilitate equality of employment policies. However, the fact that they already probably discriminate less suggests that there may be less scope for changes to emanate from policy initiatives.

In essence, policy initiatives focusing on crown corporations will have some relevance to expected responses in the private sector, although the general applicability of those responses must be tempered somewhat by the particular characteristics of crown corporations. They are neither a perfect nor a sterile laboratory for policy experimentation and initiatives.



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## EQUITY IN THE LABOUR MARKET: THE POTENTIAL OF AFFIRMATIVE ACTION

D. Rhys Phillips

### Sommaire

La compréhension des divers aspects de la discrimination en matière d'emploi et l'importance toujours plus grande d'une gestion efficace des ressources humaines nous amènent à repenser les éléments nécessaires à la formulation d'une stratégie efficace pour corriger la sous-utilisation de certains groupes dans l'économie canadienne. L'étude décrit des stratégies qui visent deux objectifs complémentaires, soit favoriser une plus grande équité sur le marché du travail et améliorer l'économie dans son ensemble. L'auteur fait valoir que le processus de planification de l'action positive est un des meilleurs moyens dont dispose le gouvernement pour réaliser ces objectifs, mais qu'une politique sage doit être établie pour que les entreprises canadiennes et les gestionnaires du secteur public y recourent.

Le document analyse d'abord les deux objectifs fondamentaux de la politique du gouvernement fédéral relativement au marché du travail: la répartition équitable des débouchés et une amélioration de la productivité par la rationalisation du marché du travail. Le premier objectif est analysé sous l'angle de l'engagement public et de la constatation que les femmes, les autochtones, les personnes handicapées et les membres des minorités visibles sont l'objet de discrimination et en souffrent. Les conséquences économiques découlant d'une mauvaise utilisation des ressources humaines sont analysées, eu égard aux objectifs économiques. L'auteur examine ensuite la définition de la discrimination en matière d'emploi, son évolution et comment cette dernière a été influencée par l'importance accordée aux résultats tangibles. Le problème est posé, les causes en sont résumées et l'utilité éventuelle de l'action positive en tant que remède est examinée en détail. L'auteur décrit les principes fondamentaux de planification d'une telle approche et résume les éléments de planification nécessaires à la réussite d'un plan d'action positive, les limites d'un tel plan ainsi que les variantes possibles selon les besoins de certains secteurs industriels. Quoique le marché du travail soit principalement visé, l'auteur examine brièvement une stratégie unifiée pour modifier les pratiques d'emploi des employeurs. Enfin, l'auteur analyse les possibilités en matière de politiques publiques visant à assurer que les employeurs incorporent un plan d'action positive efficace dans leurs systèmes de ressources humaines.

### Summary

The development of a sophisticated understanding of employment discrimination, coupled with the increasing significance of effective human resource management, leads to a rethinking of the sufficient and necessary components of an effective strategy to respond to the underutilization of certain groups in the Canadian economy. This report outlines such a strategy based on the twin, complementary objectives of ensuring greater equity in the labour market and improved efficiency in the economy as a whole. It argues that the affirmative action planning process is one of the government's most effective tools for meeting these goals but that it requires the implementation of well-thought-out policy if the process is to be used widely by Canadian business and government program managers.

The report begins with a review of the two basic objectives of federal labour market policy: the equitable distribution of job opportunities and improved economic productivity through ~~stable~~ labour market adjustment. The equity objective is reviewed in terms of public commitment, as well as the evidence that women, native people, people with disabilities, and visible minorities suffer from inequality. The economic implications of the failure to make full use of available human resources is reviewed vis-à-vis the economic objective. This is followed by a discussion of the definition of employment discrimination, how it has evolved, and how an emphasis on bottom-line results has influenced this evolution. Once the problem and its substantive causes have been summarized, the potential of affirmative action as a remedy is examined in detail. The report outlines the basic planning principles of such an approach and summarizes the core planning elements for a successful affirmative action plan, some of its limitations, and variations to respond to specific industrial sectors. While the labour market is the primary focus, there follows a short discussion on an integrated strategy required to support changes in employment practices of employers. The report concludes with an examination of some of the options for public policy in order to ensure affirmative action is a well-utilized part of employers' human resource systems.



## EQUITY IN THE LABOUR MARKET: THE POTENTIAL OF AFFIRMATIVE ACTION

D. Rhys Phillips\*

### I. INTRODUCTION: HUMAN RESOURCE PLANNING, AFFIRMATIVE ACTION, AND THE CANADIAN LABOUR MARKET

The intent of this paper is to establish the parameters of a problem that constitutes a major challenge for government, both in terms of ensuring social equity and responding to significant economic structural needs during the next decade. A problem well defined is the crucial starting point for articulating an effective solution. A second objective, therefore, is to build from the problem defined an appropriate solution and the means by which government can act to ensure its implementation with a maximum of impact and cost effectiveness. This paper presents the affirmative action planning process as one of the government's most effective tools for dealing with employment discrimination and for establishing equality in the workplace.

In its full sense, affirmative action is a comprehensive planning process designed to bring about not only equality of opportunity but also equality of results. Its primary objective is to ensure that the Canadian workforce is an accurate reflection of the composition of the Canadian population, given the availability of required skills. This objective is essentially an ethical goal based on the value of ensuring equity.

But as a systematic problem-solving approach, concerned with the validity of employment systems, affirmative action also encompasses the goal of facilitating the smooth and rational operation of the labour market while ensuring the maximum efficiency of individual company workforces. In addition, this secondary economic objective, realized by removing employment discrimination, also reduces the social costs of discrimination by improving the access of a large group of Canadians to employment and to employment in better jobs. Finally, the opportunity costs associated with the underutilization of women and the low utilization of native people, disabled persons, and visible minorities represents an enormous cost for the Canadian economy in terms of lost production and unused human capital.

#### A. The Issues

##### 1. Equity and Public Policy

Government commitment to equal rights in employment has grown steadily since the Second World War, despite a slow start. For many decades following Confederation, Canadian jurisprudence provided little assistance in establishing the legal right to equitable treatment. "It is no

wonder," Walter Tarnopolsky has written, "that the provincial legislatures, with no aid from the judiciary, had to move into the field and start to enact anti-discrimination legislation, the administration and application of which has been largely taken out of the courts." While this legislative response can be found in limited jurisdictions prior to 1945, the period since then has seen the most intervention.

There can be little doubt that the remarkable achievement of the "Universal Declaration of Human Rights" proclaimed by the United Nations General Assembly on December 10, 1948, was a key watershed. This was followed by the International Labour Organization's (ILO) adoption of the Equal Remuneration Convention (No. 100) in 1951, embodying the principle of equal remuneration for male and female workers for work of equal value. What followed in Canada was a decade of fair practices legislation in the area of employment, beginning with Ontario's Fair Employment Practices Act (1951) and including two federal acts, the Canada Fair Employment Practices Act (1953) and the Female Employees Equal Pay Act (1956).

In 1958, the ILO provided another important foundation for government action when it adopted the Discrimination (Employment and Occupation) Convention (No. 111). This Convention required each ratifying country to promote equality of opportunity and treatment in employment, with the aim of eliminating discrimination. Canada ratified the Convention in 1964.

The ratification of the Convention corresponded with the emergence of new legislative initiatives in many provincial jurisdictions. Spurred in part by the work of the ILO and in part by the conservative interpretation applied by the courts, new human rights legislation was passed in all provinces. Perhaps most importantly, the administration of the new Acts was eventually placed in the hands of provincial human rights commissions, where a more pro-active and developmental approach could be expected.

A commitment to equal rights by all jurisdictions is increasingly a matter of record at the federal level. The 1970 Royal Commission on the Status of Women, numerous studies on the economic position of native people, the Special House of Commons Committee on the Disabled and the Handicapped, the Special Committee on Participation of Visible Minorities in Canadian Society, the ratification of the International Covenants on Human Rights, the Federal Action Plan for Women, the Canadian Human Rights Act, and the Charter of Rights and Freedoms have all arisen from a deep-rooted concern with making the ideal of equality a social and economic reality.

The record of intent is also backed by a wide range of actions. The Canadian Human Rights Act, 1976-77, established the Canadian Human Rights Commission to enforce anti-discrimination laws and to promote observance of

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human rights and equality. The government has also instituted an affirmative action program in the private sector in order to test the effectiveness of voluntary programs to remove employment discrimination and to correct the effects of past discrimination. In some cases, such as the Northern Pipeline Act and the Canada Oil and Gas Lands Act, stronger provisions have been implemented to achieve employer cooperation. The key question remains—whether these initiatives will be able to obtain the results public policy has so clearly and strongly articulated.

## 2. Labour Market in a State of Change—The Economic Imperative

The requirement for effective action to remove employment discrimination springs from two distinct but practically inseparable impulses. As summarized above, one is to correct past wrongs and to prevent their recurrence, while the other is to enhance the economic well-being of Canada by ensuring efficient human resource utilization. Only by moving to make the fullest use of all available qualified workers will the economy be able to marshal the forces needed for growth and to make the labour market adjustments required to sustain that growth. In other words, economic growth depends on the social justice of bringing into the labour force those groups that have been excluded from it and permitting the fullest use of the skills and abilities of those who have been unreasonably restricted in their employment opportunities.

The Special Committee on the Disabled and the Handicapped, the Parliamentary Task Force on Employment Opportunities for the '80s, and the Task Force on Labour Market Development have advocated affirmative action to achieve these objectives. After carefully considering the projected changes in labour market supply, and changes in educational and skill requirements for productivity gains, the Task Force on Labour Market Development came to the following conclusion:

*...some form of legislated action may be required to ensure that employers adopt employment practices which make better use of this expanding supply of target group labour. Because of the complexity of the causes of exclusion and underutilization, the internal diversity of the target groups and the key significance of these groups to economic growth, a complex, integrated approach is required. This approach would consist of an appropriate mix of several instruments, each of which is designed to address a specific part of the absorption problem. The instruments which would be contained in this package are: improved market information, enriched counselling, employment support measures, training, wage subsidies, employment development measures, flexible arrangements of work and legislated measures to ensure that employers adopt employment practices which encourage the hiring and promotion of target group members.*

The Task Force projected a slowdown in the rate of labour force growth in the 1980s; it assumed that fewer skilled workers would come through immigration. Based on these assumptions the Task Force estimated that women, native people, and disabled persons would account for 75 to 80 per cent of such growth as occurs in the labour force in this

decade. (While visible minorities were not considered by the Task Force, there is increasing evidence that, exclusive of native people, they may already constitute three to five per cent of the population.) It concluded that to maintain an adequate and stable supply of labour the maximum use would have to be made of those groups that constitute the largest areas of growth in the labour force. The Task Force warned that the failure to bring women, native people, and the physically disabled into employment to the fullest extent possible could jeopardize economic growth. Moreover, if already developed skills, especially those possessed by women workers, were to continue to be underutilized the result would be to impede desired improvements in productivity. Although the uncertain economic conditions since the Task Force reported have clouded the immediate picture, it is clear that both the supply and demand for labour and attendant skills will change over the next decade. The very difficulty of accurately projecting the future, beyond general macro trends, necessitates an approach that ensures that individual employers establish well-grounded human resource systems which are able to fully utilize their employees' abilities and are able to adjust to new requirements as they emerge.

The Parliamentary Task Force on Employment Opportunities for the 1980s, following an extensive review of government policies on labour market adjustment, also highlighted the role affirmative action could play in realizing Canada's economic objectives.

*In order to make the best possible use of labour resources in Canada, a much greater effort must be made to train women, Natives, minorities and the handicapped. The Federal Government should encourage affirmative action programs in the private sector and have a contract compliance policy according to which it would only purchase from or contract with those employers who adhere to the human rights code and who have an affirmative action program as part of their corporate policy.*

Perhaps even more indicative of the growing responsiveness to this labour market adjustment argument is its acceptance by those speaking to and for business. In 1978, Henri Tremblay, vice-president of personnel for Steinberg's, speaking at the Canadian Compensation Conference sponsored by the Conference Board in Canada, stated:

*To equalize the employment opportunities of women for Canadian employers is not only a question of basic human rights, it is a question of good business sense. That specific thrust happens to be highly convergent with the transformation of our labour force. . . . To refuse to tap and optimally utilize that labour pool is not only unjust, it is managerially stupid.*

More recently, Jim Rankin, manager of organization development and salary employee-relations at Westinghouse Canada, remarked in relationship to affirmative action: "If we are going to be competitive with world markets, it makes sense for us to look at the broadest pool of people that we can, so that we can select the best people." A series of articles in the Canadian Manufacturers' Association's *Newsletter* and an article in the September, 1983, edition of *Plant Management and Engineering* have made the same argument. Finally, in the United States, lengthy hearings by the



Senate Labor Committee found remarkable support for the principle of affirmative action planning in the business community. The key to the findings of recent government reports and the increased awareness of some employers is the emerging links between economic growth, good human resource management, and the potential of target group workers.

## **B. Securing an Effective Response**

Employment discrimination is the problem that must be solved before better use can be made of the expanding supply of female, native, and physically disabled workers. It is a problem inherent in the way Canadians manage human resources—in both the public and the private sectors. Employment discrimination will not yield to any but a sustained, comprehensive organizational strategy specifically designed to solve the problem that it presents.

### **1. Organizations: Functions, Systems, and Change in the Employment Context**

Defining an appropriate organizational strategy for the problem of employment discrimination must begin with an awareness of the dynamics of organizational change and the nature of the specific changes required.

Not surprisingly, decision-makers in organizations assign priority to those functions that they believe are most able to contribute to realizing the organization's objectives. The resources applied, the complexity of the systems implemented, and the attention paid to the outcomes flow from this ordering of priorities. Despite evidence as early as the 1920s and 1930s that human resource management could strongly affect productivity, the function of such management has remained underdeveloped until recently. In 1970, the final report of the OECD's International Management Seminar on Enterprise Manpower, "Planning for Change", concluded that formal manpower planning was still rare. A study prepared for the Task Force on Labour Market Development in the 1980s reported that, in Canada, human resource planning was only just beginning to move to the core of corporate planning.

The implications are important. An approach to employment discrimination designed to significantly alter the impact of past practices must contend with a situation where the whole area of human resource management is in dynamic flux. This provides both an opportunity to merge as an integral part of emerging systems and a risk of being lost or distorted in an ever-evolving environment.

The key to a successful approach is to understand that the strategy used must be part of, rather than hostile to, organizational change management. Changing employment systems in order to restructure the makeup of the workforce is not a minor adjustment. Rather, it effects in broad ways the fundamental ways in which organizations meet their functional needs and the way individuals within the organizations view themselves, their co-workers, and, equally importantly, the social relationships they have been accustomed to.

This paper will not review the extensive literature on the principles of organizational behaviour and how to ensure a minimum of conflict during significant organizational change. But in defining an appropriate response to employment discrimination, it is important to keep in mind the first principle of organizational character.

*Every employer is unique. Similarities between organizations can be found among their parts, but each whole organization has unique character. Organization Character is the product of all the organization's features: its people, its objectives, its technology, its size, its age, its unions, its policies, its successes, and its failures. Organization character reflects the past and shapes the future (Weistler, David, Schwird, Das, and Miner, 1982).*

The clear implication is that the appropriate response must be flexible enough to accommodate a broad range of "organizational characters".

We are looking, therefore, for an approach that incorporates the principles of organizational change management. The second variable that will define the nature of the response is the problem for which change is being sought. The above already suggests that broad organizational change is required.

Integral to this approach is the belief that employment discrimination is more than the effect of intentional actions based on individual or corporate biases toward certain groups. An effective response will be able to deal both with the need for attitude change vis-à-vis certain segments of the workforce and with identifying and removing problems inherent to the operations of the organization's employment systems.

This paper will argue that affirmative action is such a strategy. It prescribes a comprehensive, problem-solving, and planning process by which employers can eliminate employment discrimination using a process that utilizes modern corporate and institutional planning techniques. Affirmative action planning thus consists of the following steps:

- a) a clear statement of executive support, the appointment of accountable senior management, the establishment of an implementation structure, the assignment of appropriate resources, and the development of a suitable labour-management consultative process;
- b) the design and implementation of a plan of action to include:
  - i) alternative, corrective systems;
  - ii) special remedial measures designed to remove the effects of past exclusion;
  - iii) quantifiable goals with an appropriate monitoring and assessment system.

In Canada, affirmative action has only recently emerged as an instrument for attacking the employment problem of certain groups. Some private employers and some governments, including the federal government, have begun to implement affirmative action strategies. But questions remain about what affirmative action is, what it can and should be used for, and how government can get employers to adopt it. Some of the questions, it is hoped, will be answered in this report.

### **2. Creating Change: The Need for an Integrated Approach**

Employment discrimination must be considered only one aspect of the problem of unequal access to and representation in the work world. A complex set of social and economic

relations has operated and continues to operate to exclude some from the labour market or from key areas of primary employment. It is useful therefore to distinguish between pre-market and market discrimination when defining employment discrimination.

**Pre-market discrimination** refers to actions taking place prior to entry into the work world that either curtail access or provide unjustified limitations on occupational or career aspirations. Educational and skill training streaming, family and community socialization, as well as inappropriate or biased career counselling all act to create barriers that may be valid in the context of an employer's real needs. The result is that target group members often lack what is referred to as the "human capital" necessary to compete for the best jobs and careers.

**Market discrimination** refers to the presence of artificial barriers within employment systems that operate to exclude or restrict certain groups from full participation. It is these barriers on the demand side of the labour market that affirmative action, as currently defined in Canada, is designed to change. Clearly, however, the degree of change possible through a systematic approach to the demand for labour will also be a function of factors operating to determine the supply of skilled and experienced workers.

In between the supply and demand side of the market lies what could be called key **market mechanisms** that facilitate the coming together of supply and demand. Most evident is the labour exchange function represented by both public (e.g. Canada Employment Centres (CEC)) and private (employment agencies) organizations. But equally important is career counselling, skill training referral, and developmental job-creation programs—all designed to influence the skill makeup of the supply side. Heavy promotion of human resource/affirmative action planning and the financial encouragement of industrial-based training operate on the demand side to ensure an accurate identification of required skills and the appropriate distribution of skills in the labour force.

In order for rapid, substantial change to take place over the next decade, public policy must ensure that target group members: *first*, have the skills to compete equally in a changing economy; *second*, have equal access to employment and careers through the eradication of employment discrimination; and *third*, have the full benefit of the mechanisms and services necessary to facilitate their movement into employment. These three areas represent the necessary components of what could be called an integrated approach to achieving labour market equality.

It is clear that certain groups have suffered from a disproportionate distribution of skills that cannot simply be linked to individual preference. Similarly, it is evident that these groups have not been equally accommodated within standard labour market adjustment services such as job referral and mobility programs. Finally, substantial evidence exists that demonstrates that women and minorities continue to face intentional and systemic barriers to entry and promotion in many jobs. The need for an integrated approach was recognized in the report of the Task Force on Labour Market Development:

*An integrated approach means more than ensuring [that target groups] receive greater emphasis. It*

*also means developing policies which break down barriers on the demand side, encourage better skill development on the supply side, and respond to the requirement for appropriate market mechanisms to support these initiatives. Though these three policy areas are closely interrelated, it is useful to regard them as separate areas for policy and program development.*

Because they can be separated out, employment discrimination as a problem and affirmative action as an effective solution can be the subject for review. But in order to achieve full results in an optimum time frame, an integrated approach will be required.

### C. The Paper's Format

This report presents affirmative action as one of government's most potentially effective tools for establishing equality in the Canadian workplace.

It begins with a review of the two basic objectives to which federal labour market policy is directed. The first is the equitable distribution of job opportunities, and the second is the economic productivity of labour through effective and efficient labour market adjustment.

In terms of the equity objective, the extent of public commitment, the evidence of extensive and persistent inequality, and the increasing insistence on effective, bottom-line results are analyzed. The economic imperative is discussed in terms of the Canadian economic environment over the next decade and the important role of target group workers in the labour market. The paper details the disadvantages suffered by women, native people, the disabled, and visible minorities and describes what the failure to make full use of available human resources means to the Canadian economy.

The definition of employment discrimination has undergone a significant evolution over the last two decades. The second section, therefore, details how discrimination should be defined and what its legal status is in terms of the enforcement of human rights legislation. Once the problem and its substantive cause have been fully summarized, the potential of affirmative action as a remedy is examined (in section four). The report outlines the basic planning principles of such an approach and summarizes the core planning elements for a successful affirmative action plan. While such an approach is no more difficult or complex than other key corporate planning processes, it does involve a comprehensive strategy of problem identification and resolution. As such, its potential to be part of a human resource management perspective is substantial. In addition, however, the need for appropriate data, expertise, etc., as well as limitations on the type of situations it can effectively handle, does create some problems for implementation. These limitations are also discussed along with some variations on the basic affirmative action method designed to respond to specialized circumstances. Section four concludes with a summary review of major benefits to employers and to the economy as a whole.

While advocating affirmative action as a labour market adjustment tool, the paper recognizes the need for a broad range of efforts to integrate target groups equitably into the workplace. A review of the key components of an integrated strategy is carried out in section five. In addition, the potential for an expanded use of the affirmative action problem

identification process to assist with reviewing and changing pre-market components of the employment market equation will be presented.

The implementation of mechanisms designed to meet the individual's right to equal opportunity for employment and career development and the collective need for an efficient labour force raises the question of the impact on individual employers. Emerging demographic patterns, rapidly changing technology, and the productivity improvement objective all suggest that a rational employer will benefit from ensuring that real merit determines employment decisions. Such returns, however, may not accrue directly to the employer who absorbs the costs, although the investment is a fundamental requirement for the economy's well-being and hence the long-term interests of the employer. Economic theory recognizes this contradiction. Such needs as national defence, education, and protection of domestic markets are not left to the "rationality" of the market. Section six, therefore, examines some of the options for public policy in order to ensure that affirmative action is an attractive or least costly alternative to not ensuring greater equity in the labour market.

The last section summarizes the case for affirmative action as a key federal instrument for realizing social justice and promoting economic growth. It advances the argument that a properly implemented, Canadian-style, affirmative action approach will further social and economic objectives through a shared effort by governments, business, labour, and target group organizations.

## **II. EQUITY AND EFFICIENCY: CANADIAN GOALS AND THE POSITION OF TARGET GROUPS IN THE LABOUR MARKET**

### **A. Introduction**

This chapter reviews the two basic goals of the government that provide the foundation for concern about the equitable integration of target group workers into all areas of the Canadian labour market. The first goal is to ensure that women, native people, disabled persons, and visible minorities receive an appropriately representative share of employment opportunities in all occupations and at all levels. An ethical principle, this goal springs from the fundamental tenet of democratic society that merit alone should determine an individual's right to participate and advance in the labour market. The second goal is to achieve the most efficient functioning of the economy through effective labour market adjustment. Continued improvement of Canadian productivity through cost-effective management of human resources is considered a prime determinant of national economic well-being.

The principle of merit as the only determinant of one's employment opportunities provides the integral link between the two goals. Rather than requiring a trade-off between the two, as some observers have claimed, equity and economic efficiency can be considered mutually supportive. This section outlines the basis for the government's commitment and explores present and likely future problems that might hinder progress to the attainment of each goal.

### **B. Equity**

#### **1. The Expanding Commitment**

Pierre Trudeau, when he was prime minister, suggested that the new Charter of Rights represents the "collective vision" of the Canadian people, a society committed to upholding the equality and the rights of all its members. The Charter represents the culmination of a lengthy process. In the introduction it was suggested that change has come slowly, in part impeded by a conservative judiciary that viewed "peace, order and good government" as more important than individual or group liberty. Unlike the United States, where human rights flowed, albeit slowly, from the compelling language of the Constitution, in Canada the Charter of Rights represents a codification of rights hammered out over decades of change brought about by international commitment, legislative intervention, and judicial interpretation.

Before the entrenchment of the Charter, the federal and all provincial governments expressed their commitment to equality through the enactment of legislation strongly prohibiting discrimination, backed by commissions with full inquiry rights. At the same time, all governments committed themselves to a series of international obligations on equality. Since the Second World War, Canada has accepted a set of universally recognized standards of equity for society by ratifying the major human rights covenants promulgated by the United Nations. In 1976, Canada, with provincial agreement, ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Article 3 of each covenant requires that "state parties undertake to ensure the equal rights of men and women to the enjoyment of all rights set forth in the Covenant".

A large step in confirming women's rights in international law was achieved in 1979 with adoption by the United Nations of the Convention on the Elimination of All Forms of Discrimination against Women; Canada ratified the Convention on December 10, 1981. In a clear statement, the Convention defined discrimination as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field" (article 1). Equally important, article 4 not only permits but requires the adoption by state parties of "temporary special measures" to accelerate *de facto* equality of women. The permissive quality of article 4 has subsequently been recognized by section 15.2 of the Charter of Rights.

The same principles have been accorded to all racial groups through the International Convention on the Elimination of All Forms of Racial Discrimination, which came into force in January of 1969. Article 1.1 guarantees "fundamental freedoms in the political, economic, social, cultural or any other field of public life" while article 1.4 allows for temporary special measures designed to rectify the effects of past discrimination.

International obligations are often not accorded great significance by those not actively involved in the human rights field. Yet Canada's continued, often intensive, response to



requirements issued by the United Nations cannot be overlooked. Detailed reports have been prepared, with provincial involvement, on most of the international conventions and covenants; Canada has participated vigorously in the international decades to combat racism and racial discrimination (1973-83) and discrimination against women (1975-85). In addition, it participated in the international year of the disabled. As one of the few nations to accede to the Optional Protocol to the International Covenant on Civil and Political Rights, Canada permits its citizens to appeal to the UN's Human Rights Commission when domestic redress has been exhausted. In addition, Canada is required to undergo a periodic vigorous review of its human rights record by an international panel, a responsibility the federal and provincial governments have taken very seriously.

Canada's position vis-à-vis international obligations could probably best be viewed as a dialectic process. The evolution of human rights within Canadian society has fostered an interest in international developments. These developments have in turn nurtured and enhanced the commitment of many politicians, public servants, and human rights advocates. For example, the 1971 Royal Commission on the Status of Women grew out of changing social attitudes supported by international developments. The ratification of the covenants in 1976, the declaration of the International Year and Decade of the Woman, culminating in the government's important UN submission, "Towards Equality for Women", in 1979, and the ratification of the Convention on Discrimination in 1981 have helped to focus and give impetus to domestic policy and action.

Canadian governments have begun an intensive review of their legislation in order to comply with the requirements of the Charter of Rights. The prohibition on discrimination before the law will take effect in April, 1985. It is interesting to note, however, that a more limited review has been under way for some years as issues have come to light through adherence to international conventions, covenants, and protocols.

The impact of the Charter and of increasing international obligations has been primarily on equality before the law. The latter, as well as increasing political demand, has also raised the question of bottom-line impact. A summary of both successful and unsuccessful program initiatives designed to realize the commitment to equal access to employment and equal pay is beyond the scope of this report. It is safe to say, however, that despite criticisms levelled at the political process, there is growing evidence of a commitment to real change. Numerous public statements by federal ministers and opposition members, the reports of Special Parliamentary Committees, and the adoption of mandatory affirmative action in the federal public service indicate an expanding commitment.

In the key area of employment, the federal government has recently outlined the priority of ensuring an active approach to achieving greater equity. Equal access to employment opportunities and commitment to assisting those facing difficulty in the labour market is now a prime goal of the Canada Employment and Immigration Commission (CEIC). In October, 1982, a new Mission Statement was approved that gave sanction to this commitment. One of the four stated missions was "equality of opportunity to compete for and

have access to jobs". Subsidiary to the Commission's Mission is a set of four objectives including:

4. *To promote equality of access to jobs for all residents of Canada*
  - i) *to reduce the economic and social disparities in the labour market resulting from artificial employment barriers and redress the results of past discriminatory practices.*

In line with this objective, the official priorities for 1984-85—the backbone for the Commission's operational planning process—include "strengthening measures to ensure equity in employment including enhanced access to employment for target group members and the removal of employment barriers". What remains is to achieve an integrated strategy.

A major problem in realizing the government's agenda is the depressed condition of the labour market over the last four years and the uncertainty of substantial improvements in the near future. Objections to interventions in the operation of the labour market usually arise from the belief that such intervention is counterproductive to improving economic performance. These problematic economic conditions, ironically, have emerged at the same time as public policy architects have come to realize the limits to changing the bottom-line results through programs designed primarily to improve the "human capital" of target group members.

While recommending that programmatic responses must be integrative, responding to barriers on both the supply and demand side of the labour market, as well as in the market mechanisms designed to facilitate the operation of this market, the Labour Market Task Force concluded that emphasis "should be focused primarily towards demand-side intervention". A Task Force recommendation, also picked up in the Commission's Mission Statement, Objectives and Priorities, is that government must strongly promote private-sector human resource planning if Canada is to show marked increase in productivity and to sustain a competitive advantage in international markets. In order to harmonize these two goals, the government has sought to ensure a barrier-free labour market through an approach that is both supportive of and integral to the human resource planning package of services advocated to employers. Affirmative action is such an approach.

Federal government policy to date has not included mandatory affirmative action requirements on a broad basis. While reports of the Labour Market Task Force, the Parliamentary Task Force on Employment Opportunities, the Canadian Human Rights Commission, and the Special Committee on the Disabled and Handicapped have advocated a mandatory approach, the government has chosen to provide leadership through application to all its own departments. In addition, as CEIC has entered into formal human resource agreements with national and provincial employer associations, as well as individual employers, affirmative action clauses, ranging from promotional to actual agreement to implement, have been negotiated. In two cases, the Northern Pipeline Act and the Canada Oil and Gas Lands Act (COGLA), the government has been authorized to require human resource development plans that ensure that Canadians receive employment opportunities. These plans may



require — and usually have required — affirmative action measures.

What emerges from the activities and statements of the last two decades is commitment to achieving bottom-line results. At the same time, there appears to be an increasing awareness that a "human relations approach" has severe limitations and that a "human capital development approach" will only be effective if a rationally functioning labour market is achieved.

## 2. Analysis of the Problem

The commitment summarized above has arisen from an acute awareness of the limited gains made in changing the bottom-line results. Considerable research and analytical work has been done on the position of women, native people, disabled persons, and, to a lesser extent, visible minorities in the Canadian labour market. Some of the identified barriers faced by workers from these groups have arisen from their traditional social situation. In other words, role socialization, education and training opportunities, career counselling, etc., have operated to deny a disproportionate number of women, native people, and disabled persons the opportunity to acquire the "human capital" rewarded in the labour market. Other barriers have been built into the various systems for recruiting, training, and promoting employees. As a result, the statistics have tended to show that each of the three target groups has higher than average rates of unemployment, lower than average wage rates, and an occupational distribution concentrated at the lower levels of a few sectors. Some of the major issues relating to target groups in the labour market are outlined below.

### a) Women in Employment

Women have had, until the most recent recession, a higher unemployment rate than men. In addition they have had a lower labour force participation rate than men (50 per cent compared to 78 per cent), although their participation rate has been increasing dramatically and is expected to reach that of men by the year 2000. However, women continue to earn an average of about 58 per cent of what men earn.

More important, women continue to be employed in the lower levels of most occupations and in a smaller number of industrial sectors, primarily clerical and service occupations. Only 10 per cent of women work in areas other than service industries, while a very small proportion work in the goods-producing sector. At all levels, women are concentrated in "traditionally female" types of jobs. In 1971, 62 per cent of working women were in clerical, sales, and service occupations and 14.4 per cent were in teaching, medicine, and health.

Women encounter employment barriers both at the entry level and in progressing to higher levels or to other occupations. The entry level jobs easily available to women are low-pay, low-skill jobs and/or jobs in the female-dominated sectors (sales, clerical, service). The proportion of women entering traditionally male occupations remains small. Women wishing to enter "non-traditional" training find training and apprenticeship systems operating to exclude or discourage them. Women entering non-traditional jobs find hostile working conditions, inadequate facilities, and inflated job standards. The absence of other female workers or of role models

in those non-traditional occupations discourages women from entering training or entry level jobs.

Women now working in the clerical sector are facing a changing work environment and loss of jobs with the advent of technological change and the expanding use of micro-electronics. The need for significant retraining is not being met. Unless the workers are retrained in technical areas or other occupations that will survive technological change, women will be further isolated from the employment and economic mainstream.

Family responsibilities cause many women to leave the labour force for significant periods or to take part-time jobs or jobs with no overtime demands. Because of the traditional structure of the workplace and the lack of adequate child-care, women often lose training and career opportunities. They also may suffer from loss of seniority and benefits.

Women re-entering the labour market after a lengthy absence encounter changed job standards or new occupational requirements requiring substantial skill upgrading, or new occupational skill training. Without adequate assistance for such training, women are further disadvantaged in employment.

The traditional lack of financial recognition of "women's work" is demonstrated in the wage disparities between jobs of equal value performed by male and female workers, and between male and female professionals. Even when examining different pay for equal work, a more conservative estimate of discrimination, major anomalies emerge. For example, after accounting for male/female differences in the work year, occupational distribution, experience, and education, there is a gap of at least 15 to 22 per cent between male and female wages for comparable work. In fact, the gap between male and female earnings increases with higher education; professional occupations in the science field have the highest salaries but the widest wage gaps.

The burden is also not shared equally. Joining the labour market is often more difficult for older women who seek re-entry into occupations in which skill requirements have changed and are declining in importance. It is also difficult for women in remote areas or one-industry towns, women in need of childcare services, and women with the disadvantage of being disabled, of native ancestry, or belonging to some other visible minority. In spite of a need for earnings, a desire to work, and in some cases possession of useful skills, many of these women do not actively seek employment. Consequently, they are among the "hidden unemployed" who are not included in the unemployment figures because they are not regarded as participating in the labour force.

In summary, although women have greatly increased their labour force participation in the past two-and-a-half decades and have made some gains in extending both their range of work and their formal skills, they remain concentrated in relatively few occupations. The wage gap remains substantial even when comparing men and women with similar qualifications and occupations working in similar industrial sectors. But, most important, women are still heavily concentrated in the lower levels of most occupational fields and in a limited number of employment sectors. Few women have penetrated the ranks of management. Few are employed in high-growth industries and occupations. The majority are employed in

industrial sectors and occupational areas where a relative decline in jobs is projected over the next 10 years.

#### **b) Native People in Employment**

Employment data on native people are not as precise as those for women. However, certain general facts are known: the rate for native unemployment varies from 30 per cent in urban centres to 60 per cent or more for off-reserve Indians and up to 80 per cent for native people in the North. In addition, detailed studies have shown that the average length of each period of unemployment—more than seven months—is far longer than for non-native workers. Participation rates are also known to be significantly lower than those of the general population, with approximately 25 per cent fewer men and 40 per cent fewer women than in the general population participating in the labour force.

Native workers are concentrated in low-level, largely dead-end jobs in the construction, manufacturing, processing and service industries. In a Winnipeg survey of households in 1980, family incomes among the native population were about one-half that of the general population.

Native people face many employment barriers, including language and cultural barriers, limited access to education, fewer facilities for training, geographic isolation, high transportation costs, and the personal bias some employers hold against them. Other barriers that traditionally exclude native people are job requirements that include academic achievement or experience in the occupation. Since most native people have less than a Grade 10 education and little access to employment in their communities, requirements for higher academic attainment screen out willing and able workers who could learn on the job.

Native people in resource development areas potentially provide a workforce close to the site of employment. However, the pattern in those areas is to hire native people only for short-term, low-skill jobs. Some employers have been successful in establishing flexible work schedules, on-the-job training programs, and assistance for transportation. Native people hope to benefit from the economic activity generated by resource development but, despite gains under the COGLA program, only a few of the employment opportunities or financial rewards have been realized.

Demographic patterns indicate that without productive intervention, greater problems may result. While estimates of the native population range as high as only five per cent of the population, the native "baby boom" of the 1960s and early 1970s will increase the working age population by about 200,000 in the 1980s (in the western provinces, native people will account for about 20 per cent of the labour force growth). Lacking the same levels of education and training as most of their counterparts in the general population, young native workers may well be the most disadvantaged of new labour market entrants. These young people face a declining traditional economy around native communities. Without improved access to the labour market they will not realize their potential in the urban industrial economy and will not find alternative opportunities in their local economy.

#### **c) Employment of Disabled People**

The range of problems faced by disabled people in the labour market is as wide as that of any other target group in Canadian society. The rate of unemployment, and especially

underemployment, is extremely high for some disabilities. Unemployment for some disabilities is reported to be 80 per cent, and for the disabled as a whole the rate is estimated to be between 30 and 50 per cent. Employable disabled Canadians currently wishing to find jobs number from 150,000 to 200,000. This does not include the many employed disabled forced into part-time work and into jobs that do not make full use of their capabilities or those forced to forgo normal occupational upward mobility. Although the data are scarce, organizations report that jobs held by disabled people are often low-income jobs despite the fact that these workers face higher personal costs for work-related expenses.

There are three major problems disabled people face in attaining employment. First, societal perceptions of what disabled people can and cannot do limit access to a wide variety of jobs. There are many jobs that can be performed by disabled people with the assistance of technical aids or reasonable accommodation in the workplace. In many cases, the major part of a job could be performed by a disabled worker and, with the aid of minor job restructuring, the remaining duties could be performed by other workers. But in the absence of a belief that disabled workers can do the job, they do not get a chance to demonstrate ability.

The second barrier is that disabled persons generally have less training, education, and experience than other workers, and therefore are readily screened out from those jobs calling for such qualifications. Pre-market discrimination, particularly in the educational and training areas, takes a heavy toll.

A third barrier is the lack of physical access to the workplace. Making a work site accessible could be as simple as adding ramps and a washroom, or adjusting table or machinery heights.

Disabled people are discouraged from even applying for some jobs. The common methods of recruitment may eliminate disabled people who do not have access to places where jobs are posted, or who are blind or deaf and cannot follow the usual recruitment procedures for phone inquiry and written application.

Disabled people, however, do form a potential and available pool of labour. With reasonable accommodation and removal of barriers, they could perform productively at all levels of employment.

#### **d) Employment of Visible Minorities**

Of all the target groups, perhaps least is known statistically about the labour market situation of visible minorities, partly because of lack of consensus on an appropriate definition and partly because visible minorities include a broad range of ethnic and racial groups, some with deep historical roots in Canada and some who are recent immigrants.

Blacks are concentrated in Nova Scotia, Montreal, and the Windsor/Toronto corridor. It is estimated that there are now about 200,000 blacks in Metro Toronto, constituting close to 10 per cent of the population. A majority of the black community in Toronto and Montreal are probably immigrants, primarily from various Commonwealth countries, while the black community in Nova Scotia are descendants of some of Canada's earliest off-shore settlers. Canada's largest Oriental and East Indian populations are on the West Coast,

although there are Oriental and East Indian groups all across the country. While many have roots in Canada, family reunification, a more open immigration policy in the past, and refugee programs mean that others are relatively newcomers.

The almost complete lack of reliable data, even given the 1981 census, makes it impossible to draw generally applicable conclusions about the labour market position of visible minorities. Socio-economic studies in Nova Scotia as well as public inquiries on racism in Montreal and Toronto suggest that blacks are often relegated to the lower end of the occupational scale, with the resulting impact on incomes. The unemployment rate of blacks in Nova Scotia is estimated to be high, above that of the general population. Most of the evidence of discrimination against Asians is limited to individual cases before human rights commissions and the general prevalence of racial violence and prejudice found by various public inquiries. Obtaining reliable statistics will require a change to the census format for 1986 and an expensive research project in the interim.

Employment barriers for visible minorities vary widely. As with native people, some—often recent arrivals—face disadvantages due to language, culture, a relative lack of previous access to education and training, and the intentional bias of some employers and fellow workers. They are viewed in some communities as key sources of labour for low-income work in which there is little or no opportunity for training, mobility, or advancement. Many in this situation are doubly disadvantaged by being women. Minority members who are well trained and experienced, skilled workers and professionals have been penalized for lack of "Canadian" experience or by artificially high requirements for certification or credentials. Those groups who have succeeded in rising close to the norm still find that they may be excluded disproportionately from senior management, executive appointment, and powerful positions.

Visible minorities have received considerably less attention over the last few decades than other minority groups. Evidence that racial prejudice and even violence is prevalent and that visible minorities are a growing share of the labour force in key metropolitan markets is changing that perception. Attention to definition, data, and the most appropriate remedial approaches is required in the near future.

#### **e) Conclusion**

The priority attached to equity objectives in the labour market is a function of the depth and permanence of problems summarized above. In addition, as the next section demonstrates, the failure to overcome inequality may well have important implications for Canada's labour market development.

### **C. Economic Imperatives**

#### **1. The Key Priority**

Radical structural changes in the world economy during the 1970s and early 1980s dictate the need to adapt the Canadian economy to a rapidly changing environment. Predictions on trends in the short to medium term are proving extremely hazardous. Past events and emerging trends do suggest, however, that a mixture of cautious fiscal steps and extensive economic restructuring will take place over the next 10 years. On the one hand, a continuing concern over

high inflation, a serious world recession marked by a delicate recovery, and unstable and unpredictable energy markets have limited the scope of government action and created a need to trim inefficiency from the Canadian economy. On the other hand, Canada's abundant natural resources, the complex challenge of both high-technology industries and "high-tech retooling" of existing productive capital, and the new frontiers of biotechnology provide opportunities which must be seized if prosperity is to be sustained. For these reasons, government policy must place a high priority on developing a strong productive economy based on both the historically strong industries of today and the new emerging technologies of the 1980s and beyond.

### **2. Canadian Labour Market and Economic Development over the Next Decade**

This section examines some of the key variables in the economy and in the labour market over the next 10 years. These include labour force growth, productivity imperatives, and restraint on public-sector resources.

#### **a) Labour Force Growth and Economic Recovery**

In the Labour Market Task Force Study (1981), it was predicted that there would be a marked decline in the growth of the Canadian labour force during the decade. Labour force growth was to decline from 3.0 per cent per year in 1975-79 to 2.0 per cent per year in 1980-84 and 1.75 per cent per year in 1985-89. This scenario, given a modest unemployment rate, suggested that a balanced, stable economic growth rate in the 4.0 to 4.5 per cent real growth range would require very strong improvements in productivity. Alternatively, labour force growth would have to be stimulated.<sup>1</sup>

The predicted decline in workforce growth meant that women and minorities would have a central role to play in future growth. Projected trends indicated that while 48.9 per cent of women were in the Canadian labour market in 1979, by 1990 that rate would reach over 60 per cent. The female labour force, therefore, would continue to grow both because of natural increase and because of increased participation. The latter would result in an increasing share of labour force growth being accounted for by women. By 1985-89, this share would be more than 70 per cent. For native people, the situation would be even more pronounced. Not only would their participation rate grow, but their overall growth rate would far outstrip that of other Canadians. Even with the participation rate growing slowly, native people would represent three per cent of labour force growth. A rapid increase to compensate for historically low participation rates could raise this figure to five per cent.

For the physically disabled, the impact is less clear. Such unmeasurable variables as increased survival rates, advances in rehabilitative technology, shortfall in income support systems, and growing public acceptance would likely increase the numbers of disabled entering the labour market. Their share of employment growth could be as high as six to seven per cent. Data on visible minorities and their demographic characteristics permit few predictions, but an estimate of two to three per cent of growth may be reasonable. In all, women and minorities would likely comprise 75 to 80 per cent of labour force growth over the decade.



An assessment was done showing projected labour force trends against a constant employment mix for each industry based on 1979 ratios of male/female employment. Such a development would result in shortages beginning to appear by mid-decade, reaching a serious level by 1990. "Male" employment opportunities will grow at an average annual rate of 2.21 per cent while the male labour force will grow at 1.08 per cent. In contrast, "female" employment opportunities will grow by 2.4 per cent per year while the female labour force would grow by 2.9 per cent per year. The result, with an assumption of 3 per cent frictional unemployment, would be a shortage of 47,980 male workers in 1985, increasing to 443,600 workers by 1990; female unemployment would reach 13 per cent by 1990 (Dodge, 1980).<sup>2</sup>

The severe economic downturn experienced in 1982-83 was not predicted in the Labour Market Task Force Report. The possibility of a continuing high rate of unemployment through the 1980s—above 10 per cent—and slow, real economic growth has been raised to counter the "male labour shortage" theory. Some rethinking therefore is required.

As expected, assuming net immigration of about 75,000 each year, growth in the civilian source population will range from 1.3 per cent in 1983 down to 1 per cent at the end of the decade. The effect of the recession, however, will displace the earlier predictions. A study on Canadian Macroeconomic Prospects to 1989 prepared for the Canadian Occupational Projection System (COPS) now predicts in its "reference case"—the most likely outcome—a labour force growth rate of more than 2.0 per cent until 1987. Department of Finance projections suggest that better than 2.0 per cent will be sustained until after 1987.<sup>3</sup>

The slowing of the decrease in labour force growth from earlier predictions is a function of the severe recession. Instead of growing by more than 2.0 per cent in 1982 and 1983, the growth rate plummeted to 0.5 and 1.0 per cent respectively. No doubt this was a function of workers either dropping out of the labour market or not officially entering because of the poor prospects for employment.

A long, sustained, and robust recovery would mean that the impact of the recession would be only to delay the emergence of a tighter labour market. The Department of Finance predicts that between 1985 and 1987 the annual growth rate will average 4.5 per cent and employment growth 3.5 per cent, resulting in a decline of the unemployment rate to nine per cent by 1987. The Economic Council of Canada in its 1983 Annual Review is less optimistic. It expects real growth to average 2.8 per cent during 1985-87, with the unemployment rate remaining above 11 per cent. The COPS reference case foresees strong growth near five per cent in the recovery period but average growth in the three per cent range after mid-decade, with unemployment remaining above 10 per cent.

On the face of it, the substantial pool of unemployed already in the labour force, the higher than expected rate of labour force growth, and the continuance of a high unemployment rate suggest that economic expansion will not be constrained by a tight labour market, even in the most optimistic predictions. Even during the recovery period only an estimated 300,000 to 350,000 net new jobs will be available

to decrease the unemployed. While these sober figures decrease somewhat the economic imperative for sustaining target group labour market participation in terms of limits to growth, these groups remain key to future growth. Women and minorities will remain the predominant group of those entering the labour market and will continue to constitute at least 50 per cent of the unemployed.

In other words, the majority of the labour pool from which new employees will be drawn over the next decade will be members of the target groups. Perhaps even more importantly, the percentage of women with the requisite skills in key areas is rising rapidly. As noted by the Economic Council, over the 1972-81 period the total number of women enrolled full-time in university rose by 54 per cent, while that of men increased by less than 8 per cent. Today nearly half of the full-time undergraduate enrolment is female; in relative terms, even greater advances have been made at the master and doctorate levels. In addition, the areas of specialization chosen by women are now more diverse, and those who continue beyond the undergraduate level are those who have opted in many cases for new areas of specialization.

Similar trends are found at the community college level, where over the past 10 years full-time female enrolment increased by 80 per cent, compared with a 50 per cent rise in full-time male enrolment. In 1981 women accounted for about half of management and administration, data processing, and financial management, although their numbers were still relatively lower in the engineering technologies (p. 84, Economic Council, 20th Review).

#### b) Productivity Imperatives

The extremely high rate of labour force growth and reasonable rates of investment in the 1970s permitted a relatively strong economic performance. A serious deterioration in productivity growth, however, also resulted.

The contribution of increases in productivity to this economic performance was declining, a trend present since the 1960s. In the 1950s, productivity increased at a rate of 3.5 per cent, in the 1960s at 2.4 per cent, and in the 1970s at 1.3 per cent. For the first time, the 1970s saw real wage increases surpass for a time productivity gains, making it necessary to cut into the share of return on capital investment. While these rates remained above comparable U.S. figures, the figures for Europe and Japan, especially in manufacturing, have been significantly stronger. For the 1979-82 period, however, Canada's growth of productivity, an alarming 1.1 per cent, fell even below that of the United States, the only other of the seven major OECD countries to experience negative growth (Department of Finance). The result is that between 1974 and 1982 real output per employed person *declined* at an annual average rate of 0.2 per cent. An important cause has been the slower rate of growth in aggregate demand and output since 1973, compared with the pre-1973 period. But other key factors include a shift in Canada's industrial structure toward less "productive" service-oriented industries, depletion of "cheap" natural resources, higher energy prices, and the decline in the growth of capital stock relative to labour.

Without any further major shocks to the Canadian economy, most forecasters expect some major gains in productivity



ty growth during the recovery as under-used means of production are brought closer to capacity. A slowdown in investment during the recovery period will result in modest growth between 1.0 and 1.5 per cent during the rest of the decade.

The continued growth in aggregate demand (although only moderate), a modest shift towards growth in employment in goods-producing industry at the expense of that of the service sector, and a continued decline in the employment share in the primary sector should provide for productivity improvement. But there is another side to the productivity question. Improved technology also plays a key role. European and Japanese competitors have produced higher productivity growth rates over the last three decades by introducing not only "new" technology but by catching up with North American technology. Evidence suggests, however, that advances in applied technology have begun to surpass the level reached here. With traditionally lower real wage rates and sometimes better quality, their goods have become increasingly competitive. It remains to be seen whether traditional problems of more expensive raw materials, less developed or less efficient markets, and less developed "human capital" will stop the gap from being narrowed completely.

The question of improved productivity through technological advances is intertwined with the other determinants outlined above. Lower costs for the end product will improve aggregate demand in a competitive market. In turn, an increase in demand improves utilization rates and hence both productivity and profits.

The fact that the European and Japanese economies were rebuilding following extensive destruction in war meant that rapid growth through capitalization was possible. It is unlikely, therefore, that the Canadian economy could have experienced such growth. But the next decade will see the major OECD nations competing with industrial bases that are relatively similar. Market size, resource costs, and human capital differences will play a smaller role. These facts will require Canada to ensure a maximum return on the efficiency of its human resources and fixed capital.

This requirement to maintain competitiveness comes at a time when major technological changes are expected. Substantial employment growth in high-technology industries will include research and manufacturing in microtechnology hardware, development of software support services, and the creation and implementation of information and communication networks.

On the other hand, applications of new technology to improve productivity in existing industries, including the service sector, will bring about changes in employment and perhaps reverse declining demand. Main areas of the economy where microelectronics will be applied are:

- manufacturing—through use of equipment ranging from computer-controlled machine tools to robotic assembly lines; and
- business and government services—through use of machines performing functions such as word processing, inventory control, information storage, retrieval, manipulation, and transmittal, and activity scheduling and control.

Initially, the impact of these industrial applications will fall mainly on assembly-line operations that are easily automated, and on financial service industries such as banks and insurance companies. Over the next 15 years, however, virtually all manufacturing sectors in Canada and most business and government services will be affected.

Microelectronics may cause substantial and relatively rapid employment displacement. New cost-effective technology is constantly being developed, and industries must keep pace with innovations in order to compete in all markets. Many applications to production processes could result in massive reductions of workforce requirements.<sup>4</sup> Assembly-line workers, skilled craftsmen in blue-collar industries, office clerks, and typists are at greatest risk.

At the same time, as outlined above, microelectronics create opportunities for the development of new products and services in the manufacturing and servicing of new technology and in the utilization and analysis of newly acquired information. This necessitates the movement of workers redundant because of new labour-saving technology to these new occupations. An increased demand for highly skilled technicians and professionals, with some related demand in the lower-skill areas of sales and services, can be expected.

Finally, firms not directly affected by technological change will feel the indirect effects resulting from labour shortages in critical skill areas.

Some important implications for skill development are summarized below.

**Highly qualified occupations** (those usually requiring post-secondary education in university or college) are heavily concentrated in personal and business services and, to a large extent, in manufacturing. Personal and business services include health and education, as well as consulting, engineering, accounting, and the legal profession. The decline of relative importance in this occupational category is largely attributable to the decrease in the general population growth, particularly in the youth population, which consequently reduces the demand for teachers, health, and other social services. However, an aging population may offset to some extent some of these trends, especially for health care services. Rising demand for the engineering and scientific occupations reflects technological changes, projected expansion of the manufacturing and construction sectors, and energy and resource industry growth.

**Highly skilled occupations** (those usually requiring apprenticeship and/or some post-secondary training) are concentrated in manufacturing, construction, and the trades. They include occupations in manufacturing, such as machinists and tool and die makers; skilled construction workers, such as welders, plumbers, and pipefitters; and highly skilled sales persons in wholesale and retail distribution. A mixed pattern of demand is projected for the 1980s. Slower growth in the trades sector and expanded growth in manufacturing suggest occupational shifts within the latter. Projections indicate that a number of trade skills could be in critically short supply during the 1980s. Severe shortages were already apparent before the recession.

**Middle-level skilled occupations** (those requiring some vocational or skill training) are more evenly distributed across all industries and include many clerical occupations.

**Low-skilled occupations** are heavily concentrated in manufacturing and in personal and business services. These jobs accounted for an estimated 54 per cent of the employment growth in 1973-79. Some projections suggest that this percentage could rise in the 1980s, reflecting an increased strength of the manufacturing industries. However, technological innovations may alter these projections substantially, due to changing office technology and the increased use of robotics in manufacturing.

The overall picture of occupational demand for the 1980s is one of substantial shifts both in skill levels and in occupations. This will require not only a highly trained labour force and the mobility of existing workers into higher-productivity jobs but also the capability to retrain this labour force several times during the span of its working life. The ability of the labour market to accommodate these requirements will be important for Canada's competitive position.

Finally, it is important to emphasize that the new microtechnology, and the availability of workers with the appropriate skills for this technology, will not be the only determinant of productivity. Significant differences remain in how well employers use existing resources. Ensuring that the best qualified worker is selected for the job; that the workplace is conducive to allowing the worker to reach his or her potential; that wages and salaries reflect the workers' contribution are equally important. In short, regardless of whether there are changes to capital technology, maximum efficiency in the use of human resources is required.

The dynamics of the productivity imperatives outlined above provide support to the idea that improved integration of target group workers will be crucial. **First**, as they already represent more than 40 per cent of the labour market, a failure to remove barriers will seriously affect efforts to readjust existing labour supply and undermine attempts to ensure optimum human resource utilization. The movement to new technology and high-technology industries will require the integration of existing workers in changing skill configurations. Women and minorities who entered the low-skill, low-productivity service sector in large numbers during the last 10 years will have to be upgraded to fill new jobs and to handle new technology in existing jobs in order to facilitate productivity gains and avoid structural dislocations. As this process involves more than simple, linear job mobility with straightforward skill adjustment, a complex and integrated strategy will be required. If these adjustments are not made or are not handled well, the opportunity costs to the Canadian economy will be enormous.

**Second**, target group members, especially women, will provide the best trained influx of new workers in Canadian history. In a sense, as the labour market projections indicate, women have been in recent years and will continue to be, along with natives, disabled persons, and visible minorities, the "immigrant" influx similar to those that fuelled much of Canada's economic growth over the last century.

Indeed, women in North America have been singled out as one of the major positive factors in productivity competition with the rest of the industrialized world. *Business Week* (June, 1980, page 110) quoted Eli Ginzberg (Director of the U.S. Commission on Employment Policy):

*Moreover, we are further ahead in know-how to use the half of the population known as women, and I cannot overemphasize the importance of that fact .... In neither [Britain nor Japan] do women have the extent and kinds of education they have [in the U.S.], in neither do they hold the variety of jobs they hold here, in neither are they moving upward as steadily as they are here and in neither does the government aid actively in their progress .... These women [entering the labour market] are labor force recruits from a brand-new source and unlike [earlier entrants] ... these recruits are highly diversified. They are capable of filling niches throughout the economy.<sup>5</sup>*

In Canada, a similar pattern of a diversified, skilled female labour force is present. However, we do not currently have the same upward mobility, in large part because government has not aided so actively in women's progress.

The relatively high-skill level of women in Canada provides a powerful base from which to draw currently required workers. In addition, the high education level provides a prime source for workers who will require a generic knowledge base in order to successfully undertake rapid occupational adjustments in the future.

**Finally**, the economy can no longer tolerate the luxury of making key employment decisions based on criteria other than merit. Systems and practices that tend to limit decisions to specific groups in the labour market will not ensure a rationalization of human resources. Overlooked talent, non-cost-effective importation of labour, high turnover costs, inappropriate skill requirements are all costs that Canadian business cannot afford in tight world competition.

Any waste in human resources stemming from the underutilization of target groups in the Canadian labour market will be significant over the next decade. The probable impact of technological change and the ensuing need to utilize and develop a strong skill supply only makes the results of such waste more acute.

### c) Public-Sector Restraint

Considerable emphasis has been placed on the impact of heavy government spending vis-à-vis enhancing or constraining Canada's economic growth. On the one hand, some economists argue that high government deficits crowd business out of the market, creating shortages of investment capital or, at the very least, driving up interest rates and thus increasing the cost of investing in capital or durable goods. Higher taxes to pay for the deficits only dampen aggregate demand.

On the other hand, some economists and planners argue that the structural requirement outlined earlier will require government involvement despite strained resources. During the next 10 years, there will be a substantial realignment in all industrial sectors. This will necessitate assisting the restructuring of some industries and the development of new industries. Needs associated with major resource megaprojects will also, in the short to medium run, place demands on government resources. At the same time, opinion polls have indicated a contradictory public response to government spending. On the one hand, there is a strong demand

for lower government spending and increased discretionary income (both consumer and investment). On the other hand, demands for increased government social and cultural services are continuing to rise. Finally, general inflationary pressures such as interest rates and construction costs will strain resources for some time to come.

In light of these resource pressures, the potential savings made from reduced support for target group members, especially the disabled and natives, are important. In terms of the disabled, a conservative estimate of \$4,000 per year per person for support of 150,000 employable disabled persons yields a direct annual cost of \$600 million. Opportunity costs, based on an estimated \$12,000 a year for the value of work these people could do, would be \$1.8 billion. It has been estimated that the cost in 1977 dollars of sustaining a native family of six on welfare over its lifetime is \$1,222,980.

The demand on government resources could also be eased by a change in perception of the ownership of the problem of equity. Traditionally, governments have been faced with providing a social "safety net" for those not able to function well in the labour market. Primarily, the problem has been defined as the target group member lacking the human capital necessary to secure or maintain employment. In addition to income support, therefore, government has been required to provide expensive training, counselling, and employment support systems. For many individuals, such services are required. But if artificial barriers on the demand side are also operating, such expensive services may be unnecessary or, at best, inefficient. A proper understanding of employment discrimination, which is outlined in the next section, results in employers assuming a major responsibility for the integrative process. Putting aside for the moment the implications of costs to business, this will have several significant results. First, the requirements to validate systems with adverse impact will result in the removal of certain unnecessary requirements that have led us to spend considerable resources on training. Second, necessary training costs can be minimized by having employers structure training and adjustment measures to meet their specific needs<sup>6</sup>.

#### **D. Equity and Efficiency: Interrelated Objectives**

Securing social equity in occupational and career opportunities must remain a priority objective of government. Its commitment through international obligations and domestic legislation is clear but bottom-line results remain the touchstone of success. The achievement of this goal will not threaten the economic objectives of government and business. Indeed, properly handled, the matter of attaining social equity itself contributes to the reaching of economic objectives.

Section II has outlined the employment bottom line for women and minorities and suggested that this inequity in part is a function of problems in the labour market. In addition, it has outlined some of the potential positive implications for the Canadian economy if this situation is effectively remedied. Section III is concerned with defining the problem in the labour market and how, once properly defined, this problem requires an effective human resource planning approach in order to be removed and its effects erased.

### **III. THE PROBLEM DEFINED**

#### **A. Introduction**

The previous section described the employment barriers facing women, native people, the disabled, and visible minorities. The discussion proceeded from an understanding that, by virtue of their group characteristics, women, native people, the disabled, and visible minorities are denied a fair share of job opportunities and economic rewards.

Methods of assessing qualifications for employment and promotion have evolved over time to suit the needs of a particular type of worker in a particular type of labour market. It was once assumed that "ownership" of an employment problem lay with the individual rather than with social and labour market barriers. Thus, there has been an emphasis on programs to increase the individual's "human capital". More recently, discrimination was seen to indicate an employer's mistaken perceptions of the rights and abilities of target group workers and job applicants. Laws have been passed to outlaw such discrimination and to prohibit employers from consciously denying jobs or job-related benefits on the basis of sex, race, or disability. Programs to change attitudes and secure equal treatment have also been implemented.

In this section, employment discrimination refers to any barrier that entirely or disproportionately excludes a group of individuals from employment or promotion for reasons other than the proven inability to do the job safely and efficiently. Target group workers may lack skills validly required for some areas of work. This deficiency may be due to "pre-labour market" discrimination, for example, stereotypical career counselling in schools. The concern in this section, however, is not with discrimination before the worker enters the labour market but with the discriminatory barriers found in employment practices of employers.

#### **1. Working From the Bottom Line**

Employment discrimination has for some time been viewed as unacceptable on ethical grounds. Legislation has been enacted that prohibits employers from consciously denying employment or employment-related benefits because of sex or minority status. But in the process of monitoring these initiatives it became necessary to define clearly what socio-economic "facts" needed to change. In the early 1960s, professionals in the field identified three core economic facts that indicated how employment discrimination contributed to major inequalities in income and status in Canadian society. Women and minorities, it was found, generally experienced higher unemployment rates, lower occupational status, and, consequently, lower income levels relative to other workers.

By defining clearly the economic "bottom line" impact of employment discrimination that had to be changed, the adequacy of our understanding of the nature of this discrimination and our subsequent ability to change its effects could be determined. It soon became evident that the concentration on changing discriminatory attitudes and ensuring equal treatment had only a marginal impact on the unequal returns to certain labour market participants.

The idea of always keeping a critical eye on the bottom line is extremely important when working on the problem of employment discrimination. This is not because of the specific nature of this particular problem but because an objectives-based approach is the key to solving any problem. Our



primary goal is to allow all social groups to compete equally and to share the rewards and opportunities within the labour market. The lack of such equality is the key problem or result, while employment discrimination is the cause. Only when we begin to see the bottom line change can we be sure that both the definition of the problem and the applied remedy are appropriate.

A bottom-line approach, to the extent that it is results-oriented, also makes sense in the area of corporate planning. Two important implications flow from this fact. First, an effective remedy to employment discrimination will be based on a human resource planning perspective; second, when developing government policy for employers, it is the bottom line to which they are attuned, while the process of achieving results may be best left to emerge from the specific corporate environment.

## B. Intent: The First Approach

Initially discrimination was seen as an overt, isolated act motivated by ill-will or prejudice. This way of conceptualizing discrimination focused on intent as the problem and the changing of attitudes as the solution.

For many years the only remedy was one of changing attitudes as the courts in Canada found few reasons to find that even overt discrimination warranted judicial remedy. In the 1940 case of *Christie v. The York Corporation* S.C.R. 139, Justice Rinfret speaking for the Supreme Court of Canada stated:

*In considering this case, we ought to start from the proposition that the general principle of the law of Quebec is that of complete freedom of commerce. Any merchant is free to deal as he may choose with any individual member of the public. . . . The only restriction to this general principle would be the existence of a specific law, or, in the carrying out of that principle, the adoption of a rule contrary to good morals or public order. . . . It cannot be argued that the rule adopted by the respondent in the conduct of its establishment was contrary to good morals or public order.* (Emphasis added.)

With only a few exceptions,<sup>7</sup> until well into the 1960s, Canadian courts had great difficulty in finding discriminatory actions in public forums as "contrary to good morals or public order". It was for this reason that legislatures, as Tarnopolsky is quoted in the introduction, moved to provide the second restriction enunciated by Justice Rinfret—a specific law.

The passing of key anti-discrimination statutes in the 1950s and the setting up of human rights commissions as agents for the legislation in the 1960s and 1970s established clearly the prohibition on intentionally discriminating in employment on prohibited grounds. The result was a strong move to combat individual discriminatory actions. Soon, however, it became clear that a second type of discrimination was prevalent. Entire groups of individuals in comparable situations with comparable qualifications were treated differently. Women, for example, were not allowed access to certain jobs, or native people were required to take an aptitude test.

While the recognition of broad group discrimination suggested the need for a more systematic approach to removing

discrimination, and hence the need for action beyond individual remedies, this realization remained tied to the concept of intent, to a belief that a group's characteristics made members of that group unsuitable or less suitable for specific jobs and occupations. As noted earlier, it increasingly became obvious that the bottom line, the social and economic inequities, did not change. This failure to have the desired results led to a significant rethinking in the understanding of the term "discrimination". After more detailed investigation and research, it became clear that employment discrimination was a far more complex and pervasive phenomenon than was previously understood. Experts in employment discrimination began to see that some employment practices, while equal in intent and in application, had a disparate effect on minorities and women.

## C. Systemic Discrimination

A third kind of discrimination, "systemic discrimination", emerged as a significant concept. It has also been called indirect, structural, constructive, and institutional discrimination.

### 1. Defined

Systemic discrimination refers to any employment system or practice that, while equitable in intent and in application, has a differential and negative impact on women or minorities. Further, these practices are not job-related in that they do not necessarily predict the ability of an individual to do a job. As well, they cannot be justified as necessary for the safe and efficient operation of business.

Many employment practices unwittingly perpetuate past discrimination and operate to freeze the status quo. Women and minorities are frequently screened out not because they lack the essential abilities and skills, but rather because current employment standards reflect the characteristics possessed by those groups who have always filled the positions in the past. Height and weight measurements are an example; word-of-mouth advertising of job openings is another type of past-in-present discrimination. The predictable outcome of an all-white-male organization relying on word-of-mouth recruitment is all-white-male hiring.

Intentional discrimination in one sphere can result in unintentional discrimination in another. For example, women and minorities denied access to the full range of education and training opportunities are handicapped in competing for employment opportunities when hiring and promotional standards incorporate unnecessary educational standards. The operation of seniority systems can also penalize women and minorities. The last-hired, first-fired rule disproportionately affects those groups who have just been granted access to trade union jobs. Where plants were intentionally segregated in the past, women and minorities may be laid off before workers in better-paying seniority lines or they may be unable to transfer their seniority to job progression lines offering greater opportunities.

Systemic discrimination is pervasive in Canadian employment systems, operating regardless of the intent of the employer. Often it can only be detected by a statistical examination of the results of an employment practice to measure the ratio of successful women and minorities to successful major group members.



## 2. Analyzing for Systemic Discrimination

Systemic discrimination is not necessarily the result of conscious attempts to exclude certain groups. For this reason it involves not an examination of motivation and intent, but an analysis of results and empirical validity. In summary, this requires employers intent on identifying and removing systemic discrimination to ascertain where target group workers are underrepresented given their availability according to requisite skills. If the composition of the workforce indicates restrictive or exclusionary practices, these are identified for intensive analysis.

The goal of this analysis is to determine whether or not employment practices having an adverse impact are necessary for the safe and efficient operation of the enterprise. This determination requires two steps. First, it is imperative to ask whether there is an alternative system or practice able to meet the employer's objective with no, or at least a lesser, differential race or sex impact. If a suitable alternative does exist, the exclusionary practice cannot be justified as "necessary". Second, if no alternative exists, it is necessary to analyze the validity of the practice. Determining validity means assessing by objective methods whether or not a practice accomplishes its predictive or evaluative function.

Three methods of determining validity are commonly used.

a) The **criterion-related** approach involves measuring the predictive capability of a standard or practice. For example, does a requirement to have a Grade 12 diploma predict job success? This requires a comparison between those that do/don't have Grade 12 and objective measures of job success.

b) The **construct validity** approach requires a careful analysis between the identified characteristics required—the construct—and the tasks required for successful job performance. In other words, it is necessary to determine whether the constructs themselves, such as an aptitude test, are likely to predict job performance because a reasonable casual link can be demonstrated. While popular with industrial psychologists, construct validity is less acceptable for justifying adverse impact unless backed up by criterion-related validity.

c) The **content** approach measures the degree to which the items on a test or in a selection practice are representative and appropriate for those tasks actually performed. If the test content approximates the tasks, for example, a program drafting test for systems analysts, validity can be shown.

The systemic approach, with its emphasis on impact and business necessity rather than on intent, provides an objective measure for determining whether or not discrimination exists. It downplays the question of individual blame and concentrates on rationalizing employment systems based on valid business need; solutions are oriented toward target group workers' employment and career development, the achievement of realistic goals, and a movement away from overemphasis on attitudinal change.

Despite the emphasis on systemic discrimination, intentional discrimination, whether individual or broadly based, must not be ignored. Both approaches must be used to complete our understanding of how discrimination adversely affects certain groups. This complete strategy provides the conceptual tools required to develop effective remedies that

are capable of changing the socio-economic bottom line of employment discrimination.

## 3. The Legal Status of the Systemic Concept

An understanding of systemic discrimination helps us to explain why certain groups continue to face difficulty in the labour market. As such it is an extremely useful concept for human resource management specialists. Systemic analysis, however, has also found acceptance by human rights commissions and by the courts. In Canada, the legal status of systemic discrimination has received legal sanction only during the last decade.

In 1971, in the *Griggs* case, the United States Supreme Court found that the Duke Power Co. had unintentionally discriminated against a black worker. The company had a proven record for ensuring "equal opportunity" and encouraging minorities to apply and to seek promotion. However, the company required a Grade 12 education and an entry examination for the job this worker applied for. Two key issues emerged: first, blacks are far less likely to have Grade 12 and are more likely to fail the mandatory examination; second, the company was unable to demonstrate that either of these requirements predicted job performance. Based on the 1964 Civil Rights Act, the Court concluded:

*The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.*

This case, a watershed for U.S. jurisprudence, resulted in a thorough reassessment of corporate responsibility. A similar if somewhat slower process has taken place in Canada. Proving intent has been an important concept in Anglo-Canadian law. In *Dritnell v. Michael Brent Personnel Place* (1968) and *MacBean v. Village of Plaster Rock* (1975), boards of inquiry in two provinces found that intention or motive must be evident to prove discrimination. A 1975 case seemed to severely limit the chances for a systemic interpretation when in *Ryan v. Chief of Police, Town of North Sydney*, the Board of Inquiry rejected the idea that a height and weight requirement constituted employment discrimination against women because of very heavy adverse impact.

Despite the weight of *stare decisis*, two key decisions reversed this trend by the next year. In an equal pay case in Alberta, Mr. Justice McDonald found:

*...relief in the form of compensation for lost wages should ordinarily be granted to a complainant whose complaint as to unequal pay has been found to be justified, even in the absence of a present or past intent to discriminate on the ground of sex. It is the discriminatory result which is prohibited and not discriminatory intent (Attorney General for Alberta v. Gares)*

This was followed by what must be considered Canada's "Griggs" case, *Singh v. Security and Investigation Services Ltd.* (1976). In this case, Singh, for religious reasons, would not wear the traditional hat of the company's uniform. Again, this case involved a crucial change in approach—discrimination was defined by the Board in terms of its effect on the protected group rather than the intent or motivation of the alleged violation.

Although the Board took a clearly systemic position, it also recognized that business necessity was an acceptable defence. It stated:

*First, one decides whether the employee's request is important and valid i.e. not trivial or arbitrary. Second, one determines the extent of the inconvenience that would be caused to the employer if the request were granted. Finally the inconvenience to the employer and the importance of the request from the standpoint of the employee must be balanced.*

Subsequently, the Singh case was supported by a number of similar decisions. In *Colfer v. Ottawa Board of Commissioners of Police* (1979), an Ontario Board found height (5'9") and weight (160 lbs.) requirements to be discriminatory and in *Foster v. B.C. Forest Products Ltd.* a British Columbia Board found, on systemic grounds, that a height/weight preference had an adverse impact and was not a good indicator of strength or of the ability to do the job. Similar reasoning was used in *Grole v. Sechelt Building Supplies* (1971) Ltd. (1979).

Despite these decisions, a number of issues could have severely limited the impact of a systemic approach. First, the "business necessity" defence could have presented a substantial obstacle. Difficulties arise if the complainant is forced not only to prove a negative proposition but also to assume the responsibility, including costs, for presenting evidence on technical matters. Cases have generally held, however, that once the basic elements of the case have been proven—*prima facie* evidence of discrimination—the onus shifts to the respondent to establish business necessity. Such reasoning can be found in *Foster* and *Colfer* as well as in *Bone v. CFL* and *Robertson v. Metropolitan Investigation Security (Canada Ltd.)* (1979), both Ontario boards.

A second problem could have arisen around the acceptability of vague and subjective conclusions concerning "business necessity". The *Colfer* decision, however, made it clear that evidence in support of business necessity must demonstrate an acceptable level of rigour. In an important decision in 1982, the Supreme Court of Canada ruled unanimously against a mandatory retirement age of 60 for firefighters in the Borough of Etobicoke. The defence of a *bona fide* occupational requirement was rejected as insufficient because it was impressionistic and relied on general assertions. Evidence to support the borough's claim must, the court ruled, cover the detailed nature of the duties to be performed, the conditions existing in the workplace, and the effect of these conditions particularly on those near retirement age.

The Canadian Human Rights Act (CHRA) states:

*It is a discriminatory practice for an employer or an employee organization*

- a) *To establish or pursue a policy or practice, or*
- b) *to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment*

*that deprives or tends to deprive an individual or class or individuals of any employment opportunities on a prohibited ground of discrimination.*

In its first annual report in 1978, the Canadian Human Rights Commission wrote:

*...it can be concluded that discrimination under the Act is not defined purely in terms of intentional bigotry or irrational prejudice. Discrimination includes, rather, an adverse differential treatment or impact, whatever its motivation.... We cannot therefore define discrimination purely in terms of behaviour motivated by evil intentions; the definition has to include the impact of whole systems on the lives of individuals — what is called structural or systemic discrimination.*

In line with this interpretation of the Act's clear reference to practices that discriminate "indirectly", many Boards of Inquiry established under the CHRA have found systemic discrimination to be prohibited. Settlements and decisions, relating to religious accommodation and weight and height requirements, for example, have helped define what constitutes systemic discrimination in federal jurisdiction.

The clear acceptance of systemic discrimination as a key aspect of the definition of prohibited employment discrimination has received, however, two recent setbacks. In October, 1982, the Ontario Court of Appeal ruled that "...intention to discriminate on a prohibited ground [is] an essential element of a contravention..." (*O'Malley v. Simpsons-Sears Ltd.*). Justice Lacourciere recognized that amendments proclaimed on June 15, 1982, to the Ontario Act clearly now included systemic discrimination:

*10. A right of a person under Part 1 is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the inclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member....*

As the case under review preceded the amendments, the court found that: "If the legislature had intended before 1981 to prohibit discriminatory results regardless of motivation or intent, it could easily have used the language adopted by congress in its *Civil Rights Act* of 1972 or the language now adopted in S.10 of the Ontario Human Rights Code." While the 1982 amendments make the issue a moot point for Ontario, leave to appeal the case to the Supreme Court of Canada has been granted. In part, this action has been taken because of fear of its implication for other jurisdictions still lacking explicit reference to systemic practices.

This fear was realized in the federal jurisdiction in June, 1983, when the Federal Court of Appeal ruled 2-1 that sections 7 and 10 of the Canadian Human Rights Act are not sufficiently comprehensive to include indirect or systemic discrimination (*CNR v. K.S. Bhinder*). Using reasoning similar to the *O'Malley* case, Judge J. Heald held that:

*Section 10 of the Canadian Human Rights Act uses the words "deprives or tends to deprive" but the words "or otherwise adversely affect" are not present in the Canadian.*

The missing words, found in the 1964 Civil Rights Act, the court concluded, were necessary if the existing Canadian Act was to be interpreted to include systemic. In addition, Judge

Heald cited approvingly the explicit wording of the 1982 Ontario amendment.

The decisions of the two appeal courts have raised a serious challenge to the legal status of systemic discrimination. While the Ontario amendments clarify the situation within that province, the federal and some other provincial acts, lacking what the courts deem to be clear statements of legislative intent, must await Supreme Court of Canada decisions on *O'Malley* and *Bhinder* in 1985.

#### 4. Conclusion

As our ethical concern with the moral implications of discrimination has deepened to include a basic concern with its socio-economic impact, the adequacy of our conceptual tools have been challenged. The result has been a thorough rethinking leading to a human resource management approach that brings the powerful tools of integrated problem-solving to bear. We now begin with a clear delineation of results and work backwards toward the specific causes without concern for whether the cause/effect was intentional. When a cause is isolated it must withstand a rigorous analysis to determine its validity or it must be removed.

For human resource managers committed to ensuring rational utilization of human resources, the legal status of this approach is not an issue. Realistically, however, the interweaving of bias, of stereotype, and of commitment to "traditional" practices requires a firm legal basis for the systemic concept. The interpretations dating from the *Singh* decision are now less definitive. Unless the Supreme Court overturns the *O'Malley* and *Bhinder* decisions of the lower courts, legislative amendments will be required in the federal and some provincial jurisdictions.

### IV. AFFIRMATIVE ACTION: AN EFFECTIVE HUMAN RESOURCE PLANNING APPROACH

#### A. An Overview

##### 1. Affirmative Action Defined

The development of a sophisticated understanding of employment discrimination and the dynamics of human resource management leads to a rethinking of the sufficient and necessary components of an effective response strategy.

Relating employment discrimination to measurable economic inequalities provides a strong measure of how successfully a particular response works. The initial human relations approach had only limited impact, and this impact only improved marginally when mandatory equal treatment was legislated. The requirement remained to develop a response whose success would be measured by bottom-line changes in the three key socio-economic facts. With the distillation of the systemic effect, it became clear that it was necessary to look not only at equal treatment but also at the equality of the effects of various systems.

It was once assumed that "ownership" of an employment problem, not clearly the result of intentional bias, lay with the individual rather than with social or labour market barriers. As a result, considerable emphasis was placed on programs to increase the individual's "human capital". Now it became clear that the problem may lie in those employment systems that inappropriately fail to reward skills or attributes already

held by the individual. Changes in these systems and the rectification of past errors, therefore, should no longer be seen as special or good faith gestures but as necessary both for equity, in terms of results, and for ensuring the rational operation of the labour market.

Finally, the full definition of employment discrimination shifts the emphasis from basic assumptions of intent to identification and analysis of impact. While it does not exclude the possibility of singular acts of bias or the unequal treatment of a whole class of specific individuals, it places its greatest emphasis on the need to identify areas of adverse impact, to determine the validity of the system or action creating the impact, and to develop means to remove those that are invalid and to remedy their effects.

Taken together, these conclusions suggest that the primary need is to develop a human resource approach that uses the generic tools of a good problem identification and solving process. Affirmative action is the term used for such a planning process.

Affirmative action is a comprehensive planning and implementation cycle undertaken by employers. This process is a subset of the corporate human resource planning process and utilizes specialized analytical tools for identifying and remedying discrimination in employment. Rather than a radical departure from business practice, affirmative action uses standard problem-solving techniques to identify and remove barriers. Emphasis is removed from changing attitudes and placed on changing corporate or organizational behaviour. It builds on and reinforces the norms of good business practice; the ongoing experience of integrating and working with qualified target group members will eventually result in decisive changes in attitude.

#### 2. A Human Resources Management Approach

The emphasis above is placed on the need to view affirmative action as an integral component of a company's human resource planning system. It is necessary, however, to recognize that the development of, and priority for, such planning systems for the labour component are relatively new in Canadian business. In the United States, the imposed implementation of affirmative action is credited with playing an important role in the evolution of corporate awareness of the significance of human resource management. The result has been the development of operational and strategic planning processes to rival those traditionally accorded financial, technical, and market management. In particular, strategic human resource planning, which accepts the need for an extended planning horizon, recognizes the complexity and long-term implications of decisions in this area of management. Effective, short-term operational planning, therefore, can be most effective when based on strong, long-range strategic planning. Likewise, affirmative action is most effective when it is fully a part of such an integrated approach.

Affirmative action in Canada is developing less as a catalyst for more sophisticated human resource management than as a component. While this may result in the lack of the singular purpose accorded affirmative action in the United States at its inception, it does offer the opportunity to avoid some of the growing pains experienced when suitable experience and an appropriate planning framework were underdeveloped. For this reason, affirmative action in Canada must



be viewed as a flexible and integrated process able to adapt to the needs of vastly different corporate styles, organizations, and cultures. At the same time it must be based on strong generic principles of planning in general and human resource management in particular.

### 3. The Affirmative Action Approach in Summary

Affirmative action is not a rigid "model" characterized by set procedures and organizational imperatives. Each affirmative action planning exercise and each affirmative action plan will differ according to the nature of the organization, its rates of growth and turnover, the demographic make-up of its recruitment area, and its skill requirements. The sophistication of its planning capability, its corporate climate and the availability of resources will also define the exact way in which affirmative action is implemented. There are, however, four basic steps for the development and implementation of an effective plan (see Figure 1).

These four steps incorporate the basic components of good problem-solving: assuming responsibility, determining if there is a real problem and delineating causes as well as

effects, removing the cause of the problem, remedying its effects, and monitoring progress leading to adjustments as necessary.

The details of how this is done in affirmative action are outlined below.

### B. The Steps in Developing an Affirmative Action Plan

#### 1. Step One: Planning

Efficient management of affirmative action, like all goals in objectives-based planning in an organization, requires skilful planning and execution. A sustained corporate effort is required in order to carry out the process from planning, through analysis and development, and on to successful implementation. The analytical and design elements will only succeed when a firm base has been laid from the start. Key to establishing a firm base is:

- a clear, definitive statement of support from the most senior level;
- the appointment of a senior executive to assume accountability for the realization of the corporation's objective;
- the consolidation of management commitment and support at all levels;
- the establishment of a shared problem-solving approach based on the establishment of a broad-based review structure, and the assignment of appropriate resources.

#### a) Senior Level Commitment: The Chief Executive Officer

The ongoing support of the chief executive officer, backed by his/her system of management accountability, is a prerequisite for success. Without visible support of the CEO the goals of the affirmative action program will not be seen as integral to the corporate objective. This requires the communication of the organization's policy to all managers and employees which, in turn, serves to situate the initiative for managers while ensuring that the target group and non-target group members understand the goals as well as the limits of affirmative action.

The key objectives of the chief executive's officer's involvement are the following:

- to establish the affirmative action initiative as a corporate objective in cooperation with the union(s) or with employee representatives;
- to communicate this policy to all management, staff members, and to the general public;
- to demonstrate the CEO's personal involvement and commitment to achieving the initiative's objectives.

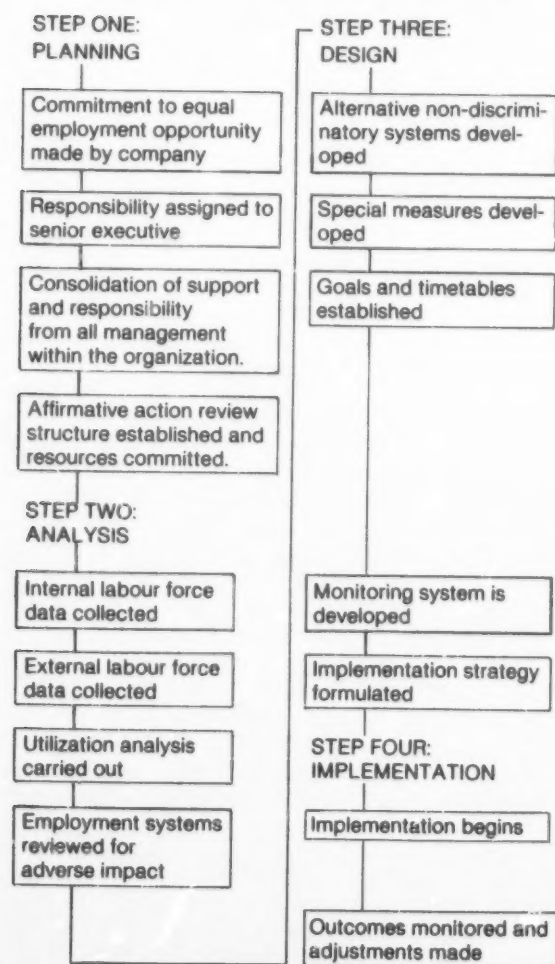
The most appropriate vehicle for articulating this involvement is through a written policy statement, approved by the organization's board if appropriate. The policy statement serves two purposes. First, it informs employees and the public of the organization's commitment to affirmative action. Second, it provides the authorization for subsequent actions, such as the establishment of a review structure.

For maximum impact, a joint statement with the unions, if appropriate, should be sought. Where not possible, an independent statement supporting the company's initiative and promising cooperation could provide the necessary support for successful labour-management consultation.

An optimum policy statement should include:

FIGURE 1

### Affirmative Action Plan Development



- a commitment to equal opportunity in the company;
- a concise definition of the affirmative action planning process, outlining the steps to be undertaken and specifying the key elements of the affirmative action plan;
- an announcement of the formation of a review structure, the appointment of a senior executive responsible for the initiative, and the basic mandate and resources established to carry out the work;
- a statement on anticipated contributions the affirmative action plan will make to both the company and the individual employees through improved human resource management;
- a commitment to ongoing, open communication throughout the planning and implementation process.

Strong executive support at the outset and ongoing involvement lends authority to the affirmative action structure's work. It ensures accountability and cooperation. Sustained commitment aids in overcoming obstacles or setbacks encountered in the review and plan development process. It enhances the credibility of the review structure and leads directly to increased awareness and behavioural change within the organization.

#### **b) Senior Executive Appointment**

The strength of senior management's commitment is indicated by the appointment of a senior executive officer—reporting directly to the CEO—who is given full authority and resources to implement the affirmative action process. Two approaches are most commonly used.

The first involves the appointment of a senior executive advisor on affirmative action reporting directly to the CEO. This individual is usually chosen on the basis of having an understanding of the problems, concerns, and aspirations of target group employees as well as a keen knowledge of management structures, practices, etc. While the person selected must have the status and ability to command respect from both managers and employees, he or she could be chosen from outside the organization.

In this model, the senior manager derives his or her authority from a unique relationship to the Chief Executive Officer. This allows the individual to deal authoritatively with other senior managers and to have access to all organizational information required. In addition, the affirmative action executive is independent of the existing personnel or human resource function, which will be reviewed. Although active cooperation is required, the appearance of conflict of interest is avoided.

The second approach, or some variant, is probably the most common in Canada and the United States. A senior vice-president, usually for human resource planning or corporate affairs, is given responsibility for implementing the review and plan development process. Functional responsibility for coordinating the ongoing work is assigned to a designated manager, usually in the human resource or personnel area of the organization. On the one hand, this approach may result in the conflict of interest cited above; on the other hand, it ensures that personnel management, who will eventually inherit the plan, will be closely involved in the development and implementation of the process. Key to the success of this delegated approach is a full-time appointment, an assured line of communication with the senior executive, and

a clear mandate vis-à-vis the responsibilities and accountabilities of other functional managers.

Whatever structure is most appropriate for the organization, the affirmative action executive has four major functions:

- to report activities and progress to the CEO and/or the senior vice-president;
- to coordinate the activities of the affirmative action review structure;
- to communicate needs to and assist line managers in solving problems related to affirmative action;
- to act as the organization's representative on affirmative action to the community.

#### **c) Consolidation of Management Commitment**

The goals of the affirmative action process will eventually affect all areas of the operation. Successful implementation, like any other major organizational change, requires broad cooperation and coordination. Such a supportive environment is also required during the analysis and plan development stage. As a comprehensive process, affirmative action requires data input and full information disclosure from many sources. From the beginning, therefore, it is important that senior management ensure that commitment and visible support is found in all areas and at all levels of management.

Such a consolidated approach does not follow necessarily from senior management directives. Affirmative action may raise sensitive, emotive issues for some managers, while first-line managers and supervisors may feel directly threatened by a close scrutiny of personnel practices. Managerial "prerogative" is an extremely strong principle in Canadian business; it is often most strongly held in areas relating to employment.

For these reasons it is important that senior management takes the time and makes the effort to ensure that the organization's commitment is understood. This requires a solid information initiative combined with clear and reasonable expectations in terms of accountability.

Commitment, communication, and resources are the key principles. During the planning phase, some of the key activities required for effective management involvement are:

- involving managers in establishing specific goals to increase their sense of ownership and responsibility;
- assigning clear, specific, and measurable goals with perceived corporate priority;
- providing tangible support for managers in terms of budget commitments, back-up decisions, and adherence to policies;
- training managers in both the technical and interpersonal skills required for new responsibilities in order to create the favourable climate necessary for implementation.

The greater the consolidation of management commitment the more likely affirmative action will survive sudden changes in senior management or inevitable challenges to the priority of assigned resources.

#### **d) A Shared Problem-Solving Approach**

Implementing the affirmative action process means implementing significant organizational change. It may well result in the identification of major systems' problems leading to

change and remedy. In addition, it will likely challenge some deeply held social relationships, and success will depend on how willing and how prepared people are to accept change. Organizational change, by definition, involves restructuring and adaptation that affects all or most aspects of the operation. Successful change in one component will require success in other areas.

Organizational change also requires considerable work. Successful affirmative action is premised on a thorough problem identification process on which appropriate remedies and change can be developed. Human resource issues touch all areas, from the basic notion of recruiting, hiring, etc., to how workers relate to the imperatives of the production process.

As a result, there is a primary need to ensure that the affirmative action plan is based on a shared problem-solving approach. A successful plan will result from a shared ownership of both the problem and its solution. The question is how this mutual ownership can best be established.

The appropriate structure for an effective review structure will depend on the specific characteristics of the organization. Whatever its structure, however, its purpose is to provide technical assistance to the responsible executive in the analysis of the company's workforce and employment systems. The review structure will also play a key role in the formulation of recommendations to the CEO with respect to the implementation of an affirmative action plan. To ensure the objective of shared ownership and to maximize the scope of ongoing information input, the review structure should ensure representation from senior management (including key areas such as production and finance), middle management, and supervisory levels, union and employee groups, key personnel or human resource management staff, and the designated target groups. As there is a need for specialists, membership may be augmented by appropriate experts.

The essential duties of the review structure are:

- to conduct or coordinate the analytical studies undertaken during the initial review process;
- to review and assess implications and to make recommendations on the basis of findings from the review;
- to establish goals and timetables and to coordinate implementation under the affirmative action executive;
- to ensure ongoing communication and feedback with sectors of the organization throughout the review, development, and implementation stage;
- to provide guidance and support for the affirmative action executive during the difficult period of initial implementation.

To operate effectively, the review structure's mandate and terms of reference should be clearly defined and documented. Clear and concrete definition of goals and anticipated results, along with specified methods and procedures, data sources, and assignment of responsibilities, will ensure a more favourable bottom line. The structure's relationship to senior management, especially the CEO, should be firm and unambiguous. Given the nature of the work and the probable outcomes, there must be clear, ongoing communication, with major shocks for the key decision-makers being avoided at the end of the developmental phase. Senior management's involvement will not only convey a sense of urgency to line

managers and staff but it will also insure that they, too, internalize the ownership of the process.

### e) Unions — Is a Cooperative Approach Possible?

The reality of Canadian industrial relations is the predominance of the adversary principle and the sometimes bitter fight to maintain broad management prerogative. Despite academic and political interest over the last decade in European experiments with labour-management co-determination, only limited inroads have been made in actual practice. Necessity, however, may produce changes in the future with the looming prospect of broad technological change, major economic restructuring, changes to pension and training requirements, and ongoing economic uncertainty. Studies have historically shown that cooperation has emerged only when serious economic difficulties threatening the company's survival or effective operation have arisen.<sup>6</sup>

In this environment the acceptance of a shared, cooperative approach to an issue involving major organizational change does not come easily, yet it is essential. There are several reasons. First, many employment systems relate directly or indirectly to issues settled through collective bargaining. Some, such as seniority, apprentice provisions, or union hall hiring, are considered key to the integrity of the collective bargaining system. While it may be possible to change some conditions of a collective agreement without union endorsement, based on the conditions' discriminatory impact, the cost to labour-management relations may well be extremely high. Second, the union possesses a communication network that will play an important role throughout the planning and implementation process. This network will provide initial legitimation at the start and can assist immeasurably in preparing the way for the least disruptive implementation. Third, it can provide a source of information on how systems and practices actually work.

Finally, unions represent all workers within the collective agreement, including those who are members of the target groups. Increasingly, the labour movement is taking up the issue of equality as target group members—women in particular—play a more prominent role in unions. Without a cooperative approach, employers can expect to have to deal with the issue at the bargaining table. Besides the implication of trying to deal with such a complex issue in an adversary process, it will also lead to a we/they dichotomy that paints the employer as the transgressor.

Management objections to union involvement usually stem from three concerns:

- unions will not support affirmative action;
- union representatives will "politicize" the affirmative action process;
- involvement in the full planning process will open up many key confidential areas to union scrutiny and set a precedent for future challenges to management prerogative.

In general, the first concern is contradicted by the increasing number of statements of support by Canadian unions for the principles of affirmative action. The involvement of local union officials and representatives within the organization, if assured at the outset, is an important component of these statements. The second objection is closely related to how



involvement is determined by management. Experience indicates that where union representatives are accorded key roles in the process, a strong, cooperative environment emerges. Problems are more likely to result when the unions are given a more distant role or are only consulted, usually in a *post facto* manner, at various intervals.

The third objection cuts to the heart of the Canadian labour relations environment. Many issues relating to staffing remain outside the realm of collective bargaining. The very breadth of a full examination of the human resource area, including how decisions are made, may well open new, previously confidential practices. The question remains, however, as to how serious the implications are for the company if union representatives are privy to this information. Again, experience suggests that unions are quite prepared to accept the confidentiality of certain information when the process is part of a cooperative, problem-solving project. The development of a trust relationship allows management to gain acceptance for non-disclosure in those limited situations where it is necessary.

The concern that broadened involvement of the union will set a precedent for future demands should also be viewed in terms of positive outcomes. Most employers report that when information is shared, especially in the context of a mutual problem-solving exercise, the result is an enhanced appreciation by the unions of the company's situation. The more likely outcome of the affirmative action planning process is the establishment of a cooperative framework for resolving other contentious labour-management issues. The result may well be to remove some issues from the collective bargaining process *per se* and deal with them in a less adversarial environment.

## 2. Step Two: Problem Identification and Analysis

The first step for the affirmative action review structure is problem identification and analysis for cause and validity. This analysis is designed to reveal any apparent racial or sexual imbalances in the organization. Where such imbalances exist, it is necessary to determine whether they result from the personal preference or qualifications of target group workers available for employment or whether they result from employment practices that adversely affect these target groups. Even where adverse impact results, detailed analysis of the validity of these employment practices may be necessary to determine if systemic discrimination is present.

Two key components make up the analysis step. The **first** involves a statistical analysis of the organization's existing workforce and a comparison of this profile with the expected profile had there been no discrimination in the corporation's employment systems and practices. Imbalances between actual and expected rates of utilization lead to the **second** analytical component, the isolation of those systems and practices responsible and their validation.

### a) Statistical Analysis of the Workforce and Labour Market

To determine if there are problems a three-part study is undertaken: a profile of target group utilization in the workforce; a profile of available target group workers with the

requisite skills in the external labour force; and a comparison of the two profiles, called a utilization analysis.

### 1. Workforce Analysis

The workforce analysis involves "taking stock" of how target group workers are currently utilized. It will reveal the number of target group members in the organization's workforce, their distribution in terms of departments and occupations, their salaries, and other related information. Essential data includes occupation, level, gender, minority or disability status, department/organizational unit, and salary. If the information is available and accessible, the following data will allow for a more refined analysis: period of employment with the company (by position), education and/or training prior to appointment, previous work experience, training since employment.

In order to review the data, two standard formats can be used: a **workforce array** and a **job group analysis**.

A **workforce array** involves listing all job titles by salary scale and range within each department or other appropriate organizational unit. A separate profile is developed for each identifiable progression line. Where there are no formal progression lines or established promotion sequences, job titles should be listed by department, job family, or discipline by order of salary ranges. A sample workforce array is shown in Table 1.

A **job group analysis** displays target group/non-target group distribution according to major job groups or job families based on similarity of content, degree of responsibility, and similarity of educational/training certification. A standard 12-job group format borrowed from the Equal Employment Opportunity Commission in the U.S. can be used:<sup>9</sup>

- |                            |                          |
|----------------------------|--------------------------|
| • managers                 | • semi-skilled operators |
| • professionals            | • unskilled              |
| • technicians              | • service workers        |
| • salespersons             | • apprentices            |
| • office and clerical      | • production trainees    |
| • crafts persons (skilled) | • white-collar trainees  |

Where wide differences in requirements exist within the job group, subgroups should be broken out (e.g., professionals: lawyers, engineers, etc.).

The completion of the statistical profile will give the employer a snapshot of where target group members are currently employed in the various occupations and levels of the organization. Problems may already be apparent. Target group and non-target employees may have different salaries despite apparent similarities of position, experience, and training. Conversely, target group workers may have high education levels or experience indicating unequal standards or lack of promotional opportunities. However, while some problems may be apparent, an availability analysis is required before final conclusions can be made about the employment of target group members in this organization.

## II. Availability Analysis

The completion of the profile of the organization's workforce represented by the workforce array and job group analysis provides a snapshot of the utilization of target group employees. For a number of reasons, it is unlikely that the revealed distribution will approximate the distribution of the target groups in the general population. The operation of discriminatory social, educational, and other pre-employment practices causes disproportionate representation of groups in the labour force. Exclusionary practices within the employment systems represent additional major barriers that reinforce those barriers operating outside the labour market. In the absence of all such discrimination, target group members would be randomly distributed throughout all occupations and at all levels in approximately the same proportions as they are distributed in the general population. Some exceptions would reflect genuine preferences of some women and native people as well as actual limitations of some disabled individuals.

A major impact on the achievement of merit-based, random distribution through the removal of unnecessary employment barriers is the long-term objective of affirmative action plans. While this long-term objective represents an ideal standard, it is less useful to the individual company in identifying problem areas, setting immediate and medium-term goals, and structuring effective recruitment and hiring initiatives. Availability analysis, therefore, refers generally to the establishment of realistic estimates of the proportion of workers available for employment in a given job group — either currently or in the future — who are members of specified target groups.

**Availability Data:** Availability data are the raw occupational, educational, and demographic data that provide the basis on which, first, standards can be developed in order to assess current rates of utilization of target group employees. Second, appropriate and realistic goals can be established for future utilization and staffing actions. Third, effective strategies can be developed for the affirmative action plan.

- **Utilization Analysis:** Availability data are used to provide the basis — along with the workforce data — for undertaking a **utilization analysis** during the problem identification phase. Target group occupational data are used to establish a **utilization standard**, which is defined as the level at which target group members might be expected to participate in a given job occupation (and level) if employment decisions had been made without directly or indirectly considering sex, race, or disability. This standard is compared with actual utilization, and areas of potential problems are identified for more intensive review. Utilization analysis is discussed in greater detail below.
- **Goal Setting:** Availability data is also used to provide the starting point from which corporate goals can be developed for an affirmative action plan. Goals are set by assessing availability, projected turnover/growth rates, and the impact of the special measures implemented as part of the affirmative action plan. (Projected trends in availability must also be established in order to develop medium- and long-term goals.)
- **Strategy Development:** Finally, availability data are used to develop strategies to be implemented as part of the

plan. In particular, recruitment sources with a higher percentage of target group members can be more effectively tapped.

**Recruitment Areas:** Definition of the organization's appropriate recruitment area in order to collect occupational data by similar geographic parameters is required.

The occupation and its position level will play a key role in determining the geographic area in which the organization should recruit its employees. For example, secretaries, clerks, and unskilled workers might all be hired locally; the technically trained staff might be hired from a province-wide recruitment area; while the professional and senior executive staff may be drawn from across the nation.

While an organization's existing recruitment area may provide the appropriate boundaries for data collection, there may be situations in which adjustments should be made. Traditional recruitment practices may not include areas primarily populated by ethnic or racial minorities, such as Indian reserves or specific ethnic neighbourhoods.

Conversely, recruitment areas may be overly broad, diluting the numerical impact of target groups concentrated in local or regional labour markets. Comparison of local and wide population patterns may reveal higher levels of availability, depending on which recruitment area is surveyed.

Data from areas with lower levels of target group representation should be used only when there are strong business reasons for doing so.

**Requisite Skills:** Requisite skills are based on the accurate establishment of what constitutes the valid qualifications for the job and level being reviewed. Certification, education, training, and work experience are examples of requisite skills necessary for job performance. Some positions also require academic or professional certification for job entry. Others require only limited training or related work experience. In some cases, the organization provides on-the-job training, and in other cases on-the-job experience provides the skills required for future promotion.

Two sources provide most of the data on requisite skills, occupational data, and educational training data. Occupational data refers to estimates from various sources on the number of workers in various occupational categories. The usefulness of this data depends on how well it corresponds to actual jobs present in the organization. Educational training data refer to graduates or students having or going to have the skills required for identified occupations. Where the skills required are limited or are obtained through on-the-job experience of less than 30 days, population figures are used instead of occupational categories.

A second important issue in establishing availability estimates in terms of requisite skills is the question of experience required for certain jobs. Many occupational groups require specific sets of skills but within the group there are distinct levels, usually determined by required experience. For example, computer specialists include junior programmers, programmers, and senior system analysts. The proportion of female candidates with the requisite skills is quite different for each level. When establishing rates of availability, it is important, where possible, to break down availability by occupational group and level. It is recommended that three levels be considered: junior/entry, intermediate, and senior.

**Sources of Candidates:** Candidates for vacant positions may come from either the organization's internal workforce or from the external labour market. Many employers recognize the importance of establishing career ladders for employees, of tapping first-hand experience in the organization, and of maintaining stability and continuity in human resource management. Thus, positions above entry level will often be filled from within.

When considering the importance of either source to the establishment of an availability estimate, care should be taken to assess the impact on target group representation. Because past practices often result in the present underrepresentation of target group members in most job categories, too heavy an emphasis on internal sources may produce lower rates of availability for target groups than if external sources were used. Conversely, too much weight on external sources in situations where a larger internal pool of target group employees is available may also adversely affect target group availability.

Historical sources for promotion should be examined to ensure that they reflect the most relevant pool and do not exclude other potential sources with greater numbers of target group members.

**Sources of Data:** Acquiring the data outlined above increases in difficulty as skill requirements become more specific, as labour pool areas become smaller, and as certain target groups are considered. The 1981 Census is a key data source, although it does not contain explicit breakdowns by experience, i.e. intra-occupational levels. Yearly reports by gender are available on many educational and training graduates and enrolments. Unfortunately, data on disabled workers and visible minorities are extremely limited.

### iii. Utilization Analysis

Availability data are used in several important steps in the affirmative action planning process. The first use is the undertaking of a **utilization analysis**. As defined earlier, this process involves using availability data to establish expected target group representation or a **utilization standard** for each occupational group and level identified in the workforce analysis. When this standard is compared with actual rates of utilization within a given organization, it is possible to determine where potential problems exist. In other words, it enables an employer to determine the equal opportunity status for each target group and for each occupational group.

In order to undertake this analysis, it is necessary to calculate an appropriate utilization standard based on the factors discussed above.

**The Utilization Standard:** The utilization standard, expressed as a percentage, is the estimated proportion of women, native people, and disabled persons that an organization would expect to have employed in each occupational category and level. In order to establish the utilization standard, occupational data are required defining skills, experience, geographic parameters, and internal/external distribution.

Often several different estimates will result when employees for a specific job are recruited from different

occupational groups. For example, there may be one estimate based on a group's occupational data, one from recent educational graduates, one from promotables, etc. Combining these different estimates to derive a single standard can be done in a number of ways.

One approach is the **incumbent distribution method**. The employer establishes the sources from which it has historically drawn its workforce and uses this current distribution to weight the data from the various potential sources. For example, if half of intermediate-level computer operators are recruited from the outside labour market, the estimate of target group availability from this source is accorded a 50 per cent weight. Similarly if 25 per cent of entry-level management trainees are recent commerce graduates, a similar weight is accorded this source.

This method provides an approach in tune with the employer's own practices. For this reason, it is also necessary to assess recruitment sources used in the past to determine if there are clear areas where other valid sources with higher levels of target group members are excluded or underutilized.

The process for establishing a utilization standard involves, therefore, the following steps:

- determine the general requisite skills, recruitment area, and internal/external distribution for each occupational group and level;
- establish target group availability estimates in each relevant source based on the parameters in step one;
- determine the importance of each source in providing potential employees;
- weight each source identified in step two and derive a single estimate of the utilization standard.

For a number of reasons, occupational and educational data can underestimate the actual availability of potential target group employees. Women, for example, may have been unable to find employment in occupations for which they are trained, or native people may not be given recognition for skills acquired through alternative means. The addition of a **pull factor** can be used to establish an **augmented utilization standard** (AUS).

Numerically, the pull factor is a percentage that is added to the utilization standard to reflect the target group population in a given area. Since women represent approximately 50 per cent of the working-age population in all areas, five percentage points (10 per cent of their representation in the population) may be added to the utilization standard to provide an augmented utilization standard.

The proportion of working-age native and disabled persons in relation to the total working-age population may vary from region to region. The pull factor must then be based on the proportion of minorities available in the recruitment area under consideration. For example, if the native population of Newfoundland, minus Labrador, is non-existent, the pull factor will be zero. On the other hand, if the native population of northern Ontario is 23 per cent of the total population, the pull factor will be 10 per cent of 23, or 2.3 per cent. Statistics Canada census information can assist in determining pull factors for various areas.



## TWO EXAMPLES

The preceding sections have outlined the set of factors used for establishing utilization standards. In order to demonstrate how the methodology would be applied, appropriate data have been gathered on the availability of women for computer programmer and systems analyst positions and on the availability of natives for maintenance workers in northern Saskatchewan.

### Computer Specialists: A Utilization Standard for Women

In this case we are faced with establishing standards for computer program specialists employed by Future Information and Data Services Inc. The positions covered by the specialists have a good fit with the occupations found in the Canadian Classification and Dictionary of Occupations (CCDO) four-digit code 2183. Other data — in this case, Labour Canada Wage Survey data — contain further data breakouts which permit a more refined approach. In particular, data for programmers and analysts can be separated and this data can be further broken down into junior and senior programmers and analysts. Separate data exist as well for colleges and universities. The estimates shown in Table 1 are based on the existence of three levels within the specialist occupation — junior/entry, intermediate, and senior.

With these estimates in hand, it is now possible to compare Future Information and Data Services Inc.'s current utilization rates with the expected rate. Where differences appear, the 80 per cent rule or other measure of statistical significance is used to determine if a potential problem is indicated.

### Maintenance Workers: A Utilization Standard for Native People

In the second example (see Table 2), a utilization standard is required to compare native employment at the Waskesiu Hospital in Lac La Ronge, Saskatchewan, for the unskilled workers in its laundry, cleaning and upkeep, and food-handling areas. None of these jobs requires previous training or experience.

If there are 186 maintenance workers in the hospital and 32 are of Indian ancestry, the utilization rate would be 17.2 per cent. When compared with the standard of 60.4 per cent, clear evidence of underutilization and potential discriminatory impact emerges.

### b) Employment Systems Analysis

Apparent adverse impact is not necessarily a definitive indication of discrimination. Only after the close examination of those employment systems and practices responsible can the presence of conscious or unconscious discrimination in the recruitment, hiring, promotion, training, or compensation of these groups be determined. The examination of the responsible system relies on the determination of the validity — business necessity — of those policies, actions, or practices producing the problematic result.

This section reviews the basic steps in the employment system analysis, the key in determining what causes the imbalances revealed in the workforce review.

#### 1. Human Resource Management and Employment Systems

Every organization, whether public or private, profit or non-profit, requires both capital and human resources to achieve

its objectives. It is an essential yet simple concept that employees make and carry out decisions concerning all organizational resources. They conceive the ideas that give an organization purpose, determine how resources are combined to produce a physical product or service, and carry out the steps required to ensure that the desired end product is realized. Ironically, human resources are probably the most complex and unpredictable of all the factors of production. Yet, as we have seen in Section II, the priority given the management of human resources has only recently received the attention it deserves.

Images of high-tech revolutions, of robotics, of microchips, and informatics should not obscure the productivity implications of the effective management of labour. Human resources still, and will for some time to come, represent a substantial investment for an organization. Salaries and wages are the largest expenditure in most organizations; this is particularly true in the dominant and rapidly expanding service sector. Equally important, as the complexity of production increases, tumbling forward with apparent need for instant adjustment and restructuring, the potential implied cost of human inefficiency increases. The importance of effective management of human resources increases rather than decreases as the value and significance of capital increases.

An organization's employment systems are made up of the policies and procedures an organization adopts, as well as the activities it undertakes to develop and manage its human resources. The goal of the employment system can be identified as the maximization of human resources in order to achieve organizational effectiveness.

Within the overall employment system are sub-systems consisting of the various employment processes. These sub-systems may be formal or informal; they consist of policies and practices that evolve over time and affect all present and potential employees. This evolution may be the product of conscious evaluation and change based on an awareness of new demands or on a succession of small adjustments made without any overall idea of change. Whatever the process, the potential for discrimination or disparate impact against target group members exists at every action point in the system. Where a problem exists, therefore, each action must be examined in this context.

Although the employment systems of individual organizations vary in sophistication and underlying philosophy, they share certain components. All organizations perform essential tasks such as defining and establishing jobs, recruiting and hiring employees, evaluating and promoting staff, establishing working conditions, and compensating employees. In sociological terms, there are functions that must be carried out in order to operate. Therefore, all organizations, large or small, have such systems whether or not they have been formalized and whether or not they have been consciously and consistently applied.

In their design and operation, employment systems fulfill and integrate two basic functions:

- acquire human resources in line with the needs and priorities of the organization;
- manage and develop human resources in accordance with overall corporate philosophy.

TABLE 1

| CS Group and Level | Data Source*                             | Target Group Availability | Source Weight** |      |   | Availability Weight |
|--------------------|------------------------------------------|---------------------------|-----------------|------|---|---------------------|
| Junior/Entry       | a) Labour Canada—Junior Programmer       | 38.1                      | X               | 55.6 | = | 21.2                |
|                    | b) University Grad (1980)                | 24.9                      | X               | 11.1 | = | 2.8                 |
|                    | c) College Grad (1980)                   | 44.3                      | X               | 33.3 | = | 14.8                |
|                    | Single Availability Estimate Pull Factor |                           |                 |      |   | 38.8% + 5.0         |
|                    | AUS                                      |                           |                 |      |   | 43.8%               |

\* Internal availability is not included in this example.

\*\* Source weight is determined by existing F.I.D.S. Inc. recruiting sources, i.e., 55.6% came from the labour market and 44.4% from postgraduate recruitment (75% community college, 25% university).

| CS Group and Level    | Data Source                                | Target Group Availability | Source Weight | Availability Weight |
|-----------------------|--------------------------------------------|---------------------------|---------------|---------------------|
| Intermediate (CS-2&3) | a) Labour Canada (1980)                    | 22.0                      | X .80         | 17.6                |
|                       | -Jr. Syst. Analyst                         |                           |               |                     |
|                       | -Sen. Program.                             |                           |               |                     |
|                       | -Sen. Syst. Analyst                        |                           |               |                     |
|                       | b) Com. College/University Grads (1976)*** | 30.0                      | X .20         | 6.0                 |
|                       | Single Availability Estimate Pull Factor   |                           |               | 23.6% + 5.0         |
|                       | AUS                                        |                           |               | 28.6%               |
| Senior (CS-4&5)       | a) 1971 Census                             | 14.4                      | X .80         | 11.5                |
|                       | b) 1971 University/College Grads***        | 25.1                      | X .20         | 5.0                 |
|                       | Single Availability Estimate Pull Factor   |                           |               | 16.5% + 5.0         |
|                       | AUS                                        |                           |               | 21.5%               |

\*\*\* Based on the assumption that a reasonable proportion of graduates in a rapidly expanding field would fast-track.

TABLE 2

| Occupation and Level | Data Source                                                     | Target Group Availability | Source Weight                            | Availability Weight |
|----------------------|-----------------------------------------------------------------|---------------------------|------------------------------------------|---------------------|
| Maintenance level 1  | a) Census, Demographics—working-age population recruitment area | 68                        | X .70 =                                  | 47.6%               |
|                      | b) potential transferable                                       | 20                        | X .30 =                                  | 6.0%                |
|                      |                                                                 |                           | Single Availability Estimate Pull Factor | 53.6% + 6.8         |
|                      |                                                                 |                           | AUS                                      | 60.4%               |

Certainly, the overall system for acquiring and developing human resources does not exist apart from other corporate priorities and activities. It is, in fact, largely shaped by the overall climate or philosophy of the organization and the decisions that flow from this.

The key elements of an employment system are job identification and evaluation, recruitment, selection, training and development, upward mobility, wages and benefits, working conditions, terminations and layoffs. Any of these sub-systems, or the practices of which they are constituted, can operate to exclude or adversely affect target group workers. When a workforce analysis reveals disparities, an in-depth analysis is required.

## II. A Systems Analysis for Discriminatory Impact

The review of employment systems in the affirmative action process is designed to identify why apparent underutilization exists. It is to identify problem causes. How comprehensive this analysis should be will be a function of the outcome of the workforce audit. The broader the evidence of exclusion or underutilization, the more extensive will be the systems review.

Where a potential problem exists, there are a series of four steps in the analytical process:

1. a full outline of what practices constitute the system. This includes not only those contained in corporate manuals or are official policies and procedures but also informal practices reflecting how things are "really" done;
2. a determination of which of these practices contributes to the imbalances through adverse impact on target groups;
3. a review of the problematic practices for their legality and consistency. Legality refers to clearly discriminatory distinctions vis-à-vis human rights legislation, while consistency refers to whether a policy or a practice is applied in an equitable manner. This analysis is designed to identify intent discrimination and those practices prohibited by legislation/regulation (e.g., ille-

gal medical requirements) or open to abuse because of overly vague and subjective standards;

4. determination of the validity of those practices contributing to imbalances for systemic discrimination.

The method described above for identifying underutilization within the occupational groups and levels of the organization can be applied to the specific procedures of the employment systems. This involves a quantitative analysis of the effects of the systems.

The impact of each function on target group members is compared to the impact on other members of the workforce. In other words, one seeks those practices having an adverse impact on target group workers, hence contributing to identified imbalances. Adverse impact as a statistically measurable unit is usually expressed as a percentage. The practical statistical standard that serves as a test of adverse impact is the 80 per cent rule.<sup>10</sup> This rule means the impact of a practice or process on target group members should be within 20 per cent of the impact on other individuals. Specifying a 20 per cent margin rather than a higher degree of conformity allows for random chance variation and differing employment conditions. More precise measures may also be used, especially where small sample sizes exist.

Stock data, used in the workforce analysis, provide a snapshot at one point in time. For systems analysis, flow data, which describe in numerical terms the results, over time, of specific employment systems, are used. Examples include the number of women selected, terminated employees by sex, or the percentage of target and non-target group employees receiving training.<sup>11</sup>

Sophisticated human resource management systems are often able to provide extensive flow data, including rapid analysis for adverse impact if computerized. Not all organizations, however, have such management systems, either because of their size or because of the relatively recent adoption of human resource management techniques. In addition, useful data may not be available because one system may have excluded target group workers prior to the second system having an impact. For example, if recruitment systems have excluded native people's applications, the



impact of selection criteria may not be immediately available. It is useful, therefore, to distinguish between observed and imputed adverse impact. The first refers to cases in which comparisons actually exist: 10 per cent of women have met the requirement for developmental training compared with 20 per cent of male staff. The second refers to cases in which general group attributes are used to impute the outcome: a Grade 12 requirement for employment will adversely affect native people because of differential education attainment rates between natives and non-natives.

In summary, while looking at specific employment practices, adverse impact analysis focuses on the relative success, observed or imputed, of target group applicants or employees when compared to other employees.

With adverse impact identified for individual practices, the next step is to ensure that overt discriminatory causes are identified. In some cases it may be clear that a practice — usually not a written policy — exists that explicitly excludes certain groups, e.g., no women are sent on overseas assignments. More likely there will be vague and subjective criteria that, while not clearly exclusionary, may well permit decisions to be made that negatively affect target group worker success, e.g., "sales staff should be neat and acceptable to our clients". Vague and subjective criteria are one of the most common problems found in problematic employment systems. The difficulty is drawing the line between the potential for discriminatory actions and the need to permit reasonable flexibility for a trained human resource specialist or manager.

Determination of systemic discrimination is the final step, and this requires the establishment of business necessity based on validity and the lack of suitable alternatives. A detailed outline of this process was reviewed in Section III.

### **iii. Conclusion**

At this point in the process, the review structure will have completed the assessment phase of the affirmative action planning process. Depending on the completeness of the data, the sophistication of the diagnostic tools used, and the nature of problems present, the organization can be confident that it now has the base analysis on which to develop an effective and efficient response. Some changes will be required immediately; others will result simply as an outcome of the investigative process itself. The next section, however, looks at how a more systematic plan of action is developed and implemented.

### **3. Step Three: Plan Design and Implementation**

After completing the workforce audit and the employment systems analysis, the affirmative action review structure can begin developing an affirmative action plan. The plan has as its primary goal a change in the existing overall employment distribution. Like all corporate objectives, results are of paramount concern.

The decisions made by the affirmative action review structure in designing the plan will reflect the objectives, resources, structure, and management style of the particular organization. Decisions will also be influenced by the economic environment and the situation in the industry as well as the particular economic situation and growth projections of the organization. Certain characteristics, however, are common to all effective affirmative action plans.

These include the development of goals and timetables, the replacement of discriminatory practices with alternative non-discriminatory or "neutral" systems, the implementation of special measures designed to remedy the effects of past discrimination, and the development of an effective ongoing monitoring system. Finally, an implementation strategy is carefully developed in order to ensure a minimization of conflict and maximization of cooperation.

#### **a) Goals and Timetables**

The development of goals and timetables is an essential element of any corporate business strategy or project. They are required in order to ensure that change takes place and that the plan or strategy becomes part of ongoing corporate management, hence part of the accountability framework. Affirmative action is no different.

The question of when goals are established is open. On the one hand, it can be argued that goals should be based on the key action elements of the plan, i.e., neutralizing and special measures; on the other hand, it can also be argued that goals should be based first on an assessment of promotional, hiring, and training potential, and corrective/remedial measures should be designed in order to meet these goals. A "dialectical" approach is probably the most suitable. Goal estimates should be developed and used in designing changes and should be reassessed and adjusted when changes have been developed.

As with all other organizational goals, the implementation of affirmative action goals stems from a statement of policy and must be integrated into the overall organizational plan. Thus a goal must be specific and operational in nature to be measurable. There are two types of goals: process goals and bottom-line goals. The latter may be further broken down into operational and strategic goals.

**Process goals** refer to a timetable for implementation of strategy elements necessary to affect changes in target group utilization. For example, a one-year goal might be set for providing cross-cultural management training to all first-line supervisory staff or the start-up of special recruitment teams by a certain date.

**Bottom-line goals** refer to numerical targets for target group utilization in specific jobs and levels and for their participation in training, etc., programs. Short- and medium-term goals — up to three, four, or five years — are integrated into the organization's operational planning framework, while long-term goals form part of the strategic plan.

Bottom-line goals are the real measure of success, for they track whether or not the position of target groups is improving. Process goals, however, cannot be ignored, for they are the means by which the organization can monitor the changes it is making. When bottom-line goals are not made, the first step is to assess whether process goals have been achieved.

Process goals are also important in an economic environment where employment growth is slow and the workforce population is relatively stable. It may be some years before real changes in bottom-line utilization begin to appear. In this case, process goals measure progress in implementing the required structural changes. They give direction and ensure that the groundwork for future change is being laid.

Clearly, goals are tied to a timetable. Indeed, process goals may be defined as a series of time measures for changes in systems and practices. Accountability for the achievement of goals must be assured; responsibility for achieving goals must flow from the accountability chain already utilized by the organization. Managers responsible for implementation should be evaluated on their effectiveness in reaching those goals within given timeframes.

Bottom-line goals are a function of target group worker availability, projections of future employment trends in the organization, and special measures implemented to remedy past imbalances. The long-term quantitative objective is to reach proportional representation of target group workers, given requisite skills. The parameters for annual or short-term goals will depend not only on availability but also on attribution rates and employment growth. It is clear, therefore, that forward human resource planning and succession planning are necessary if goals are to be realistic estimates of what the company can achieve.

Within the parameters set by the net number of staffing actions expected, goals can be set that reflect the impact of special measures. For example, if the expected rate of transactions for the year is 30, a minimum hire of six would be the goal, given local availability. A special recruitment drive on the local reserve, however, might increase the number of qualified native applicants, making a goal of 10 native hires reasonable.

Clearly, goals cannot be established and used as a management tool without regard for the severe limits to precision and the possibility of different futures from those on which they were originally based. For these reasons they must be flexible and open to change as circumstances warrant. Finally, goals are not quotas. The latter may be defined as the setting aside of a specific number of jobs, training spots, etc., for the exclusive use of target group members; goals are estimates of expected outcomes given knowledge of availability and the outcomes of special measures. They are tools allowing for impact assessment and adjustments where necessary.

#### **b) Equal Opportunity — Neutralizing Employment Systems**

The first step, following preliminary determination of numerical goals, is to ensure that the employment policies and processes identified as sources of discrimination are replaced by others neutral in their impact. A fully neutral system will produce results in proportion to labour market availability. But this is a very narrow definition, appropriate only for low-skill occupations. A neutral employment practice for our purposes, therefore, is one that does not have an adverse impact on any particular group other than for valid reasons of business necessity.

The level and complexity of actions required to ensure complete equal opportunity based only on merit and business need will vary widely. In some cases it may simply involve the removal of a selection requirement, such as Grade 12 for entry positions, because it was found to have an adverse impact on native applicants and has no predictive capability for work performance. In other cases it may involve expanding or changing current practices involving

moderate corporate action. For example, a modified advertising campaign might be required in order to ensure that recruitment information is channelled through ethnic and native publications. Finally, very broad, complex changes may be required to such systems as pay and benefits or to the tests and selection standards used to hire and promote employees. The nature of the changes and adjustments will depend on the size of the organization, the nature of its business, the sophistication of its systems, the types and breadth of the occupations involved, as well as the organizational constraints imposed by available resources.

The process of designing new or adjusted systems is based on standard practices of good project management. The basic objective of the practice or system is articulated, resource and organizational constraints are determined, options within the parameters of these constraints are identified, the validity of their outcomes and their equal opportunity impact are assessed, and decisions are made on the best options. Application of these generic precepts should result in rational employment practices with a minimum of adverse impact.

#### **c) Remedying Past Effects: Developing Special Measures**

In the last section, the development of alternative, neutral policies and practices was reviewed. The objective of neutralizing these systems is to remove invalid barriers, which have the effect of limiting the participation of certain groups in the labour force. Removing such barriers in present policies and practices will assist target group members to gain access to jobs in the future but will not address the issue of the continuing effects of past discriminatory practices.

The simplest situation is where there is heavy underutilization of target group workers, given their availability with requisite skills. Over time, with turnover and expansion, a more equitable distribution will emerge. But the time it takes to reach this point may be exceedingly long, depending on the degree of underutilization and the amount of expected hiring. The situation may be compounded, however, where discrimination at one point has an impact on availability for higher-level positions or training. For example, discriminatory barriers for women to the "fast-track" system in one company resulted in few women being in the promotion system. Changes to the entry requirements permitted more women to enter but, because of past discrimination, it would be some years before there would be women available for appointment to senior management.

An affirmative action plan, therefore, also includes special measures that speed up the increases in the level of utilization of target group members. These measures are to remedy the effects of past discrimination as well as to alleviate problems that have an impact upon a worker's ability to get and obtain a job. Reflecting these two objectives, special measures are of two kinds: remedial measures and support measures.

##### **1. Remedial Measures — Correcting Past Effects**

Remedial measures are the most controversial aspect of affirmative action planning. They provide a preferential benefit to a designated group for a temporary period of time in order to redress employment imbalances stemming from past discrimination. These measures are intended to hasten

the rate of change in the status of target groups. Because they are remedial, these measures are of specific duration and are not permanent changes to the organization's employment practices.

The preferential nature of remedial measures is the source of controversy over their use. But the types of measures used vary widely and the degree of acceptance is different, depending on the nature of the preference. For example, the establishment of a training program limited only to target group workers represents, in fact, a fully exclusive quota system. Such strong action, while extremely effective if handled well, often results in controversy. Other actions, however, are less prone to charges of "reverse discrimination". The formation and use of special recruitment teams to ensure a suitable flow of target group applicants provides a special benefit to the selected group which is not available to the population as a whole. It is less likely to lead to objections than the first example.

The type, complexity, and duration of the remedial measures in an affirmative action plan will be a function of the problems identified and the resource constraints of the employer. They must be assessed with an eye on the goals that the organization wishes to achieve.

The Canadian Human Rights Act and human rights legislation of most provinces and territories specifically sanction such special programs. Challenges, therefore, to affirmative action remedial measures on the basis of reverse discrimination are not possible for sanctioned plans in most Canadian jurisdictions. Most provinces require, however, prior approval of affirmative action plans by the appropriate human rights commission.

## **ii. Support Measures**

Support measures are systems or programs designed to alleviate particularly significant employment problems that specifically affect target groups. Unlike remedial measures, however, support measures are usually open to all employees experiencing the same employment problems. In most cases, support measures represent permanent changes to an organization's employment practices. An example includes providing a comprehensive job information and career counselling service. While such a service benefits target group workers who have been denied, through past social patterns, appropriate career path planning, it also assists other employees who have lacked opportunities in the past.

The type and number of such services that should be included in the plan will again vary, depending on the resources available to the organization. On the whole, support measures are designed to deal with problems not the direct result of barriers present in the company. They respond to barriers caused by the past or present failures of other social institutions to provide effective services. Notwithstanding this fact, support programs are not simply "good will" gestures by employers. On the one hand, they may well improve the overall performance of the company's workforce; on the other hand, they must be measured against other services and benefits supplied by an organization that has traditionally served the non-target group workforce.

## **d) Managing Change — Developing a Monitoring System**

Effective monitoring is important for the success of any major project; for one involving major organizational change, it is essential. In affirmative action implementation, monitoring allows the affirmative action manager and senior executives to:

- evaluate progress toward goals;
- assess where success is being achieved;
- identify needs for corrective action or adjustment.

Monitoring entails analysis of both statistical indicators of the status of target group members in the organization and progress in the implementation of policies and practices that have a bearing on equal opportunity employment. In other words, both process and bottom-line goals provide the key starting point for effective monitoring, i.e., clearly defined and measurable outcomes.

The generic components of a monitoring system include:

- a clear statement of the objectives to be achieved;
- the establishment of measurable indicators with a valid relationship to objective attainment;
- implementation of mechanisms for collecting data;
- establishment of expectations and effective communication to program managers;
- periodic data generation for review and assessment;
- establishment of procedures for responding quickly and appropriately to implications derived from monitoring reviews;
- implementation of a system to feed back information to those generating the data.

The main sources of the kinds of information and data needed to develop and implement useful monitoring include:

- the organization's affirmative action policy;
- flow data on recruitment, selection, training, transfer, and terminations;
- status reports on progress on system restructuring and on implementation of special measures;
- personnel records on pay, benefits, job classification, etc.;
- system data on tests, performance evaluations, selection, grievances, and counselling;
- periodic surveys on the impact of the organization's affirmative action plan, including employee opinions of its success.

## **i. Monitoring Bottom-Line Goals**

Monitoring bottom-line goals will provide concrete evidence on whether change is taking place. These goals can be broken down into primary and secondary goals for the purposes of monitoring.

**Primary goals** refer to changes in the utilization rates in occupations and levels where target group members are underutilized. For those goals, periodic reports on stock data using workforce analysis formats are required. The appropriate schedule for these reports will be a function of the amount of activity expected. A company with strong employment growth and/or turnover may need quarterly or bi-annual reports, while less active employers may need to review changes on a yearly basis.



**Secondary goals** refer to changes in rates of target group involvement in key employment practices. Achievement of these goals is required in order to reach the primary, bottom-line goals. In order to monitor these goals, flow data are required, similar to those used during the systems analysis. Flow statistics chart workforce characteristics by employment transaction and by outcome. They are monitored to ensure that adverse impact is being avoided and to measure the impact of any special measures.

In particular, flow data may be used for the following purposes:

#### **Recruitment, Application, and Selection (Hire) Flow**

- determining statistical impact of changes to recruiting and selection systems;
- monitoring entry-level pay practices;
- analyzing referral sources and selection success rate of target group members.

#### **Promotion and Transfer Flow**

- determining statistical impact of changes to promotion and transfer systems;
- observing the movement of target group members into non-traditional occupations.

#### **Training Activity Flow**

- analyzing the overall impact of training policies on target group employees;
- analyzing the relative utility of training for target group members in terms of post-training job progression and pay;
- analyzing the distribution of target group members in job-related and in developmental training.

#### **Termination Flow**

- analyzing the overall impact of termination policies and patterns on target group workers;
- investigating the relation between occupational distribution of target group workers and termination patterns;
- monitoring the impact of seniority on target group terminations;
- observing the impact of non-job-related considerations on target group terminations.

A data information system capable of capturing all of the potentially useful flow information will be fairly sophisticated. The size of the organization and the resources it has available will determine how complex and complete the monitoring system can be. During the analysis stage, most employers — even larger organizations — will find gaps in the available employment information. It is important, therefore, that consideration be given to developing or modifying existing data collection systems to fill these gaps. As new systems are developed, it should be standard practice to ensure that these systems are able to provide target group/employment information.

Costs will vary with the organization, but these costs should be viewed in light of the value of this information. Its uses exceed just the boundaries of affirmative action; rather, flow data provide the basic tool for effective human resource management.

## **II. Monitoring Process Goals**

Process goals are a series of actions to be undertaken attached to a timetable. In order to be effectively monitored it must be clear who is responsible and accountable for carrying out the necessary steps. This may be done by a series of instructional memoranda, by inclusion in management contracts or by whatever mechanisms are usually applied in the organization. Often, one set of goals can only be achieved if another has been reached. Organizations capable of sophisticated planning may use a critical path approach.

Whatever the specific tools used, it is important that regular reviews be undertaken and reported to senior management. Quick action where progress slippage is found will provide an invaluable message from senior management vis-à-vis the status of the affirmative action plan within the overall framework of corporate priorities.

## **III. Monitoring and Feedback**

Monitoring has been defined as the regular review of outcomes in relationship to corporate goals. Feedback involves the broader concept of ongoing, two-way communication. The breadth of organizational change under way, the potentially emotive impact of significant adjustments in human relationships, and the stress involved in working toward major goals all require a corporate ear fine-tuned to the work environment. For this reason it is important that an atmosphere of open communication be achieved.

At the basic level is the feedback of information and conclusions derived from the monitoring process. Not only must it be forwarded upwards to senior management, it must also be shared with all managers at all levels and with the workforce as a whole. In addition to this basic information sharing, mechanisms are needed to ensure that dissatisfaction, criticisms, or general comments can be expressed and handled. Effectively implemented, such a network will avoid the build-up of resistance and identify blockages not immediately apparent through the monitoring system. It must also be backed up by a capability to reward, support, and communicate news of successful behaviour.

## **e) Managing Change — An Implementation Strategy**

Throughout this document it has been emphasized that affirmative action, and the human resource management implications it implies, is best understood in the language of organizational change theory. A starting premise is that while "change" may be inevitable, a positive reaction to the idea of change by those in the organization is not. As Barry Hersh has written:

*After individuals have been in a job for a length of time, they begin to feel "comfortable" with doing things a certain way even if they "do not like" how those things are being done. It has been said that we both love and hate change — what we'd really like is for everything to stay the same but to get better. (CTM: The Human Element, Feb., 1982, p. 19.)*

Affirmative action as change goes even further than those things that have become habit. Change may involve a radical reassessment of deeply held sex roles, racial stereotypes, and concerns about disability, reinforced by years of socialization. These attitudes overlie and permeate those relationships that arise most directly from our employment situations.

If our goal in managing change as an organization is to ensure that change is effective (objectives met) and efficient (time and money), it is necessary to understand why people resist. Hersh has developed a convenient checklist:

1. Fear of the unknown.
2. Lack of correct information.
3. Fear of loss of security.
4. Fear of loss of status — power/authority.
5. Stubbornness or laziness.
6. Poor method of presentation:
  - a) not keeping everyone affected by the change informed at the same time.
  - b) not keeping individuals not directly affected by the change informed.
7. Not involving the individuals directly affected by the change, making a change based on personal perception of problem, or making a change based on input from a very small percentage of those affected by the change.
8. Lack of motivation to change (e.g., actual lack of rewards; perceived lack of rewards).
9. Lack of understanding or rationale for the change.
10. Habits are hard to break — values and accepted practices are built up over the years.
11. Lack of trust or acceptance in the person or work unit making the change.
12. Loss of friends (e.g., organizational splits or divisions (pages 19-20))

While the language may differ from theorist to theorist, these 12 points represent a reasonable summary.

An effective implementation strategy will involve undertaking activities designed to minimize these barriers. For our purposes, such a strategy is based on four action requirements:

- i. mutual ownership of the problem and its solution;
- ii. clarification of risk;
- iii. open communication systems;
- iv. clarification of reward.

#### **i. Mutual Ownership of the Problem and Its Solution** (See numbers 7, 9, and 11)

Clearly, this requirement takes us back to our discussion of appropriate review structures. A good implementation strategy begins not once the affirmative action plan is developed but at the very beginning of the investigative process. To the extent that a broad base review committee can still only represent the diverse elements of the organization, it is important that as many individuals as possible play a role in the various aspects of the diagnostic and development stages. In discussing the success of quality circles in the Japanese context, Hisamichi Kano has written:

*...in Japan, because of the teamwork involved in any organization, even the smallest business operates on the basis of plans which call for weeks and maybe months of study and discussion at all levels of management. The process of plan formulation actually creates, through participation, a concrete and detached image of what is to be expected. Also, this process to us is a way of meshing individual effort and performance with company*

*(and also national) objectives. It is as much a social as it is an economic or business process. (The Future of the Corporation, edited by Herman Kahn, Mason and Lipscomb, New York, 1974.)*

The degree to which this shared ownership is forged will determine the level of trust, understanding, and cooperation achieved.

The review structure and the use of joint task groups from the start is important. Once implementation of changes begins, it is equally important to sustain this visible cooperation between all groups. How this will be done is one of the first considerations in an implementation strategy.

#### **ii. Clarification of Risk** (See numbers 1, 3, 4, 12)

All change involves some risks. An affirmative action plan may negatively affect some in the short term as past effects of discrimination are remedied; those who owe their position in part to the exclusion of target group workers will face stiffer competition for rewards such as promotion, training, and benefits. Target group workers may fear or resent being singled out for special attention. But it is also a basic principle of affirmative action that existing non-target group employees may not be dismissed or demoted as part of a plan. Rationalization of employment systems will, on the whole, affect all employees positively. Many systems and practices that in the past have created frustrations, even resentment, because they have lacked general fairness or appearance of job relatedness will be removed.

As part of the preparation of an implementation strategy, a detailed, if not exhaustive, delineation of potential staff concerns should be developed. Each should be honestly assessed with actual risks identified and phantom risks explained. During implementation, appropriate teams led by respected co-workers should be prepared to answer honestly fellow employees' questions and address lingering fears or resentment.

#### **iii. Open Communication Systems** (See numbers 2, 6, 9)

Effective communication systems should emerge from the start of the diagnostic phase. Throughout the planning process, management should periodically assess effectiveness and seek to fill gaps or make adjustments as necessary. Communication must be two-way. In other words, it must avoid making pronouncements and must encourage honest feedback.

Having reached the implementation stage, it is timely to sit back and assess critically how successful current systems and procedures are in meeting needs. In the context of the optimum situation of shared ownership and risk clarification, a communication strategy should be outlined, resources determined, and operational principles articulated. Some key points for consideration are:

- What information must be communicated and fed back?
- What is the current environment vis-à-vis receptiveness to information?
- Who are the key people or instruments for reaching various groups?
- What is/are the most appropriate language and vehicle for reaching different audiences?

#### **iv. Clarification of Rewards** (See numbers 5, 8, and 10)

The other side of clarification of risks or costs is the clarification of rewards. As already indicated, it is possible to argue that affirmative action will eventually benefit all employees. This section, however, is primarily concerned with the clear articulation of management responsibility and accountability.

Accountability first suggests risk for the manager; non-attainment of goals will result in sanctions. But corporate accountability systems are based on rewarding good performance as well as punishing failure. It is for this reason that a key part of the implementation strategy is to ensure that affirmative action goals are integrated into the overall management evaluation framework. This is required for two reasons.

First, successful achievement of goals should be rewarded the way other goal attainment is rewarded. Affirmative action objectives take their place among other corporate priorities. Second, integration ensures that managers are not led to achieve bottom-line goals at the expense of other goals through inappropriate hiring or promotion. Productivity goals, for example, cannot be met if target group employees are hired who lack the valid requisite skills. In the long run, this avoids charges of "affirmative action failure" as serious human resource problems emerge with target group performance.<sup>12</sup>

#### **4. Step Four: Implementation**

The process of implementation of the carefully structured affirmative action plan is, not surprisingly, the concluding step. When appropriate, the plan is referred to the federal, provincial, or territorial human rights commissions for review and, if required, for approval of its remedial measures. Otherwise, the action plans for changing systems, for implementing various special measures, and for ensuring cooperative, conflict-free implementation are activated. Periodic formal reports will be tabled at senior management meetings, with governing boards, or, in small companies, with the company president. Periodic and annual reports on the company affirmative action program will also be circulated throughout the organization.

Individual feedback will be provided to department heads, through meetings to review annual goals and through documentation of results in department reviews. Meetings can be used both to provide advice and assistance in assessing or redefining goals and to take corrective action where goals are not being met. Meetings will also be called when apparently discriminatory actions occur or when monitoring reveals a pattern of unequal treatment.

In reality, the dawn of implementation will, in many cases, be less precise. Changes in systems will often begin as problems are identified, and managerial competition to show results will invariably surface once senior management commitment is clear. This will require the senior executive officer responsible for affirmative action to ensure that these actions do not interfere with the more systematic overall planning process. Some immediate change is healthy. Clear human rights violations will have to be acted upon quickly. Improvements in target group utilization will reinforce perceptions of management's commitment. What must be avoided is the replacement of problematic systems with other systems not properly validated. In addition, sudden changes or poorly

planned hirings of target group employees may negatively affect efforts to gain organization-wide support for the objectives and the planning process under way.

With implementation, results in terms of utilization will take time and will depend on the key variables identified above. It is important to realize the long-term planning and implementation horizon of affirmative action. Concentrated activity to change systems and create special measures will give way after the first one or two years to a steady pace of monitoring, assessment, and adjustment. To survive this transition, including possible waning of initial enthusiasm and/or changes in key personnel, the successful integration into the corporate strategic planning framework is required. American experience suggests this is both possible and a direct benefit to the company's performance potential.

#### **C. Alternative Approaches for Achieving Results**

The detailed planning approach outlined in the previous section is not meant to be taken as a rigorous model, deviation from which will necessarily result in failure. It does incorporate many of the most important principles of change management and some of the specific tools that can be used to facilitate the process. Affirmative action, therefore, involves a basic problem-solving approach but allows for flexibility based on the needs, resources, character, etc., of the organization.

The four major steps and various sub-steps make up what is usually referred to as the "affirmative action planning process". Even this general approach may not meet the particular needs of some employers. This section briefly outlines how adjustments can be made to accommodate one specific situation: project-based employment in non-traditional occupations.

Steps for a standard affirmative action plan are based on the premise that there is an existing workforce situated in an operating plant, office, etc. This premise does not hold for what we call project-based employment, which is characterized by:

- the lack of an existing workforce — workers are hired for the term of the project or contractors supply groups of workers for specific components of the work to be done;
- a fixed employment term — work is not permanent and is fixed by the term of the project or the term required to complete a component of the project;
- a predominance of non-traditional occupations — while not necessarily a condition, project employment often involves unskilled or skilled occupations that have traditionally had no or very low utilization of target groups.

To accommodate such an employment situation, an alternative approach is required. One such approach is called Special Affirmative Measures (SAM) plans.

##### **1. Special Affirmative Measures (SAM)**

The Special Affirmative Measures approach evolved from the requirement for operators seeking exploration agreements under the Canada Oil and Gas Lands Act (COGLA) to develop strategies for ensuring target group employment. Analysis of existing workforces did not make sense because although large, existing oil companies were undertaking the work, exploration projects did not use company employees. In addition, virtually no target group workers held the valid



prerequisites for jobs above the entry level. In response, an alternative, four-step approach was developed.

**a) Step One: Profile of Occupations, Minimum Requirements, and Training Potential**

The first step is to develop a complete profile of the occupations required during the project, the number of jobs, and the minimum requirements in order to fulfil the duties of the job satisfactorily. Lines of progression are determined in order to accurately determine experience and skill requirements for jobs with higher skill levels. Entry-level jobs requiring no previous experience and lower-level jobs for which target group workers could be trained prior to start-up are identified. Longer-term training, which could be carried out over the length of the project, building on the increasing availability of target group trainees as they gain experience, is also identified.<sup>13</sup>

The identification of entry-level positions will be extremely important.<sup>14</sup> Entry-level occupations are those in which, according to the Canadian Classification and Dictionary of Occupations (CCDO), an employee is able to reach full proficiency on the job within 30 days. Safety requirements, however, may necessitate that all such positions, e.g., roustabouts, cannot be filled without previous off-shore experience. These positions provide the key starting point for entry into the occupations utilized by the project.

Clearly, the nature of the planning process is different from the standard affirmative action approach. While senior management commitment and accountability remains operative, major responsibility will lie with the project planning team.

Experience to date indicates that companies will create special units to deal with governmental demands for socio-economic planning or, as it is called under COGLA, Canada Benefits. While such an approach generally ensures that resources are dedicated to the program, it does not ensure effective integration of the program into other areas of the organization's planning system. The same careful articulation of visible commitment is required in order to ensure that an effective base is established for the plan.

Involving outside target group representatives from the communities affected by the project is an important step. These representatives can become significant team members, helping to question time-honoured assumptions, to provide invaluable information on available workers, and to ensure effective and accurate communication with the community at large. Most projects of this nature will use contractors to supply some or all of the employment required. Unions may also play an important role, either through their presence in a contractor's workforce or as the key supplier of workers, i.e., union hall hiring systems. For these reasons, a mechanism for involving both these groups should be created.

At the conclusion of step one, the operator will have:

- identified all the occupations to be employed, the number, and the duration of employment;
- the valid minimum requirements for each occupation as well as necessary progression lines to higher skill positions;
- those jobs that are entry level or those for which training can be supplied prior to start-up;

- the training experience profile for skilled jobs, including what is required to move target group workers from entry level to those positions given the length of the project;
- estimates of target group workers available for both entry positions and for skilled jobs.

This profile provides the basis for the remaining steps.

**b) Step Two: Employment and Training Goals**

Based on the profile completed in step one, appropriate annual goals are drafted for both employment and training.

Employment goals are first developed for entry-level positions for the first year. They are based on the estimate of jobs and the estimate of available target group workers. In subsequent years, as target group employees gain experience, the number of total target group workers in the occupation can increase. Within two years, the percentage of target group workers in entry or low-skill jobs should approximate their availability in the labour market. Goals for higher level jobs will depend on several factors. For those jobs where experience is the main source of skill achievement, estimates can be made based on entry-level goals. The expectation will be that a proportional number of target group workers will be promoted as they gain experience. For those where training is required, goals for eventual employment will depend on the amount of training the operator is required or is willing to undertake.<sup>15</sup>

The length of the project and the complexity of the training will be key parameters. Training goals will be a function of both the training carried out and the availability of target group workers with the requisite experience/skills to enter the training. If the operator identifies, in step one, training opportunities and then implements suitable programs, it should be possible to bring some target group employees on stream at semi-skilled and skilled levels by the end of the project.

**c) Step Three: Measures to Achieve Goals**

The third step is to develop those measures required to reach the employment and training goals. The initial step of establishing occupations and minimum requirements should already have involved the operator in establishing valid requirements and, hence, in removing barriers created by inappropriate experience and skill standards. Still, it is useful to see step three in two parts: the first involves removing all discriminatory barriers, while the second covers the development of special affirmative measures designed to actively recruit target group employees.

Removing discriminatory barriers involves the basic reviews outlined in the affirmative action process to determine practices or systems adversely affecting target group utilization. On the offshore, this has involved such things as adding appropriate accommodation to drilling rigs and marine vessels, establishing recruiting services in local communities, and ensuring that recruitment information portrays an open approach to the sex and race of the workers being sought.

Special affirmative measures are designed to actively recruit target applicants, provide employment support systems in non-traditional environments, ensure required basic training and orientation as well as more advanced skill training, and adapt employment systems to meet the specific

needs of particular target groups. The nature and extent of the special measures will be a function of the goals set, which themselves are a function of the length, size, complexity, etc., of the project. Special affirmative measures may be the outcome of a need to correct the effects of past discrimination or they may also be required for doing business as established by government regulation.

In the offshore, a number of innovative measures have been used. Northern projects have used CEIC Native Outreach Projects as the first step in the recruitment process; operator planners have undertaken the development of human resource inventories and then worked with officials in the local communities to recruit workers and supply support systems; special training of managers has been undertaken to increase awareness of cultural factors. Other measures include directed recruitment drives, specialized target group employment material, community sessions, and the implementation of a commuter network to serve native communities. Double-banking, a process of attaching a trainee to a skilled worker in order to permit a "transfer of technology", has worked successfully to "Canadianize" the offshore workforce and reduce the number of skilled foreign workers. Ensuring that target group members are appropriately represented in double-bank positions is essential.

The identification and removal of barriers and the implementation of special affirmative measures in project situations will usually require very close cooperation between operators, contractors/subcontractors, and unions. The complexity of this environment, coupled with the time limitations imposed by the project, means a less systematic approach than that used in the affirmative action planning process. Implementation must be characterized by flexibility, by ongoing monitoring and feedback, and by quick, innovative action.

#### **d) Step Four: Monitoring System**

As part of the implementation of the above measures, a monitoring and reporting system is required to allow the operator to assess, on a regular basis, performance, including that of its contractors and subcontractors. This monitoring, like that in standard affirmative action, is an extension of similar systems used in other areas. For experts in the area of project management, such a requirement is easily understood and can be implemented without prohibitive cost.

#### **e) Conclusion**

A Special Affirmative Measures plan is not the only alternative approach to the standard affirmative action plan. Rather, it is one example of how the planning principles needed can be flexible and responsive to the character of the organization being changed. Other situations than those defined at the start of this section may require different modified steps.

### **D. Limitations, Concerns, and Problems**

The affirmative action planning process makes sense. When undertaken as part of a human resource management perspective, it offers a means of bringing about substantive change without negatively affecting other objectives of the organization. Despite this conclusion, affirmative action is a relatively new concept in Canada, which means that some

problems remain to be ironed out. The purpose of this section is to clarify some of the limitations of the affirmative action approach, to outline concerns that must be dealt with before broad support can be expected, and to identify problems that impact on the success of attempts to implement.

#### **1. Limitations**

Affirmative action is not designed to solve all the problems related to discrimination in employment. First, it is a process for dealing with the broad underutilization of specific groups. Second, as a comprehensive planning process it is designed for use where it is expected that this underutilization is the outcome of pervasive barriers in the organization's employment systems.

For these reasons, careful consideration must be given to which groups can be included in an affirmative action approach. Specifically, it is not a tool for use in situations of individual acts of discrimination unless these acts are symptomatic of a much broader problem. In addition, it cannot be used where the affected class or group discriminated against represents a very small percentage of the population. It is this latter situation that offers the most difficult question for structuring an affirmative action program.

A number of questions must be addressed before concluding that the affirmative action planning process is a suitable remedy.

#### **• What percentage of the population is made up of the target group under consideration?**

Data must cover not only national rates but also regional (provincial) and local labour markets. Where the national percentage is relatively high, a group may be a candidate for affirmative action in all areas of the country. A regional or local labour market may have a group concentration, not found nationally, that may warrant using affirmative action in the locale. For example, affirmative action for blacks may be feasible in Toronto but not in Regina.

The question of group size and geographic concentration is also affected by the type and level of jobs/occupations being considered. Entry level, low skill, and semi-skilled jobs will usually be filled from the local labour market, while higher skill and professional jobs will draw from regional and the national labour markets. It might be quite feasible to expect a large organization like Canadian National Railways to employ blacks in its Regina region at senior professional or management levels.

#### **• What percentage constitutes a "trigger" point for inclusion?**

The effectiveness of the analytical tools used in affirmative action depend on the ability to undertake statistical analysis. A number of factors, therefore, will affect the levels required. First, if the population being considered is large, a relatively small percentage, e.g., four per cent, will constitute a fairly substantial group; in a small population the absolute numbers represented by the percentage figure may be prohibitively small. Second, the larger the company workforce, especially if it contains large occupational groupings, the easier it will be to include small population groups.

#### **• Which groups should be included?**

Experience has suggested that once affirmative action becomes a government priority or that employers begin implementation, a bandwagon effect emerges. Other groups,

not designated, seek inclusion in order to reap the benefits on the grounds that they too require remedial action. It must be understood, however, that affirmative action is designed to remove barriers and remedy the effects of past discrimination based on pervasive, bottom-line evidence of exclusion. This evidence includes higher unemployment rates, lower occupational status, and lower incomes. Consequently, these three measures of socio-economic status provide the basic criteria for including groups as targets in an affirmative action plan.

The reason for emphasizing the limitations of affirmative action is to clearly indicate that it is a specific remedy for a specific type of problem. If possible, the use of the term as a catch-all for human rights responses should be avoided in order to avoid confusion and unwarranted expectations. Individual discriminatory acts, the employment difficulties of small minorities, and problems in very small organizations are all legitimate problems requiring unique solutions. The affirmative action planning process, however, is designed to deal with the measurable exclusion of women and minorities in organizations large enough to allow for the application of its statistical tools.

## 2. Concerns

It has been emphasized in this report that affirmative action involves substantial organizational change. The impetus for this change may come from realization of the benefits of change and/or the costs of doing nothing. Some organizations in Canada began implementing systematic human resource management change, including affirmative action goals, in the 1970s. Others have implemented change after discussions with and pressure from government and interest groups. But despite the apparent compelling logic for affirmative action in the labour market of the 1980s, and in the increasing commitment to integrated human resource management, active acceptance in the business community will not come as a matter of course.

Resistance stems from concerns about the costs of implementing such far-reaching change and from a basic disagreement about government's increasing "intervention in the market".

Implementing affirmative action does involve costs. It requires resources to undertake a thorough analysis, to change, adapt, or create more equitable employment systems, and to implement special measures to remedy the effects of past discrimination. Secondary costs include the possible diversion or expansion of management commitment away from immediate objectives, potential for disruption in the business process no matter how thorough the preparation, and the uncertainty of undertaking innovative steps under public scrutiny. When viewed as an investment, both in terms of improvement in overall labour productivity and the avoidance of costly human rights litigation or future public controversy, the overall return should be seen as positive. The question does arise, however, as to the distribution of costs and benefits, a question not dissimilar to that surrounding skill development strategies:

*The implementation of mechanisms designed to meet both the individual's right to equal opportunity and skill enhancement or redevelopment and the collective need for an efficient labour force also*

*raises an additional question related to the impact on individual employers. Emerging demographic patterns, rapidly changing technology and the productivity improvement objective, suggest that a rational employer will benefit from investing in employee development and ensuring real merit-determined employment decisions. Such returns, however, may not accrue directly to the employer who absorbs the costs although the investment is a fundamental requirement for the economy's well-being and hence the long term interests of the employer. Economic theory recognizes this contradiction. Such needs as national defence, education and protection of domestic markets are not left to the "rationality" of the market. Skill development has in large part been socialized as well over the past twenty-five years through the expansion of the Community College system and the subsidization of industry for on-the-job training. Equal opportunity, unlike skill development rights, has been viewed as an insoluble right which can not be denied by an employer. But even this individual right has certain important limitations. Legal responsibilities require an employer to neither hire unqualified workers nor to make qualified potential workers, even when the missing skills and/or experience are a function of discrimination operating elsewhere in society. Only when previous discriminatory actions by the employer result in the lack of necessary qualifications does a legal responsibility exist for employers. (Phillips, Paid Education Leave and Affirmative Action, 1983.)*

One need may be to establish a general, regulatory requirement to ensure that all employers face similar responsibilities. Employers have indicated, albeit not publicly or in writing, that such a general requirement would be acceptable as it removes the risk of being a "pioneer".<sup>16</sup>

The rationality of government establishing generalized corporate responsibilities is countered, however, by the very strong and increasingly vocal business lobby against "intervention in the market" and for less regulation.<sup>17</sup> When linked to the promise of more jobs during a time of high unemployment and the implied competitiveness of international markets characterized by low-wage, low-government regulation economies, this campaign receives substantial public support. While the economic benefits of affirmative action, both for the individual company and the economy as a whole, can be argued, the current strength of the deregulation movement will make government action difficult.

## 3. Problems

The first two sections outlined the limitations and concerns that must be considered in assessing the potential for a major affirmative action initiative in Canada. This section summarizes a few of the substantive problems that must be overcome if the affirmative action approach is to be used effectively. These include the generation of adequate data, the availability of requisite expertise, and the negotiation of jurisdictional questions.

### a) Data

Affirmative action is primarily a data-driven methodology requiring not only a profile of an employer's workforce by



occupation and level but also a similar profile of the labour market. For planning purposes, it is also necessary to estimate probable changes in the existing distribution of skills. In order to undertake this analysis, the appropriate labour force data must be available by target group and by occupation. The latter must be specific enough to ensure that the estimates derived bear some resemblance to the actual occupations or jobs in a particular organization. Two problems arise in trying to meet this requirement in the Canadian context.

The first is a conceptual problem and relates to the way labour force data are categorized. In the ideal world, jobs would be grouped according to similar generic skills, including experience required to successfully carry out the specific job. This would result in jobs involving different tasks but requiring similar skills being considered as a job group or job cluster. Similarly, workers would be labelled by the generic skills they possess rather than by the tasks they perform. This system would allow an accurate assessment of the number of target group members possessing the skills required for a job.

Such a situation does not exist.<sup>18</sup> Instead, jobs are categorized by occupation, which generally describes the tasks undertaken rather than the skills required. Likewise, census and labour market data place individuals into occupations.

The problem with this approach is that it does not necessarily give an accurate picture of real availability. In particular, the potential transferability of skills from job to job or occupation to occupation is not captured. The result may well be that traditional occupation classification systems underestimate the number of target group workers capable of meeting the requirements for the job. Despite this concern, however, current occupational classification systems do provide a useful tool and, if used with due caution, will generate useful availability estimates. It is necessary to remember the conservative bias of task-oriented systems and allow for adjustment where warranted.

The second problem — the lack of occupational data for some of the target groups for which affirmative action is most suitable — is more serious. The key information is occupation, affirmative action status, geographic parameter, and level. Why these data are required and how they are used are outlined in earlier sections. For women, the available data are relatively complete, although the data may require considerable manipulation. The situation for the other target groups is considerably less positive.<sup>19</sup>

Native people are identified in the census and by some educational data sources but many problems still exist. In particular, the relatively small native population makes it difficult to acquire reliable estimates below the national or provincial level from census figures. Even in areas with relatively high native populations, semi-skilled and skilled occupations will have too few natives for a reliable estimate. The problem is compounded by the fact that the census identifies only two per cent of the Canadian population as native rather than previous estimates of four per cent.

Employment data for people with physical disabilities and for visible minorities are all but non-existent. Work is under way to identify disabled Canadians in the 1986 Census, for a follow-up survey in the subsequent year. Race is unlikely to be clearly identified, but some changes to the question on

ethnicity may provide a better base for making estimates on the employment characteristics of visible minorities.

As a result of the data limitation summarized above, a full, reliable affirmative action planning process cannot be carried out for all target groups. In particular, the situation with the disabled and visible minorities requires the practitioner to make general estimates based on limited, usually episodic, information. This situation is likely to continue for some time. Considerable work, effort, and expense would be necessary on the part of the federal government to fill in the gaps.

### **b) Expertise**

Affirmative action has been defined in this paper as a comprehensive planning process utilizing a standard problem-solving approach and specific tools to remove and correct the effects of employment discrimination. This involves undertaking significant organizational change as part of an overall trend toward greater concern and sophistication about human resource management. The basic premises of the affirmative action approach, therefore, raise important questions about the expertise available in Canada to manage the process or provide technical assistance to those who must manage.

On the one hand, the fact that affirmative action uses basic problem-solving techniques means that once the rhetoric is removed, considerable generic expertise is available. Good organizational change specialists are perhaps more difficult to locate, but this area too is not underdeveloped and is increasingly part of business administration training. On the other hand, professionals with extensive experience in the application of these disciplines to the problem of employment discrimination are few in Canada. Unlike in the United States, where two decades of experimentation has resulted in the development of considerable public and private expertise, relatively few in Canada can be considered knowledgeable. Fewer still can claim practical experience in varied employment settings or are qualified to take implementation beyond the conceptual stage. This is compounded by the fact that full human resource management skills are still emerging as a key need for the next decade.

The implications of the lack of expertise and experience should not be overemphasized. Larger employers are already well into sophisticated human resource management and many have the organizational skills to undertake the steps outlined in this report. A scarcity of shared experiences in the business community, especially successes, is important but not prohibitive. For smaller employers, however, the situation may be more difficult. They may lack the internal resources to carry out an effective process. To the extent expertise is not available externally or is too expensive, a problem may exist.

### **c) Jurisdiction**

The laws regulating both employment discrimination and affirmative action — especially preferential practices — are derived from 13 separate jurisdictions.<sup>20</sup> Although the question of the status of systemic discrimination in the federal jurisdiction is now unclear, the key problem is the different attitude taken toward the permissibility of preferential practices as part of a remedy. All jurisdictions, with the exceptions of the Yukon and Newfoundland, explicitly permit preferential remedies. But the requirements and processes differ

widely. For example, the federal Human Rights Commission does not require, or indeed provide, for prior approval; Saskatchewan requires prior approval after a series of public hearings; and Alberta requires prior approval by the provincial cabinet. All three situations present problems. First, without prior approval, employers have no guarantee that a charge of "reverse discrimination" will be unsuccessful. Second, the public hearings requirement tends to dissuade private-sector employers from voluntarily developing and submitting plans. Finally, cabinet approval is a time-consuming, high-profile method prone to political pressures and considerations.

The different jurisdictions create problems primarily for the development of federal strategies for encouraging the adoption of affirmative action. In a voluntary situation, the major problem is in those two jurisdictions where the legislation is silent on the question of special measures. Employers either must run the risk of charges for "reverse discrimination" or must limit themselves to mild remedial actions such as special recruitment teams. But the potential unwillingness of provincial human rights commissions to approve special measures cannot be passed over. Some regions, for example Alberta, have never approved a preferential practice that is not a *bona fide* occupational requirement.

A mandatory program or requirement extending to provincially regulated employers could create serious problems. It would be necessary to avoid the untenable situation of placing requirements on the employer that violated provincial law. An important outcome of an "escape clause" would be to create quite different expectations for employers in different regions of the country. What would be lost in such a situation would be the equally shared responsibility, a key component of any strategy to gain business cooperation in a regulatory program.

Finally, not the least of the problems with the jurisdiction question is the issue of "territoriality". Jurisdictional disputes are a fundamental characteristic of Canadian politics. Attempts to regulate either directly or indirectly in another jurisdiction invariably have led to political debate and court cases. The area of employment, and especially employment discrimination, is no exception. The guarding of boundaries is not the exclusive domain of politicians; bureaucracies that administer employment and human rights regulations are equally prone to resist perceived incursions into their jurisdiction. Such territorial imperatives are present even in a voluntary setting; they would become fierce in the face of mandatory provisions by the federal government.

## E. Conclusion

This section has reviewed in some detail the steps in an effective affirmative action planning process. These steps, it has been emphasized, are easily recognizable as basic to effective problem solving. While we have described some standard techniques and methodologies that have been developed to assist in the process, affirmative action is premised on the need to adapt the basic approach to the specific situation of an individual employer. Flexibility is necessary to an affirmative action program. Sometimes this flexibility requires only the adaptation of the review structure or other component of a particular step; sometimes a more fundamental adaptation, as outlined in the Special Affirmative Measures approach, is required.

In the final analysis the success of the specific process used will lie in the bottom-line results. For the individual employer this will be demonstrated by a steadily improved use of target group workers in all occupations and at all levels. If done well and in line with the organization's character and strengths, it will also be demonstrated by overall improvements in the utilization of the corporation's human resources. For the economy as a whole, bottom-line results will be shown by an improved distribution of occupational representation, less income differential, and a more even sharing of the unemployment burden. As with the individual employer, if change is done well, the economy should also experience gains through a more rational use of skills and abilities.

Affirmative action in this section has been presented as an effective response to employment discrimination. The next section places this approach in the context of the larger problem that encompasses pre-market barriers. It concludes by suggesting that the basic methodology used in affirmative action can be used to increase substantially the number of target group members with the prerequisite skills necessary to successfully enter all areas of the labour market.

## V. AN INTEGRATED STRATEGY: THE ROLE OF AFFIRMATIVE ACTION IN ENSURING LABOUR MARKET EQUITY

The social, political, and economic goal of ensuring equity in the labour market can be well served by a strategy of removing those barriers that unnecessarily exclude certain groups in society. But an effective employment strategy for those groups that experience difficulties entering or progressing in the work world will require a set of integrated policies and programs. Affirmative action by employers is only one crucial element in such a strategy. It will guarantee that the demand side of the labour market allows qualified target group members to maximize their employment opportunities. Affirmative action plans, however, cannot be isolated responses, nor will they be able to solve all the employment problems of target group workers.

The past analysis of the problem and the efforts to correct this problem concentrated on improving the "human capital" or skills of target group members. This tended to ignore the importance of employment discrimination and shifted the major onus of the ownership of the problem to the victim. Revealing the importance of employment discrimination, including systemic, served to provide a more balanced picture of cause and effect. Nonetheless, the current disproportionate distribution of skills among groups cannot be ignored. To some extent this unequal distribution is owing to individual preference, but much of it is a function of social and educational discrimination that takes place before the worker enters the labour market. Although business organizations are returning to training more workers in specific skills, and although employers must assume some of the responsibility for even pre-market barriers, it is unrealistic to expect employers to assume full responsibility for the fact that some groups have fewer skills or less diverse distribution of skills than others.

The problem is further compounded by the fact that the public services and programs put in place to ensure a balanced supply and demand for workers often serve to exclude certain groups. It has generally been assumed that

target group workers will be accommodated within standard labour market adjustment services, such as job and training referral and mobility, which do not provide special services to designated groups. But many of the mechanisms that adjust labour supply and demand act to stream groups into certain kinds of occupations or training.

The review by CEIC's Task Force on Labour Market Development has outlined convincingly the need for a more complex analysis and response to the problem. An integrated approach to ensuring that target group workers have an equitable share of jobs in the labour market is required if all the barriers are to be removed. Such an integrated approach requires simultaneous intervention into the three components of the labour market function: supply, demand, and market mechanisms, the last referring to services designed to relate supply to demand and vice versa. As the Task Force on Labour Market Development recognized:

*An integrated approach means more than ensuring (target groups) receive greater emphasis. It also means developing policies which break down barriers on the demand side, encourage better skill development on the supply side and respond to the requirement for appropriate market mechanisms to support these initiatives.*

These three policy areas are closely interrelated, but it is useful to regard them as the major areas for policy and program development. This section summarizes the key functions of each area and suggests the basic programmatic needs of each if it is to allow, rather than hinder, target group advancement. In addition, this section will suggest that the basic affirmative action methodology can be used not just on an employer's employment systems but also as a tool to identify and remove barriers operating in areas other than the labour market.

#### **A. Supply-Side Response**

The supply side refers to the availability of target group workers with the skills and career aspirations for jobs in the Canadian labour market. The fact that many individuals within the target groups frequently lack the skills demanded by employers is not simply a function of their personal limitations and lower career aspirations. Social perceptions and inappropriate employment counselling have often narrowed training and education opportunities and lowered career expectations. In other words, the problem of limitations in human capital is often a result of pre-labour market discrimination, both intentional and systemic.

The barriers that result in target group members lacking the broad distribution of valid skills required in today's labour market reach far back. Schooling, media images, family socialization, and other social institutions have been shown to strongly affect children as they prepare for careers in adult life. Change in many of these will only result through substantial modification in social attitude and, subsequently, social behaviour. The basic problem for government, however, is two-fold: The first is the need to carefully identify those barriers over which the federal government has legitimate control and to remove those that are invalid; the second is the need to develop remedial responses designed to ensure that those who have been denied equal opportunity in the past to skill development are able to expand their options.

An effective supply-side strategy for the federal government will be based on the concept of providing training programs, including work experience/skill enhancement job creation, which provide target group workers with the education and skills to fill the available jobs in the Canadian labour market. On the one hand, this requires that barriers that result in women and minorities being underrepresented in training programs in general, and in specific occupational training in particular, are identified and removed. On the other hand, programs must be in place that will permit and encourage workers to undertake the upgrading and retraining necessary in order to enter the occupations and new career streams now opening up. For many target group members already in, or almost in, the labour market, a successful approach will be based on a combination of employment with a package of multidimensional training and support services.

The long-range ability of affirmative action to redress the existing imbalances represented by the three socio-economic indicators outlined in this report will, in large part, depend on the extent to which the government can better the distribution of training and education opportunities.

#### **B. Demand-Side Policies**

The demand side, for the most part, refers to the ability of employers to successfully absorb qualified target group members. To a lesser extent, effective policies can include wage-subsidy-type programming, which socializes the cost to employers of absorbing workers who require experience in order to become fully operational or proficient on the job. Absorption of qualified target group workers refers, of course, to the removal of discriminatory barriers. Reluctance on the part of some employers to hire employees from the target groups is still a significant problem. But, as Section III has detailed, this reluctance is compounded by systemic barriers such as unnecessary physical and education requirements, restrictive recruitment practices, and a general absence of company policies governing promotion and training of target group members. Affirmative action is the key response to ensure that improved training of target group workers, brought about by supply-side programs, leads to a demand-side labour market free of discriminatory barriers. Maintenance of artificial barriers will result in increased inefficiency as supply-side strategies begin to redress previous imbalances in training and skill development. Conversely, a more accurate identification of skill requirements from the demand side will permit a realistic assessment of training needs and will result in the recognition of previously ignored skills already possessed by many target group workers.

If target group workers have the skills required for the jobs of today and tomorrow, their integration into the labour market will depend to a substantial degree on demand from employers. This means that employers must be able to recognize the abilities and potential of target group workers and be prepared to make necessary adjustments for them. A major part of policy will be to encourage or require employers to remove both intentional and systemic barriers and to redress the effects of past discrimination. The affirmative action planning process provides the most suitable and effective response to this need.

For target group workers who lack required experience or basic work skills, integration may depend on access to



employment despite valid barriers. This may involve costs to the employer during the period in which the new employee is making the adjustment to the work environment and gaining basic work skills. In this situation, the use of wage subsidies might provide the most effective and efficient strategy for gaining initial entry to the demand side of the labour market. Caution, however, is required. Public subsidies should not be used to overcome employers' stereotypical attitudes, to provide bonuses for not discriminating, or to replace structured, institutional, or on-the-job training required for real mastery of the job.

### C. Market Mechanisms

Market mechanisms refer to those services required to ensure that the supply and demand aspects of the labour market are efficiently linked. At the primary level, this includes those services carrying out the labour exchange function: provision of job information, recruitment, job referral and placement, and mobility grants. At the secondary level, market mechanisms include those services that seek to prepare workers to enter and compete successfully in the labour exchange: career counselling, recruitment, and referral to skill training, and diagnostic assessment for employment and training. At the federal level, most of these services are centred in the Canada Employment and Immigration Commission (CEIC). While target group workers are included within the mainstream employment services offered by CEIC, there is some evidence that more specialized services may be required.

This need has partly been met by the extended services offered through the Outreach program and Special Needs Counsellors. The problems of women in the labour force have been addressed by advertising campaigns, women's trade courses, special counselling aids, and the establishment of Women's Employment Counselling Services.

Together with policy initiatives designed to improve the skills of target group members and to ensure labour market demand, integrative mechanisms must be developed to facilitate the efficient operation of the market. CEIC's Task Force on Labour Market Development has outlined two major policy tasks: the need to help target group workers enter the labour market; and the need to ensure that target group members have adequate access to skill development programs.

The most important elements of programs to increase entry of target group workers into the labour market and into productive employment are good job information and counselling, advocacy job placement, and employment support. The last element includes post-employment counselling on further training as well as access to required social support services, such as transportation and daycare.

Employers complain that, despite their desire to hire target group workers, it is difficult to find suitable applicants. The basic requirement is to assure access of target group members to training programs, but it is also necessary to provide mechanisms to ensure that they are recruited and counselled to enter these programs. Social stereotypes and past discrimination often serve to steer many target group clients away from certain skill-training opportunities. Counsellors untrained in working with target groups may contribute to

this problem. The development of programs to ensure effective marketing, recruitment, and career counselling related to CEIC-sponsored skill training has been recommended by the Task Force on Labour Market Development.

### D. Summary

An effective strategy to integrate target group workers into the labour market and to make the best use of Canada's human resources requires an integrated approach toward supply, demand, and the mechanisms used to ensure the efficient operation of the labour market. Affirmative action by employers would be a central element in such a strategy. Its role would be to maximize the demand for target group workers by removing unnecessary barriers and by stimulating the pace of integration through measures designed to offset the effects of past discrimination. By assisting in the rationalization of job, promotion, and training requirements, the review and analysis process of affirmative action would also assist in fine-tuning priorities for training and education. Finally, as an approach based on the standard principles of corporate planning, affirmative action can be fully integrated into the human resource planning systems that are emerging as key elements in Canadian companies.

### E. The Affirmative Action Process — A Broader Impact

Throughout this report affirmative action has been used to refer to a comprehensive planning process used by an organization to assess for employment discrimination. A basic problem-solving process, affirmative action uses specific tools, as well as concepts from organizational change theory, to achieve the desired results. This same generic process and many of the key tools and concepts can also be used to ensure that equity and economic rationality are present in supply-side and market mechanism program areas.

Intentional and systemic exclusion remain valid concepts when examining who is receiving skill training and what kind, or who is benefitting from services designed to ensure a balanced supply-demand equation. Stock and flow data analysis, utilization rates and standards, adverse impact, systemic validity, system neutralization, remedying the effects of past discrimination, goals and timetables, and monitoring are all tools that can be applied. To the extent that they are used as part of a comprehensive and systematic process, we can speak of the application of an affirmative action approach.

#### 1. Government Programming

The federal government expends considerable time, resources, and energy on programs and services related to securing a suitable supply of skilled labour and to ensuring its appropriate transfer to the labour market. Most directly this includes the substantial expenditure of funds under the National Training Act to purchase training seats, to support innovative training institutions, and to subsidize on-the-job training by private-sector employers. In addition, CEIC provides an extensive network of employment centres designed to facilitate the labour market exchange function, to direct potential workers to propitious training or services, and to assist with labour market adjustments as required. Within this general range of functions lie numerous programs and services, including some designed to promote the specific interests of target group clients.

Job-creation programming also plays a significant role in influencing the labour market and the availability of skilled, experienced workers. CEIC's four consolidated programs are aimed at three distinct yet related objectives:

- To meet employment problems caused by cyclical downturns in the economy or by unforeseen industrial developments (e.g., plant shutdowns, layoffs, etc.).
- To encourage and contribute to local employment growth.
- To support human resource development ("Government of Canada Job Creation Programs, an Overview", CEIC 1983, p. 7).

While it is clear that the third objective is related to preparing individuals for employment, the other two also contribute. The maintenance of existing skills, the development of new skills, and the acquisition of on-the-job experience are significant outcomes of cyclical and employment development programs.

The purpose of this section is not to provide an inventory of federal programs related to labour supply development. Neither is it to provide a critical assessment of program and service impact, either generally or for specific target groups.<sup>21</sup> Instead, the objective is to suggest the potential of applying the affirmative action methodology comprehensively and systematically to all employment-related government programming. Such an approach would begin from the premise that the expected rate of program utilization would approximate at least the labour market participation rate. Examination for adverse impact would include not only a review of overall program and service utilization but would also assess the internal distribution by target group between different occupations and different quality of services.

For example, the Critical Trade Skills Training (CTST) program offers up to two years of reimbursement to an employer for direct training costs as well as for part of the trainee's wages. This program is especially significant because it relates to jobs with complex skills in short supply. An analysis of participation rates of target group trainees is required both for the program as a whole and for specific occupational groupings. Where adverse impact in terms of utilization of training opportunities is found, a systems analysis is required to determine why there is a differential impact and whether the reasons are justified, valid, or discriminatory. Where discriminatory barriers are identified, they are removed and remedial steps are taken to correct the past underutilization of target group clients.

Such an approach is not designed to replace special programming designed to assist target group workers who lack prerequisite skills. Initiatives to ensure they have the same "human capital" as other participants will continue to be necessary because of existing disparities. Consideration, however, might be given to replacing current incentive programs, which provide monetary rewards to employers for training target group workers, to an approach that ensures that these workers receive an equitable share of training opportunities and that remedial steps are taken to correct past underutilization when appropriate.

It is a key objective of CEIC, as stated in its Mission Statement, to ensure greater equity in the Canadian labour market. Increasingly, measures to ensure that this objective is realized are being considered and, most significantly, results

are being translated into the management accountability system. Nonetheless, considerable discrepancy continues in terms of the distribution and quality of access to programs and services. To facilitate progress, consideration could be given to a systematic application of the affirmative action methodology to all CEIC initiatives. Should the government choose to establish an independent monitoring or review agency, vis-à-vis affirmative action and employers, part of its mandate could include a monitoring role of this process. Such a step, along with the effective implementation of affirmative action in the federal public service, would signal to private-sector employers the government's intention to ensure significant but economically rational change in the distribution of employment opportunities.

## 2. Education and Skill Training Outside Federal Jurisdiction

The application of affirmative action to programs and services under federal jurisdiction is an option open to the government. While it would have a significant impact on key supply areas and market mechanisms, there are many other areas that fall outside this jurisdiction. Universities (especially professional schools), community colleges, and apprenticeship programs are some important examples. Even the distribution of students within high school programs will have a considerable impact on employment distribution in future years.

Supply-side programs and market mechanisms delivered by the federal government function through systems to recruit, to select, and to support (or not to support) individuals. In this regard, they are similar to employment situations, and a similar systemic analysis can be used. A systematic review of how these functions are carried out can serve to identify those that result in disparate outcomes for target group members. Invalid barriers can be singled out and removed, while special measures can assist with redressing past effects. For example, in one case a review of applications and admittance to law school in Ontario suggested that the standard exam used did not have an adverse impact on women. The problem of underrepresentation was the outcome of the overall recruitment approach, including the impact of the "historical image" of law schools. The lack of a supportive environment, limited role models (especially for certain areas such as corporation and criminal law), and problems with obtaining appropriate articling opportunities contributed both to the attractiveness of the faculty and to the skewing of choices of specialization. Lack of jurisdiction precludes the federal government from directly intervening in many of these important areas. It might be useful, however, for the government to explore the potential of an affirmative action approach with its provincial counterparts as it undertakes such an application to its own program and services.

## F. Conclusion

The objective of this section has been to indicate that improvements in labour market equity, based on removing barriers from demand, are limited by the parameters set by the availability of target group workers with the requisite skills. To widen these parameters, an integrated strategy is required to improve the supply of qualified workers and to ensure that market mechanisms operate to facilitate entry into the labour market and into skill training. Such a strategy

will operate best if it uses the generic concepts of the affirmative action approach to assist with the identification of the real barriers, to determine their validity, and to develop an appropriate response.

## VI. OPTIONS FOR PUBLIC POLICY

Public policy decisions that dictate mandatory actions to either individuals or groups must be considered only after careful reflection on the need for, and consequences of, the prescribed compliance. Years of experience with human rights as first a moral and then a legal obligation suggests that only with government intervention will substantive change take place within a reasonable time frame. As a society, we have decided that equality of employment opportunities, with limited exceptions, is a public right even when offered within the confines of a private organization. As long as this right remains within the Canadian legislative and policy framework, the government has the active responsibility of ensuring that this right becomes a reality.

Despite this apparently strong imperative for insisting on results, the options available for government can be broad without jeopardizing its mandate. At one extreme it can insist on imposing a prescribed set of actions that presupposes a "best way" approach and that narrowly limits an employer's options for managing human resources. Such an approach assumes that only by controlling the means can the government assure results. At the other extreme, public regulators can concentrate only on results, invoking sanctions for failure to achieve clearly articulated objectives. This latter approach, more in line with standard management accountability, permits the employer whatever flexibility is desired as long as results are achieved. Both extremes have their problems. Clearly the diversity and complexity of modern industry makes the imposition of uniform and inflexible systems extremely difficult, if not impossible. But for the same reason, the development of acceptable standards of measurable performance goals that recognize the specific situation of individual operators within unique environments may be equally difficult.

What is sought, therefore, is a public policy option that will result in employers achieving measurable and realistic results within the valid confines of the organization's needs and the ability of the relevant community to meet these needs. It has been this report's objective to demonstrate that a properly applied affirmative action planning process can achieve this result. The policy need is to outline an approach that will ensure employers comply.

This section reviews briefly those policies that may be used to ensure that employers use affirmative action as a human resource planning tool. It outlines several compliance-based initiatives which will provide varying degrees of leverage. Although they will necessarily raise some difficult questions related to constitutional jurisdiction over labour relations and employment standards, properly implemented they may well represent the most direct and productive policy tools for influencing changes in demand patterns.

The following analysis outlines two approaches to establishing compliance, a legislative base and a policy base. Although the latter permits the easiest methods of implementation, by allowing for a simple cabinet directive, in the case of the former, where contract compliance and/or changes in

the Canada Labour Code are involved, statutory provisions are required.

### A. Legislative Approach

The extent to which the federal government can legislate mandatory affirmative action is limited by its jurisdiction over labour standards. The Snider case (1925) clearly established that provincial jurisdiction over "property and civil rights" extended to labour relations in general, with the exception of certain "federal works, undertakings, and businesses". In all, employees under federal jurisdiction represent approximately 10 per cent of the Canadian labour force. To increase the impact, therefore, of the government's initiative, it may be possible to insist that all or specified employers benefitting from federal contracts comply with affirmative action requirements. Such a policy would be in line with the Treasury Board Administrative Policy Manual and the Government Contract Regulations, which recognize the appropriateness of utilizing the procurement process to achieve national objectives.

To achieve the statutory mandate outlined above, three legislative changes would be required:

- Federal Labour Standards — A statutory change to the standards could be made to require federally regulated companies to implement affirmative action unless no need can be demonstrated. Such a requirement would affect all federal companies, whether or not they had a contract.
- Statutory Contract — A legislative provision could require that affirmative action clauses be inserted in specific contracts with employers falling under provincial jurisdiction.
- Other Legislative Levers — A legislative requirement for appropriate employment representation or affirmative action implementation could be part of all legislation providing a benefit, other than a contract for goods and services, to an employer.

#### 1. Federal Labour Standards

The federal employment sector is regulated by standards set by both the Canada Labour Code and the Canadian Human Rights Act. These regulations affect approximately 10 per cent of workers and 10 per cent of employers in Canada. Close to one-quarter of these workers are federal public employees. With federal crown corporations included, approximately 500,000 workers are directly or indirectly employed by the federal government. The remaining 500,000 to 600,000 of this labour force are employed in such federal industries as banking, transportation, and telecommunications.

Jurisdictional issues arise occasionally over whether or not a certain group of employees falls under federal jurisdiction. It is clear, however, that the federal government has the right to set labour standards for those employees deemed to fall within the federal realm by the BNA Act, within the limitations set by the Charter of Rights and the Canadian Human Rights Act. The most direct avenue open to the government is to establish a legislated requirement for employers under federal jurisdiction to demonstrate appropriate utilization of target groups or, having failed to do this, undertake necessary steps, i.e., affirmative action, to correct the imbalance.



Options for administering federal regulations include Labour Canada and the Canadian Human Rights Commission. Because affirmative action policies relate more closely to the provision of human rights than to employment standards legislation, as currently interpreted under the Labour Code, an amendment to the Canadian Human Rights Act would probably be the most consistent option.

A third approach would be the enactment of new legislation establishing a separate regulatory agency to monitor and ensure compliance. Such an agency has both advantages and disadvantages. Certainly, the key disadvantage is business and public reaction to the creation of yet another regulatory body. But, more closely analyzed, such an independent body may well permit greater flexibility vis-à-vis its relationship with corporate and union clients. Business cannot help but be concerned with the need to share employment data on an ongoing basis with the Human Rights Commission. Its mandate clearly permits a proactive approach to bringing charges against organizations it believes to be engaging in employment discrimination. Whether or not the regulatory and enforcement functions could be administered at an appropriate distance from each other by the Commission, the perception of those being regulated is likely to be one of doubt. An independent body, which maintained the right to refer unresolved situations to the Commission for review, would engender greater confidence among those required to submit data and develop response plans.

Whether administered through an independent body or the Canadian Human Rights Commission, mandatory affirmative action requirements must be based on a set of clearly articulated compliance procedures. As outlined in Section IV, the methodology required must be flexible enough to reflect particular and valid requirements of the regulated organizations. Final compliance procedures should be established within the basic affirmative action framework after consultations with interested parties, including the general public and target group representatives. Parliamentary approval of regulations would be used to avoid the concern that the agency is extending its mandate beyond the intent of the enabling legislation. To ensure consistency and to ensure that there is no perception of a double standard, final authority for compliance by the private sector, the federal public sector, and crown corporations should reside with the agency.

Ample evidence exists to suggest that a full mandatory affirmative action requirement is needed. An alternative, and inherently more flexible approach, would be an obligation to require only annual reporting of utilization data to the mandated agency. A decision to act, and the parameters of the action to be taken, would remain the prerogative of the reporting organization. This approach has the benefit of not regulating, even in a broad framework, the means by which employers resolve problems with utilization. The spur to action is, of course, the knowledge that the data are reported to the government and may lead to enforcement action through existing legislative provisions.

Whichever option is chosen, legislation would be needed. A requirement for a system of workforce audits would require Parliament to create new legislation or to amend such existing legislation as the Corporations and Labour Unions Returns Act (RSC 1970, Chapter C-31).

The overwhelming advantage of restricting mandatory compliance to the area of federal jurisdiction is the government's relatively unencumbered right to act. It would result in substantial action in the public service and crown corporations as well as in key private-sector organizations. With the exception of private-sector employers with fewer than 100 employees, who should be exempted, a mandatory, legislated approach could bring about orderly yet realistic improvements in the utilization of target group employees. Its major disadvantage is the purely emblematic role it would play for the 90 per cent of employers falling under provincial jurisdiction.

## 2. Statutory Contract

A statutory contract approach, commonly referred to as contract compliance, would expand the federal government's influence well beyond the federal employment sector. Certainly the interest in this approach, which places affirmative action requirements on recipients of federal supply and services contracts, has been prevalent for some time. Numerous parliamentary committees and departmental task forces as well as countless public submissions to these bodies have recommended some form of action. The magnitude of federal expenditures and the public prominence and employment size of many vendors would mean a potentially substantive impact. Major vendors include Canada's largest transportation, equipment, aerospace, petroleum, and electronics companies. Even with the exclusion of those employers with fewer than 100 employees, penetration would be significant.

Contract compliance is a system whereby beneficiaries of government expenditures are required as part of their contract obligations to undertake affirmative action. Where the audit process reveals underutilization of target group workers, the contractor is committed to undertaking remedial actions. Besides company size, the amount of the contract is taken into consideration when determining whether an employer is required to comply. A contract compliance program can be as narrow as one that is limited to large multi-year purchases, such as jet fighter or frigate contracts and increasingly common purchases of sophisticated high-technology systems. It can be as broad as to include all contractors with 100 or more employees receiving a contract in excess of a set figure, such as \$100,000.

Such an approach would not in all probability violate jurisdictional boundaries. The federal government at present inserts numerous clauses, including Canadian content requirements, relating to matters ancillary to the main purpose of the contract as long as they do not violate provincial laws. This power to attach affirmative action obligations to grants, contributions, supply contracts, or leases arises from sub-section 91(A) of the British North America Act. While the extent of this power has never been fully established, it is likely to include the right to use contract compliance in the area of employment equality.

Contract compliance is not without its problems, both in terms of its practical applications and its legal feasibility under existing contract law. Contracts, by their nature, involve the purchase of goods and services, usually at a particular point in time. Large purchases of sophisticated goods may involve long-range planning, design, manufacture, delivery, and maintenance stretching up to a decade. In these circumstances, reaching agreement on effective affirmative

action and monitoring its implications may be quite feasible. Likewise, employers who provide goods and services on a regular basis to the government may also be prime candidates for a compliance approach. Those employers doing intermittent or irregular business with the government pose a more difficult problem. If the government wished to sustain a broad impact approach, which included the large number of employers falling in the third group, it would be necessary to require potential contractors to comply with the regulations and maintain satisfactory programs between contracts. The government's primary sanction would be to remove a potential contractor from the list of those companies eligible for contracts.

A second practical problem is the clear jurisdictional right of provincial human rights commissions to regulate provincial employers. Provincial laws would override any contract terms that placed the provincial company at variance. Participants would be required to obtain consent from their respective provincial agencies if remedial measures involving preferential practices were to be part of an affirmative action plan. Some provinces/territories do not have permissive clauses in their legislation, while some — for example, Alberta — require cabinet sanction, which is rarely given. Constraints on the collection of race- and sex-conscious data could result in quite substantial provincial variations in the type and extent of the program required by the federal government.

A third problem, which appears only when other levels of government adopt similar programs, arises when an employer faces different and sometimes conflicting requirements. In the United States, for example, an employer in Baltimore, Maryland, doing business in New York and with the federal government could find it necessary to comply with programs established by the Office of Federal Contract Compliance Programs in Washington, D.C., the Maryland and New York State governments, as well as the cities of New York and Baltimore. At the least, different requirements can cause a heavy and expensive administrative burden, while conflicting regulations can make compliance impossible.

In addition to practical difficulties, the legal rights of the federal government to enforce a contractor's obligations are currently restricted by existing contract law. It is the opinion of some legal observers that this law as it now stands lacks the ability to permit monetary and specific performance remedies for violation of an affirmative action clause. For example, in Canadian jurisprudence, monetary damages for breach of contract are related closely to the actual cost to the contractee for the non-compliance. However, even without a basis for special remedies, termination of long-term contracts and/or debarment from further contracts — extra-legal remedies — would be available to sanction non-performance. These latter sanctions would provide a persuasive argument for employers, despite their somewhat cumbersome implications.

The use of contract compliance is a powerful public policy tool already in use for such objectives as increased Canadianization of publicly consumed goods. For all of the reasons outlined above, its use to require affirmative action plans is not without its problems. A number of key steps therefore are required.

First, the contract compliance lever should be established in legislation to clearly articulate the government's intent. The

necessary changes to contract law should be made to ensure that the government has the special remedies it requires. This is especially important if the program is to cover large, one-time contracts and sole supply contractors for whom debarment is unrealistic. The legislative mandate is required in order to avoid a widely fluctuating status for the program from succeeding administrations. Conscious and public legislative revisions, rather than benign neglect, would be necessary to change the program.

Second, vigorous consultations with the provincial governments should be carried out to ensure a coordinated approach that avoids duplication and minimizes the regulatory requirements for employers subject to different jurisdictions.

Third, as with a mandatory, federal employer approach, clear compliance procedures must be established and an appropriate agency chosen or created. It may well be advisable to use a phased approach, which would begin with mega-contracts and extend to the other contract situations as experience is gained.

### 3. Other Legislated Levers

Contracts are not the only levers available to the government. Employers receive substantial benefits through such instruments as the granting of federal resource leases, federal loans and loan guarantees, grants and contributions, and special pricing agreements. The government does have the option in many cases to invoke policy directives in requiring the negotiation of acceptable plans. A better approach, resulting in clear, consistent requirements, would be to carefully consider each potential lever and provide a legislated base for those considered most suitable.

Legislation is desirable primarily because the proprietary nature of compliance requirements has a tendency to be lost the greater the significance of the project to which it applies. Energy projects, for instance, are not only enormous in costs and highly significant in terms of a multiplier effect on the Canadian economy, they are also crucial to ensuring energy security in a volatile world situation. Thus, the very definite risk is that affirmative action, as a priority, will be played off against the priority of securing oil and energy self-sufficiency. For example, despite requirements for affirmative action for construction of the pre-built section of the Alaska Gas Pipeline, work was permitted to commence without approved plans. Legislated requirements clearly establish the government's intent, prescribe the parameters for negotiations, and limit the ability of bureaucrats and employers to skirt or neglect compliance.

As outlined in Section IV, many current energy-related projects operate under enabling legislation, e.g., Northern Pipeline Act, COGLA, etc. Most require the involved employers to undertake rigorous human resource planning and usually require or, more accurately, permit the government to address the question of target group utilization.

In addition to energy-related legislation, a number of programs have been implemented at the federal level to promote employment development and to assist with industrial adjustment to economic changes. Tax credit systems and loan guarantees have played a major role in these programs. As outlined in earlier sections, there will be an increasing need for government to facilitate changes during the next

decade. Job creation will decrease in importance while employment adjustment will increase. Not only will there be a programmatic change, there may also be a movement to more direct grant and tax financing of these changes. This may be particularly important for medium-size employers and companies that lack access to capital and face tight cash flow situations. Should this take place, affirmative action could be included as a condition of monetary assistance.

Examples of past federal programs that could be important contributors are the Export Development Corporation, the Enterprise Development Program, the Defence Industry Productivity Program, the Regional Development Incentives Program, General Development Agreements, and various sectoral agreements such as with shipbuilding and the pulp and paper industry.

As with the oil and gas industry, the question of whether a legislated policy decision relating to improved labour market equity would be a disincentive to participation must be resolved. With the priority of establishing new jobs generally and maintaining or creating new employment in areas where unemployment is chronically high and the industrial base is weak, the tendency of employers to see affirmative action as a cost rather than an investment will result in conflicts. The greater the competition for assistance, however, the less this is likely to cause a problem.

A more serious problem is, again, the divided jurisdiction relating to human rights obligations. The same potential double bind is present in this option as exists with contract compliance.

The adoption of a policy option involving the use of a full range of levers summarized above would require modest changes to some existing energy-related legislation — e.g., changing COGLA to "require" compliance — as well as parliamentary adoption of basic regulations such as those outlined earlier for a Special Affirmative Measures plan.

In addition, a commitment to include compliance requirements in future legislation would not only signal the government's intent but would engender substantial "voluntary" compliance by employers seeking to be prepared for future opportunities. Finally, a careful and considered review of all major contributory programs would be needed to identify those best suited for a similar initiative.

It should be reiterated that the approach adopted must be flexible enough to respond to the particular employment and production situation in which the employer operates. Section IV concluded with an outline of a Special Affirmative Measures approach developed to facilitate the realities of offshore oil exploration and production, as well as the existing valid limits of supply in the labour market. Similar adaptations may be required if other levers are to be used.

#### 4. Compliance Regulations and Success

The proposals outlined under policy instruments are the strongest measures available to the government for ensuring the implementation of affirmative action. They must be weighed in terms of the negative implications of increased regulation against the positive outcomes both in economic and equity terms. Two points deserve repeating at this time. The first is that requirements for compliance must be backed by remedies or sanctions and a willingness to use them when necessary. The second is that against this harsh necessity is

the requirement for the government to strive to create an atmosphere conducive to Tremblay's condition of "positive compliance", in which employers willingly apply the sophistication of their corporate planning systems to the problem. While many variables make this difficult, not the least being inherent hostility to regulations, such an atmosphere can be created. It will require a well-constructed and extensive education program on the potential benefits of the affirmative action corporate planning process. In addition, it must be presented as an integral part of good human resource planning. In some cases, it will be necessary to provide incentives to employers willing but not necessarily financially able to incur the short- and medium-term costs.

### B. A Policy Approach

Strictly speaking, a fully legislated approach is required only for a mandatory program for employers under federal jurisdiction. A statutory contract approach and legislative amendments to beneficiary programs would indicate government commitment, provide continuity, and facilitate action by appropriate agencies responsible for implementation. In addition, there are a number of policy initiatives that could be used to expand the impact on employers. These include: An enhanced voluntary program; incentives; and offshore recruitment of workers.

#### 1. An Enhanced Voluntary Program

Since April, 1978, the government, through the Canada Employment and Immigration Commission, has provided a technical service for employers wishing to implement full affirmative action plans. This has included not only assistance to individual employers on establishing plans but also the development and delivery of sophisticated technical training and leadership in creating a network of affirmative action practitioners. CEIC technical expertise has been utilized on the Northern Pipeline, Public Service Affirmative Action, COGLA, and with early negotiations on oil-sands mega-projects.

The role CEIC's program has played in helping to establish the parameters of a viable Canadian approach to affirmative action has not been insignificant. For this reason, the impact cannot be measured simply by the number of formal agreements signed with employers. One cannot conceal the fact, however, that the number of Canadian companies implementing effective programs is extremely limited. There is little evidence that the results of a 1978 survey of employers commissioned by CEIC, which found little likelihood of independent action, have changed radically over the last six years. Recent government decisions vis-à-vis mandatory public service programs, intermittent union lobbying, and the simple dynamic of radical demographic changes — particularly female university graduation rates — may have some effect. More likely to generate positive action is increased pressure from well-organized women's groups, effective prosecution of large employers for employment discrimination, and the emergence of a new breed of chief executive officers, senior managers, and human resource specialists more attuned to the significance of the human variable in production.

Despite these caveats, the least intrusive policy option for the federal government is to undertake a significant lobby initiative with key employers, along with other elements of an



enhanced voluntary program, backed by CEIC's core of technical expertise.

An enhanced voluntary strategy would be based on a five-point platform. These include:

- a) An Employer Contact Strategy;
- b) A Marketing Strategy;
- c) Human Resource Planning Agreements;
- d) Major Development Agreements;
- e) Technical Services.

#### **a) Employer Contact Strategy**

Core to ensuring the acceptance of the affirmative action planning process is the need to transmit a strong yet persuasive message to the business and labour communities that the government is committed to ensuring affirmative action in the private sector. The most effective means of communicating this message is directly from the top actors in the government to significant chief executive officers, union officials, and key opinion-setters. A firm message would be required stating that the government, in responding favourably to employers' wishes to avoid regulatory requirements, now expects employers to demonstrate that a voluntary approach will work. At the same time, it would be important that the business community perceive that senior public officials are fully supportive of the government's commitments. Reinforcement of the affirmative action message could be achieved through strong political contacts with important individuals in industry and maintained by national and regional senior managers in key federal departments. Mechanisms used should include both public communications and private, low-key consultations.

A contact strategy could begin with a strong commitment in a Throne Speech to the affirmative action process. To ensure a high profile and a clear message, the Prime Minister would follow with an endorsement of affirmative action as a control element in the government's human resource strategy for the 1980s and beyond. This endorsement should take the form of a call for a meeting of the Prime Minister, senior economic and employment ministers, and key opinion-setters in the business community. The same key ministers would continue to communicate to senior business leaders that the government's current strategy is predicated on a belief that industry is prepared to make substantive progress over the next five years without the imposition of mandatory controls.

This public profile must be supported by an equally clear and consistent message from those department officials most concerned with employment in the private sector. Having deputy heads, as well as other national and regional public executives, carrying the message through regular consultations and one-to-one meetings with business leaders and opinion-setters would be required over the medium and long-term.

Such steps would communicate a strong message to the private sector short of requiring mandatory compliance. With a strong, public commitment established, there would be room to negotiate with employers on what action and results could be expected over the next few years.

#### **b) Marketing Strategy**

A key requirement for a successful voluntary program is for employers to begin to assume ownership of the problem and to move towards its resolution. The contact strategy outlined above is one step in such a program; the use of an effective marketing strategy is another. The major objective would not be to reach the broad Canadian audience, but rather to develop effective means for targeting not only employers as a whole but individual industrial sectors as well. The use of selective instruments such as trade and technical journals, trade shows, and direct mailings would be used to communicate the message.

Successful affirmative action programs in the private sector are limited but not non-existent in Canada. Publicizing their results and getting solid endorsements by respected senior executives would be extremely powerful tools.

In addition to a direct and exclusive affirmative action approach, the process should also be clearly "piggy-backed" with general audience marketing, especially where it deals with human resource development or, more generally, with economic stimulation. If this initiative, or the more direct approach, is to be used, it is important that it be a continuing message rather than one tied to a time-limited priority.

#### **c) Human Resource Planning Agreements**

The government has been encouraging employers, through planning agreements negotiated by CEIC with key industry associations, to develop comprehensive human resource strategies. Despite environment pressures and government encouragement, the paucity of existing expertise has resulted in only 13 such agreements. The agreements commit signatory associations and companies to work with Commission professionals and outside consultants in the rationalization of their human resource systems and in developing projections and mechanisms designed to ensure an orderly flow of skilled labour in the future. Specific incentives for the associations and their member companies come from the Commission's expertise, training resources, supply projection abilities, referral and mobility mechanisms, and control of off-shore recruitment.

In addition to these potential benefits, the importance of government involvement will continue to be very significant in certain sectors. Aerospace, shipbuilding, mining, etc., usually include several crown corporations, depend moderately or heavily on government grants and contracts, and/or may be influenced significantly by government policy and initiatives. In some cases unions are exerting strong pressure for job security, for greater decision-making input, and for more equality for female union members.

For several reasons, not the least being the enormous significance of the existing and potential "human capital" of female workers, affirmative action must be established as an integral element of these agreements. In other words, associations must be required to develop and implement aggressive strategies to bring member companies on side and to actively encourage the development of plans. The very limited authority industry associations possess over their members makes this instrument less than a powerful lever. In order to ensure compliance, direct benefits stemming from

the agreements, e.g., training dollars, grants, off-shore recruitment, ought to be tied to performance.

In order to ensure a consistent and sustained approach that builds on the themes articulated in the government's employer contact strategy, a national "minimum standards on affirmative action" mandate should be established by CEIC. This mandate would set out the basic affirmative action requirements the Commission would expect in the text of any human resource planning agreement. While the nature of the agreements and the signatory organizations mean this approach is not a powerful tool, it is important in establishing affirmative action as a key component of human resource management.

#### **d) Major Development Agreements**

The mandatory option outlined the possibility of using such levers as drilling permits and oil prices, based on explicit compliance legislation, to require action. Alternatively, a non-mandatory approach would involve the negotiation of a concrete plan without recourse to sanctions. In the past, for example, Syncrude in Alberta undertook to implement a plan with specific priority given to native people. Despite some success with this particular program, it is unlikely that a voluntary approach could be expected to have a substantial impact even though the Special Affirmative Measures approach can tailor plans to the heavily non-traditional and sporadic nature of the work. Certainly for women, the absence of a compliance requirement would mean a much higher return from program investments in other areas of the economy. For native people, however, the heavy concentration on frontier exploration and development necessitates their significant inclusion in all employment opportunities available.

#### **e) Technical Services**

A recurring theme of this report has been that affirmative action, first, is simply the application of a basic problem-solving approach to a particular problem and, second, is simply one component — albeit a significant one — of proper human resource management. This being said, there remains a lack of experienced, technical expertise. This is a function of both a continuing failure of business, training institutions, and government to see affirmative action skills as valid and necessary for effective management and an only recently corrected failure to apply training, skills, time, and management priority to the human resource field.

American companies have had to face growing pressure for more than 20 years to develop effective systems capable of delivering results. There are those who argue that this pressure quickened, if not started, the move toward human resource planning as a core element for corporate management.

While considerable confusion, compounded by changing and sometimes conflicting government regulation, has resulted in the United States, sophisticated expertise has also emerged. Many large management consulting firms now offer an array of technical assistance related to regulatory compliance. Perhaps more important, continual top corporate performers such as IBM, Weyerhaeuser, Levi Strauss, and Norton-Simon have developed their own affirmative action capabilities and integrated these into their ongoing operational and strategic planning systems.

In Canada, as was reviewed in Section II, human resource management is just beginning to develop, and affirmative action skills are not a significant component of the corporate process. For this reason it makes sense for the government to support those employers wishing to develop plans through the development and provision of expertise. This can be done in a number of ways, all of which build on the service CEIC has provided for the last six years.

First, the number of management consultants now operating under CIEC's program of a free consultative service limits the degree of impact possible. In order to ensure an expanded impact it would be necessary to increase the number of trained personnel and ensure, possibly through a nationally delivered service, that they are able to respond quickly to geographic demand. Equally important is the need to ensure that other planners, whether in CEIC or other economic development-related agencies, are schooled in the basic skills of affirmative action planning.

Second, it is equally clear that the government's major role is not to meet all of the demand for technical expertise. In the vast majority of cases, private consultants and internal expertise must form the basis for plan development. What the federal government can do to maximize its impact and ensure a consistent approach is to provide technical training for both management consultants and corporate planners. CEIC has developed a sophisticated training package that, with sufficient resources, could be used to reach a wide audience.

Finally, the long-term success and impact of a concerted initiative can be greatly assisted by the development of a communications network designed to facilitate inter-employer/union and government exchanges of information. Such a system would assist in building support as practitioners and managers gain a better understanding of what others are doing in the field. This network ought not to be viewed as primarily a one-way flow from government but as an opportunity to share successful innovations, to explore problem areas and solutions, and to identify areas requiring government action, such as demographic data and training requirements.

A Practitioners' Workshop held in April, 1983, brought a balanced group of approximately 150 private-sector employers, unions, and public-sector employers together to discuss affirmative action. Designed by a tripartite steering group, the workshop resulted in excellent exchanges, considerable discussion of technical concerns related to affirmative action, and a general feeling that ongoing contact was necessary. The smooth interaction of employers, CLC representatives, and representatives of all levels of government allowed for the review of issues affecting all those actors.

The federal government should be prepared to continue to assume the very modest cost for an employer/union/government steering group to organize annual workshops and periodic information sessions. Properly fostered, the network could evolve into a private initiative, actively bringing together practitioners from all sectors. Key to success will be the ability to get employers and unions to begin to assume ownership of the problem and its solution.

The development and expansion of the technical consultative service are predicated on the implementation of other elements of an enhanced voluntary strategy. Without a

strong, visible profile, generated by a clear commitment at the highest government levels, the demand for and impact of such a service will remain limited and fragmented.

## 2. Incentives

An incentive approach as a means of encouraging employer adoption of affirmative action plans may be a useful labour market instrument. It also has limitations that preclude using incentives as the only or even major tool for influencing demand. Not the least of these is the ethical injunction against rewarding employers for taking steps to conform with the law. This section briefly reviews three potential incentive sources: targeted training funds, affirmative action agreement grants, and tax incentives.

### a) Targeted Training Funds

The government, through programs funded by CEIC, has steadily increased the level of support for industry-based or on-the-job training, e.g., expansion of the General Industrial Training Program and various career access initiatives. Funding for such training has grown in absolute terms as well as in relative terms compared to institutional-based training. It is expected that this trend will continue if not intensify over the next few years as government attempts to meet the criticism that new entrants often lack the specific skills required by individual employers.

Such an approach has the distinct advantage of relating training directly to employer requirements and of facilitating a training-to-job continuum. The latter characteristic has been shown to be an important element in programs to integrate the disadvantaged into the primary labour market.<sup>22</sup> While on-the-job training cannot replace entirely institutional-based training, it will be extremely important during the next decade as a core tool for upgrading the existing labour force to the requirements of new technology. In addition, new entrants will have to be trained in order to handle the specific technologies of individual industries and companies. It will be impractical and inefficient to move large sectors of the labour force back and forth between employment and institutional training. Industry-based training, therefore, will be a major instrument for facilitating the economic adjustments outlined in Section II.

Reimbursements of employee salaries and wages under existing programs include incentives for training disadvantaged labour force participants. This is accomplished by providing a sliding scale allowing up to an 85 per cent subsidy for some groups. Despite these provisions, the impact of the program on women and minorities has been questioned. Problems include employers using the subsidy to obtain cheap labour, with employees released once the reimbursement period is complete; special or disadvantaged employees entering employment situations that continue to contain discriminatory systems and practices, which affect promotion, etc.; and the simple failure of employers to take advantage of extra incentives associated with hiring and training designated group members. For these reasons it may be necessary to rethink how training dollars can be used as an incentive.

Probably the most direct and effective approach would involve targeting training — i.e., career access, etc. — funds for use only in support of an affirmative action plan. This would mean that funds would be available to an employer

implementing an appropriate plan in order to provide training required to meet goals established by that plan. Such an approach has the enormous advantage of ensuring that monies are spent in an environment committed to maintaining and increasing designated group employment and which has been thoroughly reviewed for those systems that could negatively affect ongoing employment opportunities. It also removes the existing reliance on higher subsidies as the sole incentive for training targeted employees by specifically directing funds to affirmative action-based training requirements.

### b) Affirmative Action Agreements

As outlined in an earlier section, CEIC currently offers a free technical consultative service to companies prepared to develop a plan. This service was originally designed to provide relatively intensive consultation to a limited number of companies. It was expected that consultants would play a significant role in terms of carrying out the necessary work. CEIC's ability to continue to deliver this type of service as an increasing number of employers undertake the affirmative action corporate planning process will be limited by the size of the consulting service.

Consideration should be given to establishing the capability to underwrite all or part of the costs of the development phase of the planning period. This would permit the employer to contract or hire staff required to audit employee data and employment systems and to develop an appropriate plan. The role of the CEIC consultant could be shifted to one of advising and of ensuring the technical integrity of the work being done under the terms of the agreement.

Affirmative action funding arrangements need not be applied universally to all agreements but could be used as an incentive for smaller or medium-sized firms or for companies facing financial constraints. For some firms, the opportunity to rationalize or develop their employment planning capabilities with grant funding will prove to be an effective incentive.

### c) Tax Incentives

The federal government already uses the corporate tax system to stimulate employment by private investors. Special tax rates, depletion allowances, accelerated capital cost allowances, etc., all provide a powerful fiscal tool to encourage employers to achieve government objectives. No tax incentive currently exists for an individual employer who incurs the short-term cost of developing and implementing an effective affirmative action plan. In a competitive market, the employer is faced with the real and perceived disadvantage of undertaking investments that his/her competitors do not. For this reason, a process to socialize the costs through tax incentives would shift these costs either to society as a whole or to the whole corporate sector.

Under the first approach, employers could claim a tax credit for investments incurred for affirmative action. The rate of the credit would have to be such that it would make such investments attractive. With this approach, the cost of the incentive, i.e., lost tax revenues, is distributed across the tax base. In the long term it would be reasonable to assume that savings generated through better utilization of groups with historically high rates of dependency on social support systems would more than offset the lost revenues. Such a system is not without major drawbacks. Tax credit systems have



the disadvantage of rewarding only those employers requiring means to reduce taxable income. In addition, while it relates incentives to actual costs it requires a potentially complex regulatory system to determine the validity of claimed costs.

A second approach would distribute the costs of an incentive program only among employers through a payroll tax/rebate system. Under this option all firms would be taxed a percentage of their payrolls, with those implementing plans receiving a rebate of their levy. A maximum rebate could be up to the amount of the original levy or it could include additional funds to increase the incentive. Monies raised through the tax could be supplemented if demand outstripped the limits of the funds, thus creating a combination program with the first approach. Such levy/grant systems are not without precedent — e.g., the United Kingdom — for encouraging employers to initiate or expand company-based training. The difficulty of creating an efficient system for grant distribution and program verification, however, should not be underestimated.

### ***1. The Limits of Incentives***

The overwhelming advantage of an incentive approach is its avoidance of mandatory compliance and imposed regulation. While conditions are attached to the benefit received, the employer voluntarily assumes these constraints in order to receive the benefit. But there are also severe limitations on the potential impact of incentives.

An incentive works best when the combination of the perceived positive return to action plus the offered incentive to act is greater than the perceived cost of acting. Current experience suggests that from an employer's corporate point of view the "costs" of implementing affirmative action (including opportunity costs and attitudinal beliefs) outweigh the "returns". Additionally, the gap between costs and benefits is perceived to be quite substantial to many employers.<sup>23</sup> If such is the case, the level of financial incentive required may prove to be prohibitive.<sup>24</sup>

In some cases, the incentive may be adequate to provide a positive outcome to the equation. Particularly, this may result when the incentive for affirmative action is based on the availability of funds from another program, such as training. For example, the aerospace and shipbuilding industries utilize substantial sums of training dollars. The problem, however, is that the benefits are viewed in terms of training and the costs in terms of affirmative action. The result is that the affirmative action requirement is, in fact, viewed as an imposed regulation.

Finally, it may be very difficult to assess the impact of the incentive. Answering the question of whether the employer acted because of the incentive or simply took advantage of the offer while intending to act anyway is very difficult. The tax credit program, for example, may not have increased employment because employers making claims against the credit were already committed to increasing their labour force. When resources are limited, it is crucial to be able to assess the incentive's real impact.

The conclusion must be that incentives can play a positive role but government resources, and the perception of the crucial decision-makers in companies<sup>25</sup> will limit their effectiveness. If the benefits of affirmative action can be more

effectively marketed, incentives may provide the necessary extra to trigger action.

### **3. Offshore Recruitment of Workers**

Despite the prospects of continued high unemployment over the next few years, some employers will continue to request permission to recruit employees from outside Canada. In the past, the community/personal service and oil and gas sectors have been particularly heavy users of offshore workers. Other individual employers make demands when certain skills, underdeveloped in Canada, are required. This arises both as an ongoing response to company activities and when large expansions, etc., are implemented. Shortages, both real and perceived, arise for a variety of reasons including:

- failure of training institutions to produce an adequate supply of skilled workers in certain areas;
- unpredicted demand for particular skills;
- refusal or failure of an employer to undertake required training of employees;
- restrictions in collective agreements to entry to apprenticeship; and
- inaccurate job requirements leading to underestimation of availability of domestic workers.

Consideration could be given to establishing a federal policy that approval for offshore workers is contingent on the employer's establishing real need and an affirmative action response in order to ensure that part or all of the existing requirement is valid. This lever has worked well in a number of cases to ensure Canadianization of workforces and could be expanded to include other target groups.

The right to impose such conditions on a mandatory basis may well be outside the intent of the current Immigration Act. Amendments would probably be necessary if the government wished to avoid challenges to its authority to oppose conditions. Tying affirmative action implementation to approval of offshore worker requests also has many of the same difficulties as contract compliance. This includes such things as the lack of a sanction for eventual non-fulfilment of commitments, and the possibility of strongly competing and immediate priorities related to the need for the foreign workers. For these reasons, the option of access to foreign workers would be best restricted to situations such as pipelines or COGLA, where substantive prior planning is possible and long-term project implementation will take place, or to industrial sectors, where there will be domestic supply shortfalls of skilled workers over an extended period of time.

### **C. Conclusion**

This section has set out some policy options the federal government could adopt to ensure that employers undertake effective affirmative action planning. They are by no means exhaustive, nor have their ramifications and problems been fully explored. But they do represent some of the most significant levers available to government. Of course, the pivotal decision is whether the government wishes to insinuate affirmative action — and the objectives it can achieve — as a primary socio-economic requirement through regulation, or whether it intends to rely on the good sense of an informed business community backed up by the existing legal authority of federal and provincial human rights commissions.

Experience in the United States prior to the Griggs and AT&T cases of the early 1970s has tended to confirm that a voluntary program is not likely to be highly successful. In one study it was found that, for those employers willing to be part of the voluntary Alliance for Progress Program, the rate of change for the utilization of blacks was lower than for those employers who refused. Times have changed, however, and a number of variables may improve the prospects for progress of a non-mandatory approach. The development of human resource management as an important corporate objective, a clearer understanding of the implications of demographic trends, the enactment and enforcement of human rights legislation, and the awareness that governments may be forced to act through mandatory action are some of the changes.

A voluntary approach will work only if the government is prepared to assume a high profile and actively lobby for corporate action. Alternatively, a phased-in mandatory program, using selective levers and based on carefully developed standards, could achieve results without costly disruption to the human resource management function.

#### **VII. THE IMPERATIVE FOR ACTION: ECONOMIC EFFICIENCY AND SOCIAL EQUITY IN CANADA**

The Canadian labour market does not act as a neutral arbitrator of workers seeking to market their skills based only on their merit. The implications of this well-documented problem are significant both for the country's commitment to the ethical goal of social equity and to the utilitarian goal of an economic system operating at maximum efficiency.

The starting point of effective problem solving is the determination of whether a problem indeed exists and what outcomes must be changed. This report has argued that there is a problem with labour market equity and that is reflected in disparate outcomes for certain groups, constituting the majority of Canadians, in terms of unemployment rates, occupational status, and consequent income levels. The second principle is the requirement to peel back the layers of causes and effects to determine what are the core constructs of the problem. Finally, successful problem-solving requires the development of remedies designed to remove these causes in a way that will have a direct impact on the outcomes identified as problematic. At the same time, a successful remedy will not create new problems that will negatively affect other significant goals of the problem solver. The best remedies are those that not only do not negatively affect other goals but act to support their achievement. The affirmative action corporate planning process is such a remedy.

As a human resource management approach, affirmative action cannot be viewed as an inflexibly structured formula designed to successfully handle all situations and all industrial sectors.<sup>26</sup> It is for this reason that the report has come back again and again to its starting point that this approach is based on the time-honoured principle of successful problem solving — utilizing specialized tools to deal with a specific problem. The growth and increasing sophistication of human resource management as a key element of corporate operational and strategic planning makes it an auspicious time to integrate affirmative action into business operations. Similarly, the slow maturation in recent years of the concepts of organizational and change management will assist in reducing any potential conflict.

The conclusions summarized above suggest that: there is a problem with equity in the labour market; this problem has negative social and economic implications; and Canadian employers increasingly have the sophisticated generic skills to respond successfully. This having been said, public decision-makers are faced with a number of key decisions.

#### **A. Mandatory or Voluntary**

Certainly, the first question is whether the federal government should implement mandatory regulations requiring employers to take action. Alternatively, the government can rely on the progressive intentions of most employers backed by a strong information and contact strategy designed to make clear the economic rationality of undertaking affirmative action. The latter option clearly has the advantage of avoiding regulations and the need for an enforcement agency. Its clear disadvantage is the historical perception that labour market equity is a social rather than an economic objective, that remedial action will necessarily generate conflict and non-recoverable costs, and that, as a priority, equality must give way to other objectives. The very limited successes of past programs are perhaps the most telling criticism of the voluntary approach. This being said, an initiative well thought out, well funded, and given a high political profile could conceivably achieve better results.

A mandatory approach will clearly demonstrate that employment inequality is not acceptable, both for economic and social reasons. But a mandatory program will not be a guarantee of success. Failure to provide clear and realistic regulations, to bring key corporate leaders "on side", and to provide necessary support systems through better pre-market programs and appropriate technical assistance could result in serious problems. In addition, difficult decisions will be required concerning the extent of the program, responsibilities for regulation, political jurisdiction, etc.

#### **B. Providing the Tools**

A decision to implement effective affirmative action planning — whether voluntary or mandatory — requires quick movement to provide the appropriate tools to support the initiative.

**Data** — As discussed earlier, affirmative action requires appropriate labour market data; the greater the reliability of the data the greater the reliability of the planning decisions made. The vast gaps in historical data for all groups and the current gaps for all but perhaps women are a problem. A decision is required to commit Statistics Canada to ensuring that the necessary data are collected in the 1986 Census and subsequent censuses and to commit resources to developing an immediate "snapshot" occupational/skill inventory of the key minority groups.

**Federal-Provincial Jurisdiction** — There will be a need to move quickly to clarify potential areas of conflict with provincial governments. While legal jurisdictions cannot be changed, high-level consultations can create a cooperative environment that will minimize the possibility of placing employers between two masters.

**Technical Assistance** — In the initial phase of a strong initiative, the federal government would need to supply technical expertise. This would require a decision to enhance its current capabilities, particularly its ability to orchestrate a skill transfer to the private sector. This includes not only

individual employers but also a well-developed management consulting service industry.

### **C. An Integrated Strategy**

Affirmative action in the labour market is ultimately limited by its commitment to the principle that appropriate utilization rates are determined by the availability of qualified and interested target group workers. The continued presence of pre-market constraints in training, in market mechanisms, and in socialization will continue to deny many workers the opportunity to fully and freely realize their employment potential. For this reason, serious consideration will have to be given to a concerted effort to remove systemic barriers from supply-side and market mechanism programs and to remedy the impact of past discrimination. If a regulatory or mandatory agency is established, serious consideration should be given to incorporating a tough audit function with the responsibility to monitor federal programs, even those involving cost-sharing with other levels of government.

The provision of an independent audit watchdog is as necessary for the equal employment opportunity/human resources management areas as it is for finance and official languages. It would signal to both public program managers and employers a strong government commitment. In addition, it would clearly demonstrate that the government is aware that employers cannot bear the full responsibility for ensuring eventual equality.

### **D. Conclusion**

Change is perhaps inevitable; change that furthers the principles of social justice and economic equity is not. A public policy centred on the use of the affirmative action tool can ensure such an outcome. The next decade will provide an opportunity to factor in the equity issue into the complex yet potentially rich and productive process of structuring a responsive, technically sophisticated economic system. This opportunity should not be lost.



## NOTES

1. Potential real growth is determined by productivity growth plus labour force growth. High unemployment provides additional growth potential as the unemployed worker, except for the discouraged worker, is already part of the labour force.
2. This conclusion is based on an assumption of a static distribution between industry groups and non-traditional occupations. There is some evidence that the trend of sex distribution in non-traditional industry groups, between 1975-79, if extended to 1990, is in line with the projected employment trend. It is quite probable, however, that this trend is a function of an increased number of traditional female occupations in traditionally male industries (e.g., office employment in mining). It is likely that employment growth in these industries during the 1980s will be in occupations other than those traditionally filled by women. In this case, the 1975-79 trend does not contradict the possibility of shortages.
3. The Economic Council of Canada, however, in the Base Case Projection, predicts labour force growth will remain below 2.0 per cent and will decline to 1.4 per cent by 1987.
4. It should be remembered that while large workforce reductions may occur in one area, e.g., car assembly, the robots that replace workers must also be produced. In a closed system, net reduction of workers required is a factor of growth in overall productivity. The real problem is dealing with the need to move a large number of workers from one work area to another.
5. Affirmative action in enrolment at Canadian universities and training institutions has not been required, as it has been in the United States under Title VII of the Civil Rights Act of 1964. Nonetheless, the data show women have made broad strides in almost all high-skill, professional occupations. It cannot be argued that they have simply "displaced" males; rather the increased access has meant a larger pool of competent students from which universities have been able to draw.
6. Through various vehicles, the government has been attempting to ensure that a general rationalization takes place. The Northern Pipeline Act and the Canada Oil and Gas Lands Act both require detailed human resource plans before training and foreign workers can be discussed. Major agreements with industry associations and CEIC have included both general human resource planning and equity objectives.
7. *Wren, Re Drummond*, [1945] O.R. 778; 4 D.L.R. 674.
8. An exception has been in the work health and safety area where some governments have required a joint approach.
9. Statistics Canada is currently working on a 15-group classification based on education and experience requirements.
10. For example, if 25 per cent of female and 75 per cent of male applicants for a particular job are interviewed for a job, the interview ratio of women to men is 33.3 per cent, well below 60 per cent.
11. In addition to affirmative action objectives, flow data can be used to examine career paths, establish training needs, and identify areas of high turnover.
12. Examples abound in the United States of companies that have integrated goals and companies that do not. The latter have been at the forefront of those pointing at serious problems with target group employees and blaming "affirmative action". The former have been more likely to report improvements in overall productivity.
13. Offshore oil jobs involve a number of non-interchangeable occupational groups, but also include several where workers traditionally progress after gaining experience at lower levels. Construction projects are similar, although entry into skill training, especially apprenticeship, may not require such extensive previous experience.
14. In one case, a review of minimum requirements for jobs on a pipeline project resulted in the number of entry-level jobs rising from 10 per cent to 25 per cent.
15. Required training refers to both training the employer would undertake on his or her own volition to meet operating needs and the training required by government regulations. Training and "technology transfer", as it is called in COGLA's Canadianization program, in project-type situations are usually a function of the latter.
16. Off-shore oil and gas operators have sometimes complained that the more active companies end up recruiting and training target group workers who are "picked off" by other, less active employers.
17. Less government regulation as a business slogan tends to be selective and has resulted in splits within the business community. For example, deregulation of the trucking and airline industries in the United States has resulted in big winners (large trucking firms, small regional airlines) and big losers (independent truckers and large airlines).
18. CEIC Affirmative Action Directorate has developed a Generic Skills Job Classification System with the assistance of Art Smith. This system allows the employer to develop a generic skill profile of a job and an applicant. In addition, the generic skills of an occupation can be profiled and compared with other occupations to determine the potential for transferability.
19. See Ivan Timonin, Report Data Assembly Project, CEIC, December, 1983.
20. Ten provinces, two territories, and the federal level.
21. See CEIC, *Labour Market Development in the 1980s*, July 1981; and Parliamentary Task Force on Employment Opportunities for the '80s, *Work for Tomorrow*.
22. For example, see this author's report, "Evaluation of Programs for Integrating the Disadvantaged into the Labour Market", prepared for the Manitoba Government in 1976.
23. See results of the *Affirmative Action Study* commissioned by the Affirmative Action Division, CEIC, 1979-80. There were no indications that the employers interviewed perceived corporate benefits to implementing affirmative action.
24. This may be particularly true for large companies. For example, a large international firm establishing a new operation in Winnipeg was eligible for approximately \$50,000 in training funds. The company financed all the training itself simply because the perceived paperwork was considered too burdensome, i.e., the "cost" of using the program was considered greater than the financial "benefits".
25. It has been the experience of affirmative action consultants that these may well be personnel/human resource managers rather than senior executives.
26. See "The New Breed of Strategic Planner", *Business Week*, September 17, 1984, for an interesting report on the failure of a formula approach to strategic planning.

## APPENDIX 1

### Employment Systems

The appendices are the result of work under way by the Affirmative Action Division of the Canada Employment and Immigration Commission.

#### A. Job Evaluation

Job evaluation is undertaken to determine the relative importance of different positions within the organization. The emphasis is on the value of the job itself, in terms of duties and responsibilities, rather than on the value of the employee in the job. Job evaluation forms the basis on which relative compensation is determined. As it also involves defining the tasks and duties of the job and the requisite skills required, it is the cornerstone on which other employment decisions concerning recruitment, selection, training and development, and wages and benefits are based.

Many organizations apply different evaluation methods for different job groups. A non-quantitative approach, such as ranking or classification, is often applied to secretarial, clerical, and semi-professional labourer groups, while a quantitative or analytical approach is used in evaluating higher-level groups. For example, a point system or a factor-comparison approach may be used for executive, professional, and technical positions. Use of these different evaluation methods does not, however, permit comparison of jobs across sector lines.

Although a quantitative evaluation approach may be more objective than a non-quantitative one, it is important to realize that job evaluation always involves subjective judgement. No job evaluation system will guarantee entirely accurate results. The outcome will depend on the skill exercised by those applying the system.

The purpose of job evaluation is to describe an organizational hierarchy based on the relative value of jobs. There is a tendency, however, for job evaluators to incorporate bias by undervaluing jobs traditionally performed by women. Section 11 of the Canadian Human Rights Act seeks to address this problem by requiring employers under the jurisdiction of the federal government to pay men and women equally for "work of equal value". This requirement also exists in the province of Quebec. In all other provincial and territorial jurisdictions, the standard for equal pay is the narrow definition of work that is "substantially the same". The practical effect of this narrow standard is that only jobs that are similar in nature are compared. Traditionally, men and women enter different occupations; therefore, the demands of jobs held by women are not usually compared to those of jobs held by men.

Potential sources of discrimination in the job evaluation process and plans include the following:

- unconscious bias on the part of the job analyst;
- rating by one person rather than by committee;
- use of subjective rather than quantitative methods of analysis;
- inaccurate or incomplete job information;
- built-in bias in the evaluation system;

- comparisons limited to occupational categories rather than to all jobs in the organization.

#### B. Recruitment

The objective of recruiting in all organizations is to attract the most qualified job applicants. The time and cost involved in selection procedures are important considerations, and many organizations will retain applications only from those perceived to be the most suitable candidates.

If assumptions about the characteristics of desirable candidates are discriminatory in nature, this will be reflected in the choice of recruitment channels and procedures. Many organizations tend to follow recruitment methods that have been successful in the past. If the firm has traditionally employed few women, native people, or disabled persons, present recruitment methods may be contributing to the continuation of this pattern.

Recruitment methods should be examined with a view to determining whether women, native people, and disabled persons are applying in sufficient numbers and for a sufficient range of jobs, given their present availability in the labour market. If an examination of job application patterns reveals that target group members are underrepresented, then methods of recruitment should be examined. It may be that the recruitment channels chosen by the organization are not accessible to most minority groups, or that job information is presented in such a way as to discourage their application. Just getting as far as the selection process has been identified as one of the major employment problems of target group members.

Several common methods of job recruitment that may affect the recruitment of target group members are examined below.

##### 1. Internal Recruitment Methods

**Promoting the Person Next in Line.** Vacancies are often filled by simply promoting the individual next in line in the organizational hierarchy. If feeder positions have not, as a matter of course, been filled by target group employees, they will not have access to higher levels within the organization. Seniority systems are another form of promoting the person next in line. However, the determining factor in a seniority system is "years of experience" rather than "position in the hierarchy". Seniority systems frequently operate to the disadvantage of target group members, since they have had fewer employment opportunities in the past.

**Internal Job Posting.** This method has the advantage of making the recruitment process open and visible. However, if there are few eligible female, native, or disabled candidates within the organization because of past hiring policies, this method will not be effective in improving the representation of these groups.

**Inventories.** Employers sometimes fill vacancies by referring to a skills inventory which gives information about the abilities and career interests of their employees. Inventories

have three potential shortcomings. They are open to considerable subjectivity in candidate selection and thus vulnerable to overt discrimination. They are not always comprehensive; employees at all levels may not be included. Inventories sometimes have arbitrary boundaries, for example, they may include only management employees or those above specified salary levels. These practices tend to exclude many target group members.

## 2. External Recruitment Methods

**Word-of-Mouth Referrals.** Organizations sometimes rely heavily on referrals from relatives or friends of current employees. This practice tends to replicate the pattern of the organization's current workforce. It can have an adverse impact if target group members are currently underrepresented.

**Walk-Ins.** Another method of recruiting is to rely heavily on applicants who simply walk into an employment office. The effect of this practice depends on the location of the organization, particularly its employment office. A company or employment office located in a middle- or upper-class suburb will not, according to current demographic patterns, attract a significant pool of native applicants. Similarly, if physical access to the employment office is difficult, disabled persons may not be able to submit applications. In addition, this method resembles word-of-mouth recruitment in that the organization does not actively invite applications, and therefore tends to perpetuate existing employment patterns.

**Advertising.** Employers can choose from a wide range of media when they advertise vacancies, including daily newspapers, trade publications, professional journals, community newspapers, and radio. The choice of media will determine the audience. The choice of text and illustrations for job advertisements can convey preferences as of age, gender, and physical ability. Pictures that do not include women, native people, or disabled persons, or that depict them only in stereotypical roles, will not be effective in attracting applications from target group members.

**Employment Agencies.** The private employment agency that an employer elects to use will determine the pool of applicants. Because private agencies are in the business of promoting high-profile clients, they tend to exclude target group members.

**Schools.** On-campus recruitment is a common way of attracting new graduates. However, recruitment that is limited to faculties in which the population is predominantly male is obviously a disadvantage to women.

**Unions.** The recruiting practices of employers whose establishments are unionized are influenced, and sometimes determined, by union agreements. Some collective agreements require that only union members may be recruited for vacant positions. In other cases, recruits must join the union when they are hired or the union itself may recruit employees through a union hiring hall.

In many unionized occupations and industries — for example, the skilled trades and the construction industry — there were, until recently, formal and informal barriers to the employment of women, native people, and disabled persons. Restrictions on external recruitment based on union agreements may present a real barrier to enlarging the participation rate of target group members. It may be possible to

negotiate a solution to this problem with the union(s) involved.

**Professional Associations.** Some professional associations provide employment advertising and candidate referral services for their members. As with other recruitment methods that involve inventories, there can be unconscious bias in the selection of candidates for referral.

## C. Selection Standards and Procedures

Discriminatory selection standards and procedures may be screening out qualified female, native, and physically disabled job applicants.

The selection process is open to discrimination of two basic types:

- The process itself involves continual evaluation of applicants against each other and against the selection standards. Each time candidates are evaluated there is potential for discriminatory impact.
- In many instances, selection standards themselves are not based on job requirements or tested for disparate impact and validity.

The selection process may go through several steps with different objectives.

### 1. Pre-screening Procedures

Aptitude tests, application forms, and general interviews are used by organizations to screen out unqualified candidates. However, these procedures may also screen out qualified applicants.

When the organization is faced with more applicants than it requires, it may use "cheap screening" devices to reduce the number of candidates. Non-job-related requirements, such as arbitrary standards of education or work experience, may be used. In many cases, these requirements have an adverse impact on target group members. For example, some applicants will be screened out by a requirement for completion of Grade 12 education; others re-entering the labour force will be screened out by the requirement for recent or related work experience.

Many target group members are also screened out by educational, cultural, and physical work standards based on arbitrary concepts of the ideal worker. Such concepts are likely to be based on the typical worker employed in similar positions. In most cases, the employee is male, white, and not physically handicapped. Discrimination of this kind may not be intentional; it is part of a system that has developed over time.

It is important to note that these standards, like cheap screening devices, are generally not related to ability to perform a job and that the individuals who are screened out may be as qualified as those who survive the selection process.

**Reception Procedures.** Discretionary powers of accepting or rejecting applications granted to untrained receptionist personnel may leave a company open to charges of overt discrimination. The atmosphere of the reception area and the attitude of the person receiving applications contribute to the comfort level of job applicants. An unfriendly atmosphere can result in candidates not submitting applications.

**Pre-Screening Tests.** Some organizations administer a general aptitude test to all job applicants as a screening device. Such tests are often not job-related and may in fact



screen out qualified candidates. In addition, many standardized tests are sexually or culturally biased. Tests that require physical ability or dexterity to complete, although these skills are not related to the job, can screen out qualified physically handicapped applicants.

**Pre-Screening Interviews.** Pre-screening interviews that are general in nature, rather than specifically job-related, can result in candidates being screened out on non-job-related grounds. The personal bias of the interviewer may also be reflected in the choice of candidates.

**Application Forms.** Application forms that require a candidate to provide information that is non-job-related can screen out applicants on a discriminatory basis. The inquiry may also be illegal if the information requested is counter to human rights legislation.

## 2. Interviews

Interviews are the part of the selection process where the impact of discrimination is most obvious. Discriminatory questioning and subjective or biased rating criteria are examples of intent discrimination. Many factors, such as personal appearance, mannerisms, tone of voice, and speed in responding to questions, influence the outcome of the interview.

There are numerous concerns about the interview process itself. The environment in which the interview takes place, the composition of the interview board, and the manner in which candidates are made to feel at ease all affect the outcome. An organization's selection process will be largely determined by the selection standards and procedures that are used. These may not be discriminatory in themselves but may still have an adverse impact on target group members. This can result in ineffective use of human resources, possible legal liability for the organization, and a lack of opportunities for target group members.

## D. Training and Development

Training and development policies determine access to the opportunities offered by the organization. Admission to training programs is frequently based on factors such as seniority, status, salary, or occupation. Such criteria, which may appear to be neutral, often eliminate target groups.

An employer's objective in providing opportunities for training and development are:

- to improve current job performance;
- to identify and groom employees for future opportunities and responsibilities;
- to assist employees in their personal growth;
- to reduce costs associated with recruiting and integrating new employees.

Types of training and development that organizations may offer include: on-the-job training, institutional training, apprenticeship plans, career development assignments, job rotations, and in-house training courses. In addition, tuition fees may be reimbursed or leave of absence arranged so that employees can further their education.

An organization that recruits mainly at the entry level, and determines upward mobility by training and development, must ensure that all staff have access to these programs.

Many training and development policies have the potential for discriminatory impact. In examining policy, a close scrutiny should be made of the areas described below:

### 1. Limited Access

An organization can unintentionally limit access to training and development by imposing artificial barriers. To provide training that is related only to an individual's present position will not furnish a basis for career progression. As well, the definition of "job related" tends to be more flexible as employees move up the ladder. It is generally easier for an administrator or supervisor to relate management courses or university credits to a job than it is for a clerk, secretary, or technical support employee.

One discriminatory practice is to use arbitrary limits based on salary, or level, within the organization when assessing eligibility for training. Cut-offs based on salary or status appear to be neutral but probably have an adverse impact on target group members due to their current employment status.

Training and development policies that are open, that is, without restrictions as to job-relatedness, salary, or occupational category, may still operate to the disadvantage of target group members if access depends on the subjective judgment of individual managers or supervisors.

### 2. Information Flow

The way in which information about the organization's training and development policy is disseminated also determines access for various groups. Information may not be accessible to all workers. For example, information about training and development filtered through managers may reach only selected employees.

### 3. Non-Job-Related Requirements

Training is sometimes limited to persons who meet criteria that may not be related to their present or anticipated position. Age and previous education are common restrictions.

### 4. Hostile Training Environment

A hostile training environment will have an adverse impact on the success rate of the group experiencing the hostility. For example, if an employer wishes to improve the employment status of native workers and takes steps to do so by enrolling more of them in company training courses, these objectives can be thwarted in an unreceptive training environment. Similarly, female apprentices will have higher attrition rates in unsupportive environments.

### E. Upward Mobility Systems

Criteria used by an organization to determine employees' qualifications for developmental or promotional opportunities depend on the organizational climate as well as external societal factors. Systems that appear fair and neutral may prove to be inefficient and inequitable in practice. They may, in fact, restrict opportunities for advancement for target group members. In many instances, there is considerable scope for subjectivity or bias in selecting candidates for developmental or promotional opportunities. Personnel records may reveal that a smaller proportion of target group workers are regularly selected for formal training and development programs or for various on-the-job mechanisms such as transfers, job rotations, and special assignments, all of which enhance job

mobility. All upward mobility systems should therefore be examined for systemic or intent discrimination.

### 1. Promotions

Most organizations promote employees on the basis of merit. Yet the deployment of target group members in general suggests that upward mobility systems are not operating equitably.

The potentially discriminatory nature of promotion systems parallels the way in which recruitment and selection policies and practices operate to the disadvantage of underrepresented groups. Promotion systems frequently fall short from an equal opportunity perspective for the reasons discussed below.

### 2. Seniority

Seniority is often a major factor in promotion. Seniority rights that were won by unions have traditionally been regarded as non-negotiable. While it may seem logical that promotional rewards go to long-serving, experienced employees, seniority systems also tend to perpetuate the effects of past discrimination against target group members and thus contribute to systemic discrimination.

When seniority is based on length of service in a particular job or unit, rather than in the organization as a whole, it is particularly disadvantageous to target group members. Target group members are usually concentrated in low paying jobs where lines of progression are limited. No amount of seniority will make these employees eligible to apply for jobs in the technical or management fields if the seniority lines are exclusive and no bridging positions exist.

### 3. Developmental Placements and Assignments

Developmental placements and assignments are a common way of grooming "fast track" employees identified as having potential for higher-level positions. This type of grooming can take many forms — job rotations, secondments, transfers, or special assignments. The impact of these on target group members depends on the same factors as the impact of promotional policies and practices. On-the-job development will not improve the status of women, native people, or disabled persons if their access to these opportunities is restricted by unnecessary barriers; or if subjectivity and bias play a part in the choice of candidates.

## F. Wages and Benefits

Wages and benefits packages are complex matters where equity is concerned. Legal requirements and exemptions vary in different jurisdictions. Benefit plans, in particular, may involve differential treatment based on:

- actuarial factors relating to sex, age, or disability;
- social factors, such as marital status and dependants;
- organizational factors, such as level in the organization.

It is advisable to consult with the relevant labour department and/or human rights commission to discuss these issues.

### 1. Wages

There is a basic legal requirement of equal pay for men and women who perform work that is "substantially the same" (under the legislation of most provinces) or work "of

equal value" (federal jurisdiction and the province of Quebec). Companies take many factors into consideration in establishing wage rates for jobs.

Probably the two most important factors are the current labour market supply and compensation rates. Generally, the salary rates for jobs traditionally held by women and minorities are low. The supply and demand structure of these jobs dictates that pay rates will likely remain low, despite the assessed relative value of these positions in the organization. Employers should, however, recognize that they may be open to complaint as a result of recent human rights legislation on the basic requirement of equal pay for work of equal or similar value.

Entry-level salary and promotion within pay ranges are areas of potential bias because they involve subjective judgement. Entry-level salary may be a matter of negotiation between the employee and employer, with bargaining to determine at what level of the pay range a new employee will start. Employers often justify paying men higher starting salaries than women, even when their responsibilities are the same, because men had higher earnings in previous jobs. Such practices are discriminatory and make the employer vulnerable to legal action.

Progression within the pay range may be automatic, based on seniority, or tied to a performance evaluation or merit pay system. In the last case, there is potential for bias and care must be exercised in its application.

### 2. Benefits

Legal requirements for benefit packages involving health insurance, retirement pensions, or maternity leave differ among jurisdictions in Canada. Some of the areas of possible differential treatment under benefits provisions are discussed below.

**Pre-Existing Conditions.** Health insurance, income replacement plans, and other insurance plans may have "pre-existing conditions" clauses that limit an employee's coverage related to a health condition that existed prior to joining the plan. These clauses will have an adverse effect on disabled persons. Under the Canadian Human Rights Act, pre-existing-condition clauses are limited to conditions that have been treated within one year prior to the employee's becoming insured under the plan. Employers with fewer than 25 employees are exempt from these clauses.

**Pregnancy.** A growing number of pregnant women are choosing to take short-term maternity leave. The right to a temporary leave of absence without jeopardizing career advancement is of serious concern to women. A growing number of short-term disability plans and union agreements are providing maternity benefits even if there is no legal requirement to do

**Pensions.** Pension plans may provide lower monthly benefits for women or may require larger contributions from women in order to receive equal benefits. The traditional rationale is that women live longer than men and will therefore collect benefits for a longer time. Legal requirements vary from province to province with respect to pension benefits based on factors such as sex, marital status, and dependants.

The regulations of the Canadian Human Rights Act do not allow sex-based differences in benefits administered by the

federally regulated sector. An exception is provided for voluntary plans. In the case of provincially regulated companies, it is advisable to seek the advice of the provincial human rights commission.

### **G. Working Conditions**

Working conditions normally refer to such things as hours of work, attendance reporting, access to facilities and services, and dress and grooming codes. As with the question of benefits, the provisions that are not made may be as important as those that are. Good working conditions foster a good working atmosphere.

It is important for organizations to ensure that the working conditions that are established are job related and consistently applied across all levels. It is also critical that organizations deal with personnel issues that relate to the internal working atmosphere. Failure to do so results in an inappropriate use of human resources and increases the risk of human rights complaints.

#### **1. Working Atmosphere**

In terms of affirmative action analysis, the working atmosphere in an organization is defined by the degree to which the environment is receptive to target group members in all positions.

Many working women, and some men, are victims of sexual harassment. In many cases, sexual harassment is difficult to detect because victims are hesitant to lodge a formal complaint. One indication may be the high turnover of female employees in a particular unit.

Sexual harassment may be defined as any sexually-related act, practice, comment, or suggestion that injures, humiliates, insults, or intimidates an employee; constitutes an invasion of personal privacy; undermines job performance; or threatens economic livelihood. Most employers deal with such incidents on a case-by-case basis. This often leaves the victims of harassment unsure of their rights or uncertain of the outcome of a complaint. It also does nothing to prevent these incidents from arising again.

Women working in various non-traditional jobs, or competing with men in areas where women have traditionally been underrepresented, may experience a general lack of acceptance and support from colleagues. Harassment may be overt, as when derogatory remarks are made or a supervisor refuses to give women certain assignments; or covert, as when women are left out of meetings, not sent on out-of-town trips, or bypassed in information systems.

Native employees may encounter similar harassment at work in the form of derogatory comments, isolation, or differential treatment. In the same manner, disabled employees are denied opportunities due to misinformation concerning their disabilities.

Failure to provide a hospitable working atmosphere for target group employees results not only in the unfair treatment of the individuals involved, but also in the ineffective use of human resources.

#### **2. Non-Job-Related Duties**

Another way in which job assignments reflect stereotyping is in the assignment of non-job-related duties. Support staff are often assigned non-job-related duties, such as shopping or arranging personal appointments or holidays, for their

supervisor. Relegating these kinds of duties to certain employees promotes an image of their office role as an extension of their traditional social role. It also infringes on the time they can devote to job-related duties, resulting in inefficient use of the organization's resources. These practices may also influence opportunities for advancement in the organization.

### **3. Physical Access**

Limited physical accessibility to working premises may restrict the participation of disabled workers. Inadequate transportation or parking provisions may even prevent access to the worksite.

### **4. Availability of Alternative Work Arrangements**

Inflexible work arrangements may have an adverse impact on some target group workers. In some instances, full-time work may be beyond the physical capacity of some disabled workers or interfere with family responsibilities of some women. Flexible arrangements for job-sharing or part-time work may be advantageous for both workers and employers in these instances.

It may be noted in this connection that the family responsibilities of raising children need not be entrusted only to women. Granting leave to either parent for attending to family responsibilities would permit many women to participate more fully in the labour market.

### **5. Dress and Grooming Codes**

While organizations may have many legitimate concerns about the image their employees present, only job-related requirements should be imposed. Employers have legitimate concerns in certain jobs and situations — for example, where an employee represents the company, or when a certain image is desired — but dress criteria should be job-related and consistent.

### **6. Disciplinary Action**

Rules and procedures in organizations should dictate acceptable standards of work behaviour for safety and efficiency. These rules may be presented in detailed written documents or in verbal instructions open to constant modification. Areas covered will often include safety requirements, definitions of insubordination, hours of work, reporting time, behaviour on the job, dress and personal grooming, and a definition of satisfactory work. In many jobs or professions there are also unstated "rules" regarding political affiliation or social conduct. Disciplinary action for violation of rules may range in severity from informal warnings to discharge.

Perhaps the most common discriminatory practice is to apply standards inconsistently. This may result when disciplinary procedures permit a substantial degree of discretion by the manager/supervisor. Although flexibility is required in individual situations, it is essential that procedures be consistent.

### **7. Resignations**

Members of target groups may be overrepresented among employees who voluntarily resign. Reasons for higher turnover among these workers may include the discriminatory practices already discussed. Two of these deserve special attention.



**Concentration and underutilization.** The low pay and low status of jobs in which many women and minorities are concentrated destroys incentive to remain there, particularly if working conditions are also unpleasant. Discrimination in pay and benefits may contribute further to lower morale and higher turnover.

**Harassment.** Management in organizations may ignore or tolerate harassment of women or minorities on the job. If the individuals being harassed feel that supervisors and co-workers tolerate this behaviour, they may leave their jobs. This can result in high turnover for the organization involved.

#### **H. Terminations and Layoffs**

When a firm has to cut back its workforce, seniority and performance appraisal are generally used as guidelines in determining layoffs. Both of these criteria may result in adverse impact on target group employees. Terminations stemming from changing skill needs can also have adverse impact on target group members concentrated in jobs affected by these changes.

**Seniority.** Terminations and layoffs often tend to affect target group members because of their recent entry into the workforce. This negative impact is accentuated when seniority is narrowly defined, that is, by department or job group rather than company wide.

**Performance Standards.** Using performance appraisals is one alternative to a seniority-based system. Performance appraisals, however, are open to all the problems associated with subjective evaluation criteria and attitude bias on the part of the evaluator.

**Change in Needed Skills.** Technological changes may affect the skill needs of an organization. Women, native people, and disabled persons are often concentrated in jobs most likely to be eliminated by technological change. For example, new office technology may reduce an organization's requirement for typists and clerks but increase its need for administrators and technically trained operators. Some employees will be retrained while others will be terminated. The criteria used to select those to be retained must meet the tests of objectivity and validity.

**Alternatives to Termination.** Employers may develop alternatives to termination. It is necessary to determine the impact of these alternatives and to ensure that policies are applied equally. For example, policies developed to allow employees to transfer to other positions as an alternative to layoff or termination can be discriminatory in nature. If eligibility relates to seniority, is restricted to occupations or units that effectively exclude target groups, or is influenced by subjective or biased opinions, adverse impact may result.

## APPENDIX 2

### Formulas for Projecting Target Group Representation

This appendix presents formulas to project the representation of target group members within a company over a number of years given certain rates of hiring and separation.

These formulas enable us to calculate:

- (i) the target group representation after several years; or
- (ii) the representation of target group members among new hires necessary in order to achieve a given target within a given period; or
- (iii) the number of years it would take to achieve a desired representation.

It should be noted that while these formulas refer to the target group representation among the total company workforce, the same formulas can be and should be applied to target group representation in the various job groups within companies.

The formulas are composed of the following elements:

- A = the ratio of target group members to the total number of employees in the company at the present time, expressed as a decimal (e.g., 35% is expressed as 0.35).
- B = the ratio of target group members to the total number of new hires, again expressed as a decimal. The assumption is made that this ratio will remain constant over the time period covered by the calculation.
- C = the ratio of target group members to the total number of employees in the company at the end of the time period of the calculation, also expressed as a decimal.
- R = the ratio of employees who remain with the company throughout the year to the total number of employees at the end of the year, expressed as a decimal.

To illustrate:

- 1.00 = total employees of company
- R = ratio that stay
- 1-R = ratio that leave (or the turnover rate)

Three assumptions are made:

- 1) that R will remain constant over the time period covered by the calculation, and
  - 2) that R will be the same for target group members and non-target group members;
  - 3) that every employee who leaves will be replaced.
- k = the number of years into the future for which the projection is made.

Two combinations of these elements that appear in the formulas are explained below.

- $R^k$  = the ratio of original employees who will still be employed at the end of k years, to the total number of employees who will be employed at that time.
- $1-R^k$  = the ratio of newly hired employees (i.e. employees hired within the period of k years) to the total number of employees who are employed in the company at the end of k years.

To illustrate:

If 85% of the workforce remain each year ( $R = .85$ ) and 15% leave and are replaced ( $1 - R = .15$ ), then after three years ( $k = 3$ ) the workforce will be composed as follows.

$$\text{Old workforce} = R^k = .85^3 = .85 \times .85 \times .85 = .614$$

$$\text{New hires} = 1 - R^k = 1 - .614 = .386$$

In other words 38.6% of the workforce will be employees who were new hires during the three-year period, while 61.4% will be employees who were initially part of the company workforce.

#### Projecting Target Group Representation After a Specified Number of Years

##### Objective:

To determine the ratio (C) of target group members after a period of k years, given a present target group ratio of A, a target group ratio among new hires of B, and an annual retention rate of R (or an annual turnover rate of  $1 - R$ ).

The Formula:

$$C = A \cdot R^k + B (1 - R^k)$$

Essentially this formula says that in k number of years, the ratio C of target group members will be the sum of  $A \cdot R^k$  and  $B (1 - R^k)$ .

$A \cdot R^k$  is the proportion of the future workforce that will be made up of present employees ( $R^k$ ) who are target group members (A).

$B (1 - R^k)$  is the proportion of the future workforce that will be made up of new hires ( $1 - R^k$ ) who are target group members (B).

##### To Calculate:

- 1. Multiply R times itself k times, to give you  $R^k$ .
- 2. Multiply  $R^k$  times A, to give you  $A \cdot R^k$ .
- 3. Subtract  $R^k$  from 1, to give you  $1 - R^k$ .
- 4. Multiply  $(1 - R^k)$  times B, to give you  $B (1 - R^k)$ .
- 5. Add  $A \cdot R^k$  (from Step 2) and  $B (1 - R^k)$  (from Step 4), to give you  $A \cdot R^k + B (1 - R^k)$ .

#### Calculating the Rate of Target Group Hiring Required to Achieve Specified Goals

##### Objective:

To determine the required ratio of target group members to total new hires (B) for a period of k years, in order to move from the present ratio of target group members (A) to the desired future ratio of target group members (C), given an annual retention rate of R (or an annual turnover rate of  $1 - R$ ).

##### The Formula:

$$B = \frac{C - A \cdot R^k}{1 - R^k}$$

##### To Calculate:

- 1. Multiply R times itself k times, to give you  $R^k$ .
- 2. Multiply  $R^k$  times A, to give you  $A \cdot R^k$ .
- 3. Subtract  $(A \cdot R^k)$  from C, to give you  $C - A \cdot R^k$ .
- 4. Subtract  $R^k$  from 1, to give you  $1 - R^k$ .

5. Divide  $C - A \cdot R^k$  (from Step 3) by  $1 - R^k$  (from Step 4), to give you

$$\frac{C - A \cdot R^k}{1 - R^k}$$

### Calculating the Number of Years Required to Achieve Specified Goals

#### Objective:

To determine the number of years ( $k$ ) required to change the ratio of target group members to total employees  $A$  now to  $C$  in the future if the ratio of target group members to total new hires is  $B$ , given an annual retention rate of  $R$  (or an annual turnover rate of  $1 - R$ ).

Two methods of calculation are shown below.

#### Method 1:

For persons who have access to logarithm tables or to a calculator with a "log" function, the formula is as follows:

$$k = \frac{\log(B - C) - \log(B - A)}{\log R}$$

#### To Calculate:

1. Subtract  $C$  from  $B$ , to give you  $(B - C)$ .
2. Calculate or find the logarithm of  $(B - C)$ , to give you  $\log(B - C)$ .
3. Subtract  $A$  from  $B$ , to give you  $(B - A)$ .
4. Calculate or find the logarithm of  $(B - A)$ , to give you  $\log(B - A)$ .
5. Subtract  $\log(B - A)$  from  $\log(B - C)$ , to give you  $\log(B - C) - \log(B - A)$ .
6. Calculate or find the logarithm of  $R$ , to give you  $\log R$ .

7. Divide  $(\log(B - C) - \log(B - A))$  (from Step 5) by  $\log R$  (from Step 6), to give you  $\frac{\log(B - C) - \log(B - A)}{\log R}$

#### Method 2:

For persons who do not have access to log tables,  $k$  can be determined by using the following formula:

$$R^k = \frac{B - C}{B - A}$$

Once the value of  $R^k$  has been calculated (Steps 1 to 4) it will be possible to calculate the value of  $k$  (Steps 5 and 6).

#### To Calculate:

1. Subtract  $C$  from  $B$ , to give you  $B - C$ .
2. Subtract  $A$  from  $B$ , to give you  $B - A$ .
3. Divide  $B - C$  (from Step 1) by  $B - A$  (from Step 2) to give you  $\frac{B - C}{B - A}$ .
4.  $\frac{B - C}{B - A}$  (from Step 3) is equal to  $R^k$ .

Now, to determine the value of  $k$  from  $R^k$ :

5. Multiply  $R$  times itself and repeat until the answer is equal to  $R^k$  (from Step 4).
6. Count the number of  $R$ s that were multiplied in Step 5, to give you  $k$ .

#### An example to illustrate Steps 5 and 6:

If  $R^k = .008$  and  $R = .20$

$$R^k = .20 \times .20 \times .20 = .008$$

Count 1 2 3

Then  $k = 3$



## APPENDIX 3

### Neutral Employment Systems

One of the initial steps in developing an affirmative action plan is to ensure that the employment policies and processes identified as sources of discrimination are replaced by others neutral in their impact. A neutral employment practice is one that does not have an adverse impact on any particular group. A practice having an adverse impact can be justified only when it is both a business necessity and has the least negative impact of any other alternative.

This appendix suggests some ways of neutralizing those employment practices that result in adverse impact.

#### A. Recruitment

The purpose of neutralizing the practices within the organization's recruitment system is to ensure that qualified women, native people, and disabled persons seeking work are encouraged to apply for positions. It is also important to ensure that they are not overlooked or screened out for non-job-related reasons.

The actions taken to inform staff and the general public of the organization's affirmative action stance will indicate its commitment to equal employment practices.

Fair employment practices dictate that the qualifications stated in job advertisements and the standards used to screen and select employees be directly job related. The importance of accurate, up-to-date job specifications and relevant statements of qualifications cannot be overemphasized.

Some examples of neutral responses to specific recruitment practices could include the following:

##### 1. Internal Recruitment

In terms of internal recruitment, instead of automatically promoting persons next in seniority, the employer could open the applicant pool to qualified people in other areas of the organization, especially in areas where target group members would be found in greater numbers.

For internal job postings, the employer could ensure a wider distribution of posters, particularly in areas where target group employees congregate.

Inventories could be modified in terms of content and access so that they include employees in lower-level jobs as well as ensuring that minimum requirements are job related.

##### 2. External Recruitment

When an organization is involved in external recruitment, rather than in replicating the present workforce by word-of-mouth referrals, the employer could make use of wide advertising to attract a broader group of applicants.

To encourage a more diversified pool of walk-in applicants, a plant situated in a suburban industrial park could establish a downtown hiring office. By carefully wording advertisements that describe actual job requirements the employer will broaden the field of applicants for a particular job. Advertisements placed in publications with a wide circulation, including community agency publications, could be very effective.

If an employer utilizes the services of an employment agency, the agency should be advised that the organization is an equal opportunities employer. If feasible, the employer should determine the agency's approach to affirmative action initiatives before utilizing its services. The employer could also recruit from employment centres and agencies representing underutilized groups.

#### B. Selection Standards and Procedures

##### 1. Personnel Procedures

Receiving and processing applications must be carried out in an unbiased way. If individuals employed in screening applications are not highly trained, they should only sort applicants on a pass/fail basis using readily identifiable, objective, and job-related criteria. Staff with greater expertise should be involved in a second screening to determine candidates for interviews. Records should be kept of all job applicants, noting gender and minority status, in order to determine the impact of initial screening procedures.

The impact of any tests conducted should be assessed. If a disproportionate number of target group applicants are being rejected, alternative approaches should be substituted whenever possible. If no ready alternative exists, tests should be validated to determine their job-relatedness. If test performance is not positively correlated with on-the-job performance, testing should be dropped.

Contact with all candidates should be consistent and objective. All forms should be reviewed for questions that are not job-related and for questions that screen candidates on prohibited grounds such as age, gender, marital status, and disability. Information on native language, number of children, or medical data should not be requested at this time. While not always illegal, this information may be used unconsciously to screen out target group members.

##### 2. Job Requirements

Job requirements should be regularly reviewed to ensure that only the essential elements are included. Eliminating unnecessary requirements will increase opportunities for native people and women. Any specification (education and related experience being the most common) that acts as a barrier to members of target groups should be carefully scrutinized for job-relatedness, and credit should be given for equivalent on-the-job experience or related skills. For example, describing a management job on an oil field site as suitable to someone with progressively responsible oil business experience could reduce the number of "qualified" women and native applicants. Describing the real components of the job (project management, planning, supervision) would open the competition to a wider range of candidates.

Physical requirements have been the subject of recent court decisions, which have rules against height and weight standards. Requirements must relate to actual needs of the job rather than to arbitrary standards. Performance tests should be devised to duplicate actual strength or skill needs.

### 3. Interviews

In structuring the interviewing process, it is appropriate to introduce as many checks and balances as possible to ensure a non-discriminatory outcome. Some of these are outlined below.

- Interviewing by a board rather than a single individual offers some assurance that the possible bias of any individual can be offset. Ideally, the board should include a target group member.
- Interviews should be held at a location that is easily accessible to everyone, including disabled persons.
- In order to avoid inconsistencies in approach, the board should standardize the manner in which information is requested. There should be consensus on a rating scale.
- Increasing the validity of interviews as a predictor of job performance requires that interviews be conducted by experienced staff.
- The assessment of candidates should be done in a manner that permits interviewers to arrive at an objective and a comparative measure of the candidate's ability to perform the requirements of the job.
- Company guidelines on interviewing should be made available to all employees, and interview procedures should be monitored by management on an on-going basis.

### C. Training and Development

Frequently, organizations provide job improvement training, such as refresher courses, for support staff only, while general programs contributing to career development are provided for management and professional staff only.

A number of actions can be taken to ensure that all staff members have access to training programs that will enhance their current job performance or future career development. These include:

- removing occupational status as criteria for entrance to training courses;
- actively encouraging participation in non-traditional training;
- ensuring a supportive environment in training situations;
- validating entry requirements to key training courses (i.e., a university degree required for a management program when 50 per cent of current managers do not have degrees).

### D. Upward Mobility Systems

If target group members are blocked from promotion because of their absence from the pool of workers directly in line for available jobs, expansion of this pool to include other possible candidates within the company should be considered. For example, secretaries with relevant experience should be considered for promotion to administrative or supervisory positions.

The establishment of career paths is a significant neutralizing measure. Lower-level jobs are frequently dead-ended,

although the incumbents may possess skills useful in other parts of the organization. Career paths should provide for upward mobility by recognizing that skills obtained in one area can be relevant in others. For example, a secretary in a financial department with an interest in accounting should be able to move to the accounting stream through a combination of off-the-job and on-the-job training.

The establishment of bridging positions between different career ladders in the organization will greatly improve the career opportunities of women and other target group employees.

Seniority considerations may be restricting the career development of many target group members. Unit-based seniority systems should be altered to an organization-wide system. Otherwise, affirmative action measures aimed at increasing mobility of workers into a greater diversity of occupations and job units will be ineffective, as workers who transfer will be penalized by loss of seniority benefits.

### E. Wages and Benefits

The evaluation of the salary administration system is difficult to deal with. To neutralize this system it is important to:

- review the language of job specifications;
- look at the value assigned to different job requirements to ensure equitability;
- assess the value of, and access to, perquisites such as discounts, interest-free loans, or other "perks", such as use of the company car, etc.;
- compare salary increments over job levels to assure an equitable pattern;
- review the method of arriving at entry-level salary to assure equality and legality.

Laws concerning benefit provisions vary by jurisdiction and in some cases limit options for neutralizing their impact. The two benefit areas most relevant to target group members are pregnancy provisions and exemptions from health insurance and pension coverage for pre-existing conditions. Consideration should be given to devising neutralizing measures to prevent adverse impact of these benefit provisions on employment opportunities for women in child-bearing years and for disabled persons.

### F. Working Conditions

Where possible, working conditions should be standardized so that the treatment of all employees is consistent and fair. Conditions should not be related to status but rather to job requirements.

### G. Terminations, Layoffs, and Disciplinary Action

In all cases, any policies based on sex, race, marital status, or disability should be eliminated and appropriate corrective action should be undertaken.

All the above actions and others required to neutralize an employment system should be integrated to form a comprehensive plan designed to ensure an equal employment opportunity environment.





## STRATEGIES FOR ESTABLISHING AFFIRMATIVE ACTION GOALS AND TIMETABLES

Edward B. Harvey and John H. Blakely

### Sommaire

L'établissement d'objectifs et d'échéanciers est un sérieux problème pour ceux qui veulent mettre en œuvre l'action positive. En effet, les employeurs, les syndicats et les organismes de réglementation doivent s'entendre sur les normes jugées raisonnables et réalisables par toutes les parties concernées. Le problème est aggravé par le manque de données bien organisées, la méconnaissance d'autres méthodes et l'incertitude quant au mode de réglementation qui sera adoptée.

L'auteur décrit les divers aspects des programmes d'action positive aux États-Unis et au Canada en vue de l'adoption de normes pertinentes au Canada, et notamment les aspects suivants: 1) normes américaines en matière de rapports, d'enquêtes et d'application; 2) modèles précis de disponibilité, y compris des analyses du marché du travail interne et externe; 3) récent progrès de la Division de la planification des ressources humaines de la Commission de la Fonction publique du Canada. D'après l'étude, il semble évident que ceux chargés de la formulation de lignes directrices, de même que les syndicats et les employeurs doivent unir leurs efforts pour établir des prévisions raisonnables de la disponibilité externe et que les employeurs doivent améliorer la planification des ressources humaines pour pouvoir établir des estimations de la disponibilité interne.

L'étude présente une méthode globale pour estimer la disponibilité de la main-d'œuvre externe et interne au Canada, en s'inspirant d'une technique d'analyse économique mise au point pour la marine américaine. Cette méthode nous permet de déterminer les données nécessaires à l'établissement d'objectifs en matière de politique. Les recommandations portent sur la nécessité pour les employeurs, les syndicats et le gouvernement d'adopter des initiatives pour recueillir les données requises. En outre, des mesures additionnelles sont proposées concernant la présentation de rapports, le contrôle des résultats et l'appui d'un organisme compétent. Enfin, bien que l'établissement d'objectifs semble être un processus de longue haleine et compliqué, il s'agit d'un processus qui profite des travaux de recherche. Les expériences positives ou négatives des nombreux employeurs, représentants syndicaux et agents chargés de formuler les politiques et qui élaborent actuellement des programmes d'action positive pourraient servir à l'établissement de normes raisonnables et réalisables.

### Summary

Setting goals and timetables is a critical problem facing those committed to implementing affirmative action. To employers, unions, and government regulators the problem centres on reaching agreement on standards that are jointly perceived as reasonable and possible. This problem is further compounded by a lack of systematic and appropriately organized data, limitations in understanding of alternative methodologies, and uncertainties about the form regulation will take.

This paper reviews aspects of the affirmative action experience in the United States and Canada in order to lay the groundwork for establishing relevant standards in Canada. The review includes: 1) U.S. standards in reporting, investigation, and enforcement; 2) specific availability models, including external and internal labour market analysis; and 3) recent developments in the Human Resource Planning Division of the Public Service Commission of Canada. On the basis of the review, it seems clear that policymakers, unions, and employers must coordinate their efforts to establish reasonable external availability estimates; employers must improve their human resource planning capabilities so that they can accept primary responsibility in developing internal availability estimates.

The paper presents a comprehensive model for estimating external and internal availability in Canada, drawing on an economic analysis technique developed for the U.S. Navy. This model allows us to identify data needs associated with desirable policy objectives. Recommendations focus on the need for employer, union, and government initiatives to meet these data needs. In addition, reporting, monitoring, and agency support measures are proposed. Finally, while goal-setting appears to be a long and complicated process, it is indeed a process that benefits from an accumulation of research. The positive and negative experiences of the many employers, union representatives, and policymakers who are already working toward meaningful affirmative action could provide a sound basis for establishing reasonable and possible standards.



## STRATEGIES FOR ESTABLISHING AFFIRMATIVE ACTION GOALS AND TIMETABLES

Edward B. Harvey and John H. Blakely\*

### 1. INTRODUCTION

In the absence of any theoretical foundation, hiring quotas have been formulated on purely subjective grounds, and herein lies the difficulty. The establishment of purely subjective job quotas tends to restrict employment or advancement opportunities to members of particular groups in an artificial and unjustifiable manner. The development of employment goals based upon the availability of workers, however, tends to establish realistic and measurable objectives which institutions endeavour in good faith to achieve on a timely basis within the framework of the institutions' system of employment

(Wright and Lawson, 1974: 4)

It is not unusual for organizations to complain that affirmative action guidelines provided by compliance agencies are both ambiguous and contradictory. Too frequently this complaint is issued in a vacuum; no systematic effort is made to catalogue the guidelines which do exist and identify strategies which permit compliance efforts that are consistent with organizational realities.

(Newman and Krzystofiak, 1979: 25)

The above observations underscore a persistent problem in the implementation of Equal Employment Opportunity (EEO) policy. The problem centres on the reaching of agreement, between government regulators and employers, on affirmative action goals and timetables that are jointly perceived as reasonable and possible. The difficulty of arriving at such goals and timetables is often further compounded by a lack of systematic and appropriately organized data and limitations in the methodologies developed for the analysis and use of those data that are available. (See also Niehaus, 1979: Chapter 3.)

The central objective of this report is to develop an affirmative action goal-setting strategy for use in Canada. The approach to goal setting presented here assumes a mandated, as contrasted with voluntary, approach to affirmative action.

The elaboration of such a goal-setting strategy implies a number of issues. It is our view that the strategy should not be isolated from broad social policy objectives. We take the position that an affirmative action goal-setting strategy should not simply measure and evaluate end results or future intentions. It should also be directed toward *generating* the supply of qualified or *qualifiable* workers from affirmative action target groups.

Going beyond such basic assumptions, our formulation of the strategy has been influenced in light of initiatives that have worked, or have not worked, in other relevant jurisdictions—in this case, the United States.

In overall terms, the methodology we propose for carrying out the goal-setting strategy is multi-step and data based. The steps correspond in a general sense to the developmental sequence of an affirmative action implementation.

The initial step involves the setting of long-term affirmative action goals in light of the current representation in the population of the relevant target groups. Steps two and three of the methodology are concerned with the procedures for setting intermediate and short-term affirmative action goals.

Step two is concerned with the calculation of the available labour pool for each of the target groups. Step three is concerned with augmenting the "floor" measures produced by step two by adding estimates of the numbers of potentially qualifiable persons outside the labour force or not working in the job field where the employment opportunity exists.

Step four is focused on the internal labour markets of employer organizations. It is well known that the employment practices of organizations (the "internal labour market") have profound implications for affirmative action goal setting and achievement.

At the level of the organization, a major obstacle to the development and implementation of an affirmative action plan is the state of the organization's internal human resources information system. With several years of EEO implementation and reporting experience behind them, many organizations in the U.S. now have relatively sophisticated, computer-based human resource planning systems. (Atwater *et al.*, 1981; Niehaus, 1979.) This is much less likely to be the case in Canada. (Consider, for example, the Commission's difficulty in obtaining detailed human resource data in its questionnaire survey of crown corporations.)

It is our view that an affirmative action goal-setting strategy, if it is to be effective, requires organizations to have a human resource data base and planning system that is sufficiently evolved to permit formulation of an acceptable affirmative action plan and the reporting of progress in terms of that plan. We provide various specific examples in the elaboration of the methodology.

If the U.S. experience with mandated affirmative action is any guide, one would expect that Canadian organizations would, in response to EEO requirements, develop such human resources data bases and planning systems. Again, if the U.S. experience is a guide, one would also expect that

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many of them would find that such human resource planning systems have organizational applications and benefits that go beyond EEO-related requirements. It would appear that this is an area where government can play a potentially effective consultative role with employers in the development of such human resource planning systems. A precedent already exists in the attempts by the Canadian Employment and Immigration Commission (CEIC) (in cooperation with provincial agencies) to promote the wider adoption of human resource planning.<sup>1</sup>

The fifth and final component in the methodology set forward here relates to the monitoring and audit functions we view as important to the ongoing effectiveness of a mandated affirmative action initiative.

As with any methodology, modifications are likely to occur as it is put into practice. As discussed in Section 3 below, the methodology set forward here has associated with it various data requirements. In many cases, the data are already available. In other instances we have identified where further research is required. We have also identified, in a preliminary way, some of the responsibilities for employers and for government that arise from the implementation of the type of affirmative action goal-setting strategy put forward here. The putting into operation of the strategy, or some form thereof, would clearly give rise to a range of trade-off issues; for example: the degree of detail and specificity in affirmative action plans versus the costs and complexity of assembling the required supporting information; the extent and nature of responsibility sharing between employers and government. In terms of the information and responsibility burdens implied, the goal-setting strategy advanced here does not appear to be inconsistent with the practice in other relevant jurisdictions, notably the U.S.

In addition to this introduction, this report contains three sections. Section 2 examines various aspects of the EEO experience in the United States. In the light of this experience, Section 3 develops an affirmative action goal-setting strategy for Canada. Section 4 presents the major conclusions and recommendations.

## 2. THE U.S. EXPERIENCE

### 2.1 Introduction

This section reviews selected aspects of the EEO experience in the United States as they potentially pertain to the development of affirmative action goals and monitoring in Canada. In addition, we examine the development of specific EEO methodologies in the U.S. These include: 1) setting geographic boundaries to labour pools; 2) the role of external labour market analysis in setting goals; 3) the significance of wage levels in achieving EEO goals; 4) the role of internal labour market analysis in setting goals; and 5) the audit and evaluation of goal achievement.

### 2.2 Equal Employment Opportunity in the United States: Issues Relating to Goal Setting

Equal employment opportunity law in the United States is embodied in Title VII of the 1964 Civil Rights Act. Title VII prohibits discrimination or segregation based on race, colour, religion, sex, or national origin. The Equal Employment Opportunity Act of 1972 amended Title VII by strengthening enforcement procedures and extending its coverage to state

and local government employees, to all persons working in educational institutions, and to employees of private firms with more than 15 persons on staff. Executive Order 11246 issued by President Lyndon Johnson in 1964 prohibits employment discrimination by federal government contractors, sub-contractors, and employers with federally associated construction contracts. The Order carries the additional requirement that contractors must develop a written plan of affirmative action and establish numerical integration goals and timetables to achieve equal opportunity.

Over the 19 years equal employment opportunity and affirmative action laws have been in place, a number of significant issues relating both to enforcement and compliance have evolved. We will briefly review three such issues that pertain to the goal-setting process in Canada.

1. *Reporting:* The Equal Employment Opportunity Commission (EEOC), established under Title VII and amended in 1972, carries, in addition to the responsibility for resolving discrimination charges, the responsibility for gathering statistics. All employers of 100 or more employees subject to Title VII are required to submit employment statistics reporting employment by sex, race, and other protected categories by broad job classification. These statistics (using broad job classification data such as "managers", "professionals", "craft workers", "service workers"; see Exhibit 2.1) serve a useful purpose in measuring national trends. However, it has been pointed out (Niehaus, 1979: 60-61) that these data bear little relationship with those required to measure compliance with EEO or affirmative action guidelines. At a minimum, a more valid reporting structure may include the use of more detailed occupational data as well as career level data.

2. *Investigation and Enforcement:* The EEOC's powers of investigation and enforcement consist of investigating charges of discrimination and attempting to negotiate settlements. In the past the EEOC also had the power to bring lawsuits against employers in the federal courts. The burden of investigation and enforcement rests in on-site investigation of complaints made to the Commission—a costly and time-consuming process in the absence of a strong base of information that a strong monitoring function can supply. The cumbersome nature of this process partly explains the mid-to late 1970s experience of the EEOC—increasing backlogs of cases; large costs or hardships being placed on parties when investigations took inordinate lengths of time to complete; and so on—which tended to increase opposition to the EEOC's activities in many quarters.

3. *Recourse to the Courts:* Recourse to the courts in the U.S. cases rests in the hands of individual citizens (or groups). Although EEO decisions in the courts have been criticized for their apparent unpredictability, the statistical measures developed before the courts are meaningful. Statistical measures pertaining to EEO and affirmative action have been developed in the following areas (Connolly and Peterson, 1982):

(a) *The Recruiting Process: Identifying a Relevant Labour Pool:* As Atwater *et al.* (1981) point out, our economy consists of many labour markets depending on geographic area and occupation. Statistical measures have been developed to establish geographic boundaries of labour pools, to measure the demographic composition of these pools, and to estimate the availability of qualified and qualifiable persons in

## EXHIBIT 2.1

## Occupational Detail of EEO-1 Report

## Section D — EMPLOYMENT DATA

Employment at this establishment — Report all permanent, temporary, or part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros.

| JOB CATEGORIES                                     | NUMBER OF EMPLOYEES                       |                                   |                                   |          |                           |                                   |                                   |                                   |          |                           |                                   |
|----------------------------------------------------|-------------------------------------------|-----------------------------------|-----------------------------------|----------|---------------------------|-----------------------------------|-----------------------------------|-----------------------------------|----------|---------------------------|-----------------------------------|
|                                                    | OVERALL TOTALS<br>(SUM OF COL. B THRU. K) | MALE                              |                                   |          |                           |                                   | FEMALE                            |                                   |          |                           |                                   |
|                                                    |                                           | White<br>(not of hispanic origin) | Black<br>(not of hispanic origin) | Hispanic | Asian or Pacific Islander | American Indian or Alaskan native | White<br>(not of hispanic origin) | Black<br>(not of hispanic origin) | Hispanic | Asian or Pacific Islander | American Indian or Alaskan native |
|                                                    | A                                         | B                                 | C                                 | D        | E                         | F                                 | G                                 | H                                 | I        | J                         | K                                 |
| Officials and Managers                             |                                           |                                   |                                   |          |                           |                                   |                                   |                                   |          |                           |                                   |
| Professionals                                      |                                           |                                   |                                   |          |                           |                                   |                                   |                                   |          |                           |                                   |
| Technicians                                        |                                           |                                   |                                   |          |                           |                                   |                                   |                                   |          |                           |                                   |
| Sales Workers                                      |                                           |                                   |                                   |          |                           |                                   |                                   |                                   |          |                           |                                   |
| Office and Clerical                                |                                           |                                   |                                   |          |                           |                                   |                                   |                                   |          |                           |                                   |
| Craft Workers (Skilled)                            |                                           |                                   |                                   |          |                           |                                   |                                   |                                   |          |                           |                                   |
| Operatives (Semi-Skilled)                          |                                           |                                   |                                   |          |                           |                                   |                                   |                                   |          |                           |                                   |
| Laborers (Unskilled)                               |                                           |                                   |                                   |          |                           |                                   |                                   |                                   |          |                           |                                   |
| Service Workers                                    |                                           |                                   |                                   |          |                           |                                   |                                   |                                   |          |                           |                                   |
| TOTAL                                              |                                           |                                   |                                   |          |                           |                                   |                                   |                                   |          |                           |                                   |
| Enter employment reported on previous EEO-1 report |                                           |                                   |                                   |          |                           |                                   |                                   |                                   |          |                           |                                   |

(The trainees below should also be included in the figures for the appropriate occupational categories above)

|                            |              |  |  |  |  |  |  |  |  |  |  |
|----------------------------|--------------|--|--|--|--|--|--|--|--|--|--|
| Formal on-the-job trainees | White collar |  |  |  |  |  |  |  |  |  |  |
|                            | Production   |  |  |  |  |  |  |  |  |  |  |

1. NOTE: On consolidated report, skip questions 2-5 and Section E.

2. How was information as to race or ethnic group in Section D obtained?

1 ☐ Visual Survey

3 ☐ Other — Specify .....

2 ☐ Employment Record

3. Dates of payroll period used —

4. Pay period of last report submitted for this establishment

5. Does this establishment employ apprentices?

This year? 1 ☐ Yes 2 ☐ No

Last year? 1 ☐ Yes 2 ☐ No

protected groups in these pools. Once these measures are established, employers can develop recruiting programs aimed at persons in the protected groups.

(b) *The Selection Process: Evaluating Procedures and Outcomes:* The numbers of new hires relates directly to the goal-setting strategy. If goals are not achieved at the selection stage, then corrective action needs to be taken by employers with respect to interviewing procedures, testing procedures, "screens" (height and weight), and so on.

(c) *Job Assignment, Transfers, and Promotions:* The number and proportion of persons in protected groups who are promoted relate directly to the goal-setting strategy. Although decisions to promote individuals can be made without particular reference to the labour market, the results of these decisions bear directly on mobility and future labour market rewards.

(d) *Discipline and Discharges:* Rates of discipline and discharge, although important in individual discrimination cases, do not relate directly to a goal-setting strategy. Programs developed in this area may nevertheless interest employers because they can reduce recruitment needs associated with an affirmative action goal.

(e) *Equal Pay, Wage Mobility, and Pay Awards:* A final area where statistical measures were established in U.S. jurisprudence is the area of equal pay and wage mobility. Again, although these issues are very important in discrimination cases, they do not apply directly to the goal-setting process.

### 2.3 The Development of Specific EEO Methodologies in the U.S.

In this section, we review a range of specific EEO methodologies developed in the U.S. These include procedures for determining the available labour pool and analyzing labour market conditions, the significance of wages in EEO goal setting and achievement, the EEO implications of internal labour markets in employer organizations, and audit and evaluation procedures relating to the monitoring of EEO goal achievement.

#### 2.3.1 Setting Geographic Boundaries to Labour Pools

Since labour markets vary by occupation and region (labour markets can be national, regional, or local in scope) much attention is devoted to setting geographic boundaries for specific occupations. No standard procedures exist (Rosenblum, 1979); the process in the U.S. is still evolving, and the facts of each case affect specific approaches used.

Acceptable approaches (from the perspective of U.S. courts) have included using U.S. census data on commuting patterns, transportation times, and other such dimensions (Connolly and Peterson, 1982: 5-5 to 5-35) that relate accessibility of a work establishment to the residences of a certain population. Other approaches have included equating product markets with labour markets; defining the labour pool in terms of applicant geographic densities and dispersion<sup>2</sup> (Rosenblum, 1979); and defining the labour pool in terms of the geographic densities and dispersion of new hires (Atwater *et al.*, 1981). Other procedures have been accepted under certain circumstances.

In evaluating these procedures, it is important to recognize that much of the research in the area has emerged out of court cases. If consensus between parties can be achieved, then the need for costly research in the area can be eliminated. For example, in the case of American Telephone and Telegraph (AT&T), the regulators and the company agreed on a plan to divide the country into 550 geographic groupings corresponding with 273 Bell System establishment areas (on a 2:1 ratio) (Dyer and Wesman, 1979). Since most hiring occurred at entry levels and was roughly evenly distributed across areas, this turned out to be an equitable arrangement in AT&T's case.

Another consequence of U.S. research in this area has been that part of the research is (necessarily) directed at making a company's case demonstrating its compliance, while another part is directed at making a plaintiff's case demonstrating company non-compliance. In a Canadian context, it may be more appropriate to make some advance decisions on appropriate geographic boundaries by occupations. Several types of factors could be taken into account in the development of such geographic boundaries for occupations, including present hiring patterns, local unemployment rates, whether or not an occupation is in a critical skill area, or sets of specific issues that affect specific areas (such as dealing with local unemployment in the far north). Another approach may be a consensus approach (before the question of compliance emerges), in which regulators and employers explore the different approaches that best fulfil the intent of affirmative action measures.

#### 2.3.2 Setting Goals: External Labour Market Analysis

Setting long-term goals for affirmative action is a deceptively simple process. In 1973, AT&T broke down the working age population of the United States (with few exceptions)<sup>3</sup> from the 1970 U.S. Census into its 273 establishment areas and calculated the proportion of the population in each protected group in each area (Dyer and Wesman, 1979). These figures were adjusted "to reflect realistic expectations with respect to the sex composition of certain jobs (e.g., operators and outside crafts)". The end result of the adjustments was AT&T's long-range goals for each job classification within each area.

The debate in external labour market analysis rests in setting intermediate goals. On this point, the strength of an affirmative action mandate can affect the period of time it takes to achieve long-range goals. For example, data are readily available in the U.S. on the proportion of persons in protected groups employed or looking for work in a specific occupation. These data are available in the U.S. census and are often compiled and (if possible) updated for local use by state employment departments (see, for example, West Virginia, 1981). If a firm employs fewer persons in protected groups than the proportion employed or seeking employment in the relevant labour pool, then the firm may be required (or encouraged) to take "affirmative action" to achieve equal employment opportunity. The implication is that the actions taken do not necessarily facilitate increases in external supply because the actions can (potentially) be abandoned when the firm's proportions roughly match those of all firms in the relevant geographic areas.

If the affirmative action mandate is explicitly linked to the objective of increasing overall supply of protected group per-



sons, then approaches that identify qualifiable persons also need to be developed. For persons in highly educated labour markets this is a relatively easy task, since annual university graduation data (in Canada as well as the U.S.) can be matched with the employment experiences of graduates some years down the road. In the U.S. context, Atwater *et al.* (1981) were able to extend this procedure to lower educational levels on the strength of a 1976 Health, Education and Welfare Survey of Income and Education. In the Atwater study, qualifiable persons consisted of those not in the labour force, such as discouraged workers, and those who had jobs in the past five years with skills relevant to the job level under consideration. It was discovered that inclusion of non-worker data could add as much as 50 per cent to the representation of minorities and women in certain labour pools.

The notion of qualifiability has also been examined from psychological and sociological perspectives. Dunnette *et al.* (1979) explore testing procedures that may be used to identify jobs with comparable content, experiences, and/or training for fulfilling the requirements of other positions. This type of research identifies new relationships between jobs so that flows of persons into under-represented jobs can be increased, affecting future goal-setting exercises. Ritchie and Beardsley (1978) performed a "market" survey of a general population of men and women that attempted to identify the demographic characteristics of men and women interested in non-traditional work.

### 2.3.3 Wage as an Intervening Variable in External Labour Market Analysis

Research studies by Atwater and Sheridan (1980), Atwater, Niehaus, and Sheridan (1981), and Atwater, Bres, Niehaus, and Sheridan (1982) all emphasize the importance of wages as a determinant of supply in affirmative action research. The "reservation wage model" they develop suggests that availability to a firm can depend on the average wage it pays its employees relative to the industry average. The "reservation" or "expected" wage is defined as the minimum wage needed to attract a person to begin work in a defined job. A wage leader (an employer that traditionally pays its workforce higher than the going wage) may well achieve affirmative action goals with relative ease by drawing the "cream" of persons in protected groups away from other firms without actually contributing to an increase in labour supply. Conversely, firms that pay the going rate for an occupation, or less, may, even with the best of intentions, be unable to achieve similar goals.

### 2.3.4 Setting Goals: Internal Labour Market Analysis

Much more has been written on the analysis of internal labour markets. This seems to be the case because goal setting and achievement are within the sphere of company responsibility, or because recruitment and promotion policies that characterize many large firms (hiring at entry levels and promoting from within) place greater emphasis on how persons in protected groups are developed.

Since human resource development is generally regarded as well within the sphere of organizational responsibility, very specific goals can be set and organizational resources explicitly devoted toward their achievement. Exhibit 2.2 shows two sets of goal-setting decision rules that are typical of agency

## EXHIBIT 2.2

### Goal-Setting Decision Rules

#### AFFIRMATIVE ACTION PLAN I

1. Goal: Same for all Job Categories
  - (a) For females and minorities, SMSA Civilian Labor Force representation or representation in the total facility, whichever is greater.
  - (b) For white males, the residual after other female/minority goals are calculated.
2. Hiring Rules: 1½ times the goal with a 50% maximum of opportunities going to any group (except when job category is 85% or more of goal; then hiring objective equals the goal).
3. Promotion Rules: Two times the percent in the labour pool when the job category is less than 85% of goal except:
  - (a) For most advantaged group: promotion objective equals percent in pool.
  - (b) Where pool of underutilized groups exceed 50%: then promotion objective equals percent in pool.
4. Promotion Rules: 1½ times the percent in the pool when job category is 85% goal, except:
  - (a) For most advantaged group: promotion objective equals percent in the pool.
  - (b) Where pool of underutilized groups exceed 50%: promotion objective equals percent in pool.

#### AFFIRMATIVE ACTION PLAN II

1. At the minimum, fill 1 out of every 2 openings with underrepresented men or women of whatever races are present in relevant availability.
2. Maintenance: replace minority and women terminations in underrepresented job classifications on a one-for-one basis before making other assignments to that activity.
3. Minority goal: establish goals which reflect parity with the minority percentages in each relevant availability.
4. Female goal: the goal for women is a minimum of 38% in all job categories.

Source: Milkovich and Krzystofiak, 1979: 74.

and employer affirmative action plans and litigated settlements (Milkovich and Krzystofiak, 1979). Both plans express their intermediate goals for each job category in terms of their long-term goals. For example, in Plan 1, the affirmative action goal for females and minorities is to match or surpass civilian labour force representation in the relevant Standard Metropolitan Statistical Area (a SMSA is roughly equivalent to a Census Metropolitan Area, CMA, in Canada) or in the total facility, whichever is greater. It is expected that these goals will be achieved by a set of internally generated hiring and promotion rules: limiting hiring of any one group to 50 per cent of opportunities available in a job category; promoting protected groups from a relevant internal labour pool at twice the rate of white males until protected groups achieve 85 per cent of goal in each job category; or in cases where a relevant labour pool is dominated by persons in protected categories (for example, bank tellers as a relevant labour pool for first-line management), an appropriate affirmative action measure may involve promoting from that pool at a rate equivalent to their composition in that pool.

## EXHIBIT 2.3

## Staffing Matrices

U = unskilled  
 SS = semi-skilled  
 S = skilled

NE = salaried non-exempt  
 E = salaried exempt  
 L = layoff roster

FROM

|         |                  | TO     |    |    |    |    |    |     |        |    |   |    |   |    |     |
|---------|------------------|--------|----|----|----|----|----|-----|--------|----|---|----|---|----|-----|
|         |                  | Whites |    |    |    |    |    |     | Blacks |    |   |    |   |    |     |
|         |                  | U      | SS | S  | NE | E  | L  | Out | U      | SS | S | NE | E | L  | Out |
| Males   | U                | 22     | 3  | 0  | 0  | 0  | 5  | 22  | 8      | 0  | 0 | 0  | 0 | 0  | 10  |
|         | SS               | 3      | 35 | 3  | 0  | 1  | 8  | 24  | 2      | 14 | 0 | 0  | 0 | 4  | 1   |
|         | S                | 1      | 7  | 53 | 0  | 2  | 5  | 5   | 1      | 2  | 3 | 0  | 0 | 0  | 0   |
|         | NE               | 0      | 0  | 1  | 12 | 0  | 0  | 2   | 0      | 0  | 0 | 0  | 0 | 0  | 0   |
|         | E                | 0      | 0  | 5  | 2  | 39 | 0  | 9   | 0      | 1  | 0 | 0  | 0 | 0  | 0   |
|         | L <sup>1</sup>   | 0      | 0  | 0  | 0  | 0  |    |     | 0      | 0  | 0 | 0  | 0 |    |     |
|         | Out <sup>2</sup> | 2      | 2  | 1  | 0  | 2  |    |     | 1      | 0  | 0 | 0  | 0 |    |     |
| Females | U                | 331    | 2  | 0  | 1  | 0  | 84 | 158 | 109    | 0  | 0 | 0  | 0 | 30 | 55  |
|         | SS               | 5      | 5  | 0  | 0  | 0  | 0  | 1   | 0      | 1  | 0 | 0  | 0 | 0  | 0   |
|         | S                | 0      | 0  | 4  | 0  | 0  | 0  | 0   | 0      | 0  | 0 | 0  | 0 | 0  | 0   |
|         | NE               | 1      | 0  | 0  | 15 | 0  | 0  | 7   | 0      | 0  | 0 | 3  | 0 | 0  | 1   |
|         | E                | 1      | 0  | 0  | 0  | 3  | 0  | 0   | 0      | 0  | 0 | 0  | 0 | 0  | 0   |
|         | L <sup>1</sup>   | 0      | 0  | 0  | 0  | 0  |    |     | 0      | 0  | 0 | 0  | 0 |    |     |
|         | Out <sup>2</sup> | 45     | 0  | 0  | 0  | 0  |    |     | 3      | 0  | 0 | 0  | 0 |    |     |

<sup>1</sup> These rows are call-backs from layoffs.

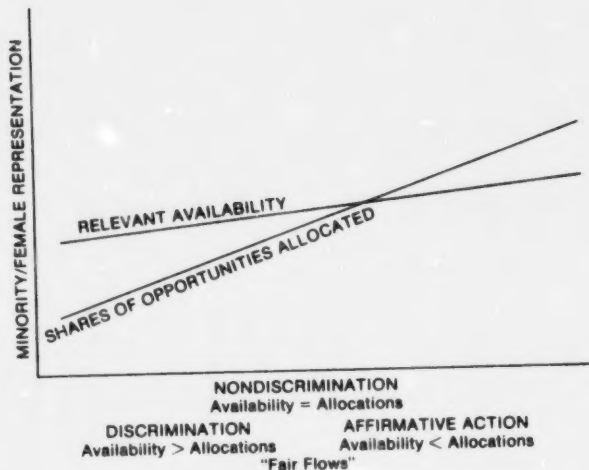
<sup>2</sup> These rows are new hires.

Source: Ledvinka, 1978: 138

These goal-setting decision rules (theoretically) reflect an organization's traditional capability to recruit, develop, and promote employees plus a commitment (usually negotiated with a regulatory agency) to expand these capabilities by a certain amount. In fact, if an employer is able to demonstrate progress over a period of time, then the employer can probably make the case it is in compliance with EEO/affirmative action requirements (Glueck, 1978).

There are two human resource planning modelling techniques that can provide summary measures of employer progress. On one hand, flow models investigate staffing dynamics in terms of the "shares" or proportion of opportunities allocated among each protected group. These flows include all personnel transactions such as applications, hires, upgrades, layoffs, retirements, or admission to training programs (Ledvinka, 1975; Ledvinka and La Forge, 1978). Exhibit 2.3 shows four staffing matrices that identify the

"flows" of white males, black males, white females, and black females from one job category at a certain period of time to the job category they reside in during some later period. The exhibit provides a meaningful indication of how employment practices affect employees. For example, if we compare the white male unskilled row with the white female unskilled row in the lower left matrix, we discover that 3 of the 52 unskilled white males were promoted to semi-skilled labour grades while only 3 of the 576 unskilled white females were promoted. As is illustrated in Exhibit 2.4, the measurement of state-to-state transitions can provide evidence of discriminatory, "fair flow", or affirmative action behaviour. In this example, discriminatory behaviour was evident because the proportion of white male promotions was greater than other groups; if promotion proportions were roughly equal, then this would provide evidence of "fair flow" behaviour; if promotion proportions exceeded those of white males, then evidence of affirmative action behaviour (to remedy past dis-

**EXHIBIT 2.4****Fair Flows**

Source: Milkovich and Krzystofiak, 1979: 75

crimatory behaviour) would be apparent. At each level, long-term numerical goals were set in terms of the availability of protected group persons in the relevant labour force. Intermediate goals can be calculated on the basis of the proportion of protected group persons who join the organization at entry levels.

A second human resource planning modelling technique consists of stock and flow models (Milkovich and Krzystofiak, 1979). Stock and flow models are representations (simulations) of the allocation of either job opportunities or personnel among a variety of states or conditions. Starting with alternative sets of goal-setting decision rules, the projected outcomes of these rules are evaluated in terms of the organization's long-term goals. The model is simulated across various scenarios (no growth, slow growth, rapid growth); the "best rules" associated with the "most likely" outcomes can then be implemented.

The significance of research in internal goal setting to a Canadian goal-setting strategy is that it is embedded in other personnel functions—particularly strategic planning and human resources planning. American researchers admit that the models they develop are not widely used by U.S. employers. However, if they are deemed to be worthwhile goal-setting and evaluation techniques, it would certainly be worth continuing CEIC efforts to encourage employers to engage in human resource planning. Another approach could involve requiring human resource planning reports along lines proposed by Weiermair (1980) (discussed below).

### 2.3.5 Monitoring and Audit of EEO Goal Achievement

Mandated affirmative action in the United States has given rise to a wide range of monitoring activities, emanating both from government regulators and from the efforts made by employers to perform their own evaluations of EEO goal achievement. The assembly and interpretation of quantitative data have become central to such monitoring activities, to

the performance of compliance reviews (audits), and, as noted earlier in this report, the kind of evidence considered in EEO litigation (Connolly and Peterson, 1982). Research in the United States suggests that compliance reviews and employer awareness of ongoing employment discrimination litigation tends to reinforce the EEO behaviour of employers (Leonard, 1983; Chertot *et al.*, 1982: 53-78). Furthermore, the U.S. experience suggests that monitoring and audit activities "push" employers to develop in-house human resource data and planning systems. This incorporation into organizational practice of EEO-related monitoring and planning activities tends to reinforce the legitimacy and desirability of EEO-oriented behaviour within the organizational context. For these and related reasons we are of the view that monitoring and audit functions would be a most important part of the implementation in Canada of an affirmative action goal-setting strategy. We return to this point in the next section of this report.

## 3. IMPLICATIONS FOR CANADA

### 3.1 Introduction

Compared to the U.S., much less has been done in Canada with respect to the development of EEO goals and timetables methodologies. This section of the report begins with a discussion of some Canadian work that has been concerned with estimating the external availability of various target group members for public service employment. Our examination of this work (and what we take to be its limitations) leads to the identification of various issues that need to be taken account of in the development of an expanded model of external availability.

Our proposals in this regard are presented in the form of a design for an affirmative action goal-setting and monitoring strategy for use in Canada. This strategy involves five steps: 1) setting long-term goals; 2) setting intermediate and short-term goals; 3) developing an expanded model for setting intermediate and short-term goals; 4) setting internal (i.e., within employer organizations) intermediate and short-term goals; and 5) establishing monitoring and audit functions. We also make a preliminary identification of the responsibilities—for both government regulators and employers—implied in the implementation of such a strategy. The section concludes with a discussion of how available data may be used in support of such a goal-setting and monitoring strategy.

### 3.2 Canadian Efforts to Formulate EEO Methodologies: The Case of External Availability Estimates

The Human Resource Planning Division of the Public Service Commission (PSC) of Canada proposes a methodology for determining an estimate of external availability of target group members. The objective of the methodology is to calculate a "single external availability estimate" of target group members in selected occupations (or job classification levels), drawing on a number of relevant data sources. These estimates can then be compared with current representation and recruitment data to provide an indication of situations that may benefit from further analysis or remedial measures.

The process consists of four phases. Phase one involves evaluating four factors that will determine the use of external data sources. These factors are:



1. *Requisite Skills:* Data sources used generally vary from one occupational group to another depending on the skills required. Requirements for the numerous occupational groups and levels in the Public Service can be classified into these three minimum requirements groupings: 1) training (certification or educational attainment); 2) training and/or related work experience; 3) no previous training or work experience.

2. *Organizational Level:* Current graduation data may be regarded as an appropriate data source at entry-level positions while historical data may be regarded as more appropriate at other levels.

3. *Target Group Identification:* The choice of data sources to measure availability also depends on which of the target groups (women, indigenous people, or handicapped persons) is under review. Not all data sources contain data for all three groups.

4. *Geographic Location:* Since the geographic area of recruitment for the different occupational groups can be either national, regional, or local in scope, it is important that the data can be expressed in these terms. The appropriate geographic location is selected on the basis of the normal area of competition described in the PSC staffing manual.

Phase two involves identifying the available data sources based on the four factors examined in phase one. The process involves listing all available data sources and evaluating each in terms of their comparability with data needs identified in phase one, validity, and reliability. This phase also includes a discussion of assumptions that may have to be made in order to ensure consistent, comparable measurement.

Phase three involves calculating a weighted average describing the representation of the target groups in the various data sources identified for specific occupational groups and levels. A quantitative approach calculates the weight given to a data source based on the percentage of the previous year's recruits that came from the population described by that data source. A qualitative approach—for those occupations and levels where sources of external recruitment data are not collected—is based on an assessment of the sources from which the Public Service might reasonably draw personnel for a particular group and level.

Phase four involves calculating the single external availability estimate. A single, numerical estimate of the external availability of qualified group members is calculated by multiplying the percentage weight assigned to each data source by the percentage representation of the target group within that population and then adding the value obtained for each.

### 3.2.1 Limitations

The methodology just examined represents an articulation of a basic model of external availability. The following issues need to be resolved in an expanded model of external availability.

1. What is the relationship between external availability indicators and the actual number of target group members seeking employment in the relevant occupation and level or who may be induced to seek employment in the relevant occupation and level? The individual choice to pursue other options (such as for women, staying home and raising a

family) could lead to an overestimation of availability at a certain level. These individual choice factors can be examined in terms of a work-leisure choice framework (Atwater *et al.*, 1982). Factors that may induce individuals to return to a certain occupation may be added to an expanded model of external availability.

2. What specific criteria may be used to identify qualifiable (as contrasted with fully qualified) individuals who may be encouraged to move into an occupation? A failure to accurately identify individuals with qualifiable skills could lead to an underestimation of availability at a certain level. Again, an expanded model of external availability may be able to take account of lateral changes in occupations or of educational or training differences that are one or two steps removed from the qualifications required for a given occupation. Certainly such alternative scenarios can be tested to measure the potential impact of alternative policies on external supply.

3. How would characteristics specific to an employer or an industry affect estimates of external availability? Policies (even non-systemic policies) pursued by an individual employer will affect estimates of the number of target group persons available to that firm. For example wage leaders (firms that, as a matter of policy, pay their workforce more than the going wage) may well achieve affirmative action goals based on external availability estimates with relatively little effort. This may be achieved simply by drawing persons in target groups away from other employers. One objective of an expanded model of external availability can be the development of a measure of "wage availability" (the external availability of target group members at a given wage rate). Since wage differentials between firms and industries are part of the "economic reality", it is important to adjust external availability estimates to take account of this reality. A measure of "wage availability" can also be useful in a policy sense, measuring alternative wage scenarios and as a means of evaluating possible government facilitating programs (such as wage subsidies).

4. How valid are external availability estimates as a goal-setting device for occupations embedded in an employer's internal labour market? The distinction has often been made between jobs in a firm that are generally filled by external candidates, and those generally filled from within. Those filled from within tend to be at higher levels than those (entry-level) positions filled by external candidates. As a result, the selection and promotion decisions taken by firms filling positions from within depend somewhat more on "internal labour market" conditions (for example, promotion policies, training and development policies, performance evaluations, and so on) and less on the "external labour market" characteristics of the job under consideration. To the extent that internal labour market conditions predominate, the goal-setting process may be more closely linked to an evaluation of company policies than to the external labour market. As such, for these positions, external availability estimates may provide a rough measure against which individual firms can measure their progress. However, it should be expected that firms significantly below the benchmark may well be in compliance with affirmative action principles, while firms at or above the benchmark could conceivably have achieved these levels with relatively little adherence to affirmative action principles.

### 3.3 Design of a Goal-Setting/Monitoring Strategy for Use in Canada

The strategy we propose is based on the following assumptions:

1. The objective of a goal-setting strategy is not limited to measuring an end case scenario. Rather, the intermediate goals that are set ought to be aimed at *generating* external supply rather than simply measuring the present or a future state. As a result, any supply-generating mechanisms should feed back into the strategy to set a new set of goals closer to the long-range objective.
2. The responsibility for achieving affirmative action goals rests with employers. The particular actions taken to achieve these goals are not a public issue as long as they are legal. However, government does have a consultative role, a role as facilitator, a role as a data and information source.
3. Government also has the role of ensuring compliance. In part, this may be achieved through the development of effective mechanisms for coordination and consultation between employers and the relevant government regulatory agencies. Under the U.S. framework this level of coordination is quite low. The U.S. framework places a quite reasonable burden on employers by shifting the burden of proof to the employer when a complainant is able to make a *prima facie* case of discrimination on the basis of employment statistics (Connolly and Peterson, 1982). However, the "weight" of this burden is a cause of some concern because it can be exacerbated by invalid or incomplete reporting procedures, dated or incomplete labour market information, and weak enforcement procedures. The goal-setting/monitoring strategy advanced here is based on the assumption that the relevant regulatory agencies in Canada would play a strong and central role in the coordination, consultation, and audit (monitoring) functions related to mandated affirmative action.

#### 3.3.1 Suggested Form of the Methodology

The suggested form of the methodology takes five steps.

**Step 1:** Set long-term goals. This simply represents the proportion of civilian working age population in each protected group to total civilian working age population. Any exclusions, such as students, retired persons, or armed forces personnel, and so on, can be explicitly defined. These findings can be calculated for the nation as a whole, for each region (or province), and for each local labour pool defined by policy and consultative processes. Since 1981 Census data are the most complete data source, other labour pools can be defined using census data or public use sample tapes.

**Comment:** These long-term goals are identified using very simple calculations. The findings report a constant proportion across all job classifications and labour markets—a highly unlikely outcome; nevertheless it represents a valid operational goal for planning purposes.

**Step 2:** Set intermediate and short-term goals, first by using a basic labour market analysis model. Before the calculations are made, a decision has to be made on the level of occupational detail that should be used. At a minimum, these data should be reported at the same level as the level required by the proposed reporting and audit functions. Earlier, we suggested that the level of occupational detail of the reporting function should be greater than that in existence in

the U.S. However, in the absence of any further research in the area the EEO-1 classification (or a Canadian equivalent) may have to be the minimum level of analysis. Analysis may still be conducted on specific occupations at 2, 3, and 4-digit CCDO occupations to answer specific questions.

The intermediate and short-term goals using a basic model are calculated as the proportion of labour force participants (employed and unemployed) in each protected group to total labour force participants. These proportions are then reported for each occupational category and age group in each relevant national, regional, or local labour pool. Again, the 1981 Census contains all the data, although experimental calculations may be made on the Statistics Canada monthly publication *The Labour Force* (Catalogue No. 71-001). These experiments would apply only to goals for women, since other protected groups are not yet separately reported in labour market data.

**Comment:** These calculations simply reflect current external labour supply, and therefore offer, at best, a floor measure for any affirmative action goals. However, they provide important calculations for evaluation and monitoring purposes.

**Step 3:** Set intermediate and short-term goals: expanded model. This step represents an attempt to add estimates of the number of persons outside of the labour force or not working in their area of training to the estimates of external labour supply. There is no consensus on how these estimates can be established at all levels of the occupational structure. Extensive research must be done in this area. At this time we propose one strategy that has produced useful results in the U.S.

Using 1981 Census data, education (training) occupation matrices for each protected group and age group can be developed. Changes in labour force participation rates may be used as an estimate of the "flow" into or out of the labour force. Differentials in coefficients between white males and protected groups would imply discrimination or differences in choice considerations. Diagnostics could then be applied, either to increase education and training opportunities at certain levels of the matrices, or to increase participation of protected group members in certain matrix cells.

Further analysis can be attempted using an economic analysis technique that allows for the measurement of the impact of wages on an individual's decision to work in an occupation. Starting with 1981 Census data excluding no potential workers, education, experience, and wage data are used to estimate market wages. These findings, plus data on hours of work, wages, numbers of children, alternative wages, and education are used in order to estimate annual hours of work. These results are used to estimate the value of work for each protected group, comparing them with wage data from a sample of firms. At a given wage rate these results will yield the number of potential workers available for a specific job category.

**Comment:** These techniques are still relatively untried. Further research can strengthen these techniques or develop alternative approaches.

**Step 4:** Set internal intermediate and long-term goals. The proposed method assumes some company knowledge of human resource planning techniques. Using a "flow" model, transition matrices are developed for each protected group

## EXHIBIT 3.1

## Statistical Summary on Manpower Analysis and Planning of Company XYZ per June 31

| Manpower Flow Characteristics per Period |             |                 |          |                                    |                      |                                    |                                        |                                                           |                                            | Manpower Stock per Date of Audit |                                  |                        |              | Manpower Flow Projections (short- and medium-term) |                                              |                    |             |                                                                           |   |   |   |   |
|------------------------------------------|-------------|-----------------|----------|------------------------------------|----------------------|------------------------------------|----------------------------------------|-----------------------------------------------------------|--------------------------------------------|----------------------------------|----------------------------------|------------------------|--------------|----------------------------------------------------|----------------------------------------------|--------------------|-------------|---------------------------------------------------------------------------|---|---|---|---|
| Manpower Category                        | New hirings | Voluntary quits | Lay-offs | Organisa-tional internal transfers | Promo-tions (+ or -) | Number being trained in their jobs | Ave. net cost of training per employee | Number being retrained in the process of ration-alization | Average monthly, weekly or hourly earnings |                                  | Total manpower stock per 31 June | Ave. age of work-force | % of females | % of aliens and guest workers                      | Expected manpower changes over the next year |                    |             | Projected new hirings over next 5 years (revisions from past projections) |   |   |   |   |
|                                          |             |                 |          |                                    |                      |                                    |                                        |                                                           | male                                       | female                           |                                  |                        |              |                                                    | Promo-tions and transfers                    | Quits and lay-offs | New hirings | years                                                                     |   |   |   |   |
|                                          |             |                 |          |                                    |                      |                                    |                                        |                                                           |                                            |                                  |                                  |                        |              |                                                    |                                              |                    |             | 1                                                                         | 2 | 3 | 4 | 5 |
|                                          |             |                 |          |                                    |                      |                                    |                                        |                                                           |                                            |                                  |                                  |                        |              |                                                    |                                              |                    |             |                                                                           |   |   |   |   |
| Managerial Categories                    | ...         | ...             | ...      | ...                                | ...                  | ...                                | ...                                    | ...                                                       | ...                                        | ...                              | ...                              | ...                    | ...          | ...                                                | ...                                          | ...                | ...         | ( ) ( ) ( ) ( ) ( )                                                       |   |   |   |   |
| Professional Categories                  | ...         | ...             | ...      | ...                                | ...                  | ...                                | ...                                    | ...                                                       | ...                                        | ...                              | ...                              | ...                    | ...          | ...                                                | ...                                          | ...                | ...         | ( ) ( ) ( ) ( ) ( )                                                       |   |   |   |   |
| Technical Categories                     | ...         | ...             | ...      | ...                                | ...                  | ...                                | ...                                    | ...                                                       | ...                                        | ...                              | ...                              | ...                    | ...          | ...                                                | ...                                          | ...                | ...         | ( ) ( ) ( ) ( ) ( )                                                       |   |   |   |   |
| Clerical Categories                      | ...         | ...             | ...      | ...                                | ...                  | ...                                | ...                                    | ...                                                       | ...                                        | ...                              | ...                              | ...                    | ...          | ...                                                | ...                                          | ...                | ...         | ( ) ( ) ( ) ( ) ( )                                                       |   |   |   |   |
| Sales Categories                         | ...         | ...             | ...      | ...                                | ...                  | ...                                | ...                                    | ...                                                       | ...                                        | ...                              | ...                              | ...                    | ...          | ...                                                | ...                                          | ...                | ...         | ( ) ( ) ( ) ( ) ( )                                                       |   |   |   |   |
| Skilled Workers Categories               | ...         | ...             | ...      | ...                                | ...                  | ...                                | ...                                    | ...                                                       | ...                                        | ...                              | ...                              | ...                    | ...          | ...                                                | ...                                          | ...                | ...         | ( ) ( ) ( ) ( ) ( )                                                       |   |   |   |   |
| Semi-skilled Workers Categories          | ...         | ...             | ...      | ...                                | ...                  | ...                                | ...                                    | ...                                                       | ...                                        | ...                              | ...                              | ...                    | ...          | ...                                                | ...                                          | ...                | ...         | ( ) ( ) ( ) ( ) ( )                                                       |   |   |   |   |
| Unskilled Workers Categories             | ...         | ...             | ...      | ...                                | ...                  | ...                                | ...                                    | ...                                                       | ...                                        | ...                              | ...                              | ...                    | ...          | ...                                                | ...                                          | ...                | ...         | ( ) ( ) ( ) ( ) ( )                                                       |   |   |   |   |
|                                          | ...         | ...             | ...      | ...                                | ...                  | ...                                | ...                                    | ...                                                       | ...                                        | ...                              | ...                              | ...                    | ...          | ...                                                | ...                                          | ...                | ...         | ( ) ( ) ( ) ( ) ( )                                                       |   |   |   |   |

Other organisation statistics to be collected:

Industry and firm size classification

Major changes in personnel policy over the last period

Production or work lay-out changes over the last period

Planned expansion and rationalization investments (quantitative and qualitative dimensions)

Output per worker over the past period

Planned output and productivity targets from period 1 to 5

Specific manpower problems: open ended question

Source: Weiermair, 1980

and for white males. A comparison of coefficients in the matrices will determine whether discrimination, "fair flow", or affirmative action behaviour can be observed. Numerical goals can be calculated comparing the present state in each occupational group with long-term goals set in step one. The rate at which long-term goals are achieved will take into account a discounted measure of the employer's "traditional" organizational behaviour, as well as a measure of "innovative" affirmative action behaviour. In consultation with a regulatory body, a set of decision rules that effect the transformation from the present to the desired state can be established.

*Comment:* Weiermair (1980) has made a case for the desirability of firms submitting human resource planning statements to a labour market information agency. Such a statement may lend itself to easy modification in light of an affirmative action goal-setting strategy. (See an example form in Exhibit 3.1.)

**Step 5:** Establish monitoring/audit function. In section two of this report we reviewed U.S. research (Leonard, 1983) which showed greater affirmative action goal achievement in federal contractor organizations (as opposed to non-contractor)

and where compliance reviews had been conducted (as opposed to not being conducted). These results supported the researcher's conclusion that "...affirmative action programs work best when they are vigorously enforced" (Leonard, 1983: 16).

The monitoring function need not have an exclusively regulatory overtone. Monitoring activities can be effectively blended with the type of coordinating and consultative functions a federal government agency or agencies could properly play in a mandated affirmative action environment. There is considerable precedent for such a role in the present mix of federal policies and programs in the employment/human resources area. Such an approach is also consistent with the reasonable philosophy that monitoring is not simply compliance-oriented but also serves a function of identifying changing data and reporting needs and assisting employers to discharge effectively their affirmative action obligations. To be effective, however, such an approach to monitoring must be accomplished by a strong compliance review or audit function. The presence, and periodic exercise of such an audit function, can establish affirmative action behaviour as the norm in the recruitment, selection, and promotion decisions of employers.



## EXHIBIT 3.2

## Steps in a Canadian Affirmative Action Goal-Setting Strategy and Corresponding Employer Organization and Government Responsibilities

| Organizational<br>Responsibilities                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | Government<br>Responsibilities                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | Goal-Setting Strategy                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         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| <ol style="list-style-type: none"> <li>1. Conduct job and task analysis to validate organizational job classifications in terms of established job categories for reporting purposes.</li> <li>2. Within guidelines set to meet certain employment policy objectives, determine relevant labour pools for each job category.</li> <li>3. Calculate organizational performance relative to base-line measures set in Goal-Setting Strategy #2. Cases in which organizational performance falls below base-line measures may warrant immediate attention to remedy the impact of past discriminatory practices.</li> <li>4. Conduct organizational and local labour market studies that address the issues of qualifiability and the inducement of protected group members back into the labour force. Use sociological, psychological, and economic techniques to identify non-traditional entry points or career ladders. Publish the findings so that they may be validated or invalidated in other organizational settings. Feed the findings into the internal goal-setting process.</li> <li>5. Adjust human resource planning models to take account of affirmative action needs.</li> <li>6. Develop "decision rules" in consultation with government that facilitate the achievement of affirmative action goals.</li> <li>7. Feed information back to government on a consultative basis before questions of non-compliance are addressed in a regulatory environment.</li> </ol> | <ol style="list-style-type: none"> <li>1. Facilitate updates of 1981 Census data (e.g., include relevant questions in 1986 Census).</li> <li>2. Set guidelines for establishing job categories for reporting purposes that reflect some occupational detail and career level data.</li> <li>3. Set guidelines for establishing relevant national, regional, and local labour pools to reflect national employment policy considerations, established practice, or special regional/local considerations.</li> <li>4. Publish the findings from Goal-Setting Strategy #1.</li> <li>5. Publish the findings from Goal-Setting Strategy #2.</li> <li>6. Through a set of consultative mechanisms, conduct research using the expanded model described in Goal-Setting Strategy #3. Encourage organizations to conduct similar research. Adjust base-line measures in light of the findings of this research. Publish samples.</li> <li>7. Encourage or require a human resource planning approach to internal goal setting, perhaps by requiring a human resource planning report (Weiermair, 1980). Provide consulting services in the area as needs arise.</li> <li>8. Feed information back to organizations on a consultative basis before non-compliance sanctions are activated.</li> </ol> | <ol style="list-style-type: none"> <li>1. Set long-term goals: Use 1981 Census data and frequent updates. Calculate the proportion of civilian working age population. (Define any exclusions—e.g., retired persons, students, members of armed forces, etc.) Report these proportions for each relevant labour pool and apply them to each job category.</li> <li>2. Set intermediate and short-term goals: Basic model. Calculate the proportion of labour force participants (employed and unemployed) in each protected group to total labour force participants. Report these proportions for each relevant labour pool, and for each population age group. Use 1981 Census data to calculate these proportions for specific occupations and for job categories established for reporting purposes (cited in #2, Government Responsibilities). Use Statistics Canada <i>The Labour Force</i> (Catalogue No. 71-001) for periodic updates for broad occupational categories by sex. Unfortunately, other protected groups are not separately reported. Use up-to-date craft, union, or professional association data for specific occupational analysis matched with company performance, where appropriate. These calculations represent a floor measure where the goal-setting process does not necessarily generate increased overall supply. However, these are important calculations for evaluation purposes.</li> <li>3. Set intermediate and short-term goals: Expanded model. Calculate the proportion of labour force participants (employed and unemployed) in each protected group to total labour force participants. Add an estimate of availability of qualifiable persons not in the labour force and a measure of the magnitude of inducements that may draw them into the labour force (Atwater <i>et al.</i>, 1981). Report these findings for each labour pool and age group. Use 1981 Census data including any potential workers. Relevant variables are likely to include education, experience, wage rates, and data on hours of work, number of children, and alternative sources of income. This should enable us to estimate the "wage availability" of persons in the relevant labour pool.</li> <li>4. Set internal intermediate and long-term goals. Set internal (within firm) goals, expressing them in terms of the long-term goals set in #1. The speed with which these long-term goals are achieved will depend on the current size of the protected labour pool and the proportion of new hires achieved (under affirmative action goals) in the future.</li> <li>5. Set strong evaluation and audit measures. #2 above provides base-line national, regional, and local progress estimates. An analysis of new hires (#3) compared with relevant labour pools provides evidence of discriminatory or affirmative action behaviour. An analysis of flows through the organization (Ledvinka and La Forge, 1978) provides evidence of discriminatory, "fair flow", or affirmative action behaviour in company promotion policies. A strong audit function can establish as the norm affirmative action behaviour in recruitment, selection, and promotion.</li> </ol> |

**EXHIBIT 3.3****A Strategy for Setting National Affirmative Action Goals for Women**

## 1. Set long-term goals:

From the 1981 Census calculate

$$\frac{\text{The number of women in civilian working age population}}{\text{Total civilian working age population}} = \text{Long-term goal coefficient (\%)}$$

Apply the long-term goal coefficient to each job category.

## 2. Set intermediate and short-term goals:

$$\text{i) } \frac{\text{Number of women labour force participants}}{\text{Total labour force participants}} = \text{Floor measure (\%)}$$

Calculate women labour force participants/total labour force participants for each job category and age group.

- ii) Using cross tabulations from Census data, develop education (training)/occupation matrices for each sex and age group. The male/female differential in coefficients represents a measure of "slippage" — reflective of discrimination, or choice consideration — in labour force participation and occupational achievement.

- iii) Further analysis of persons with qualifiable skills:

One approach — develop a set of regression equations

- a) Education, experience, and wage data to measure market wage;
- b) Market wage, hours of work, wages, number of children, alternative wages, and education to measure annual hours of work;
- c) Compare this measure of "value of work" with wage data from individual firms to measure "wage availability" of women.

## 3. Set internal intermediate and long-term goals:

Develop separate flow matrices (measuring occupational category in a past time period against occupational category in the present period) for men and women. Compare the coefficients in the matrices to determine whether discriminatory, "fair flow", or affirmative action behaviour can be observed. Calculate numerical goals (comparing present state with long-term goals set in #1). Taking into account "traditional" organizational behaviour (recruitment patterns, typical career paths, growth projections, training infrastructure) and the development of innovative organizational behaviour associated with affirmative action programming (alternative recruiting, non-traditional career paths, expanding the training infrastructure), develop decision rules that effect the transformation from the present to the desired states.

**3.3.2 Responsibilities of Employer Organizations and Government**

In relation to the five-step methodology outlined in section 3.3.1, the basic responsibilities of employer organizations and government may be identified as follows.

**Organizational Responsibilities:** The primary organizational responsibility is implementing the affirmative action plan. In terms of the actual goal-setting process, organizational responsibilities would be formally limited to submitting a human resource planning/affirmative action plan and consulting with a regulatory agency on the development of a set of affirmative action goal-setting decision rules. However, it is expected that organizations and government will consult each other at each step of the process.

**Government Responsibilities:** Government plays a role as a source of information, a consultative body, and a regulatory body. As an information source, government can assist the goal-setting process by publishing the relevant national, regional, and local tables, by including relevant questions in the 1986 Census, and by facilitating further research. As a consultative body, government can assist organizations with human resources/affirmative action planning. As a regulatory body, government can assist firms in developing goal-setting decision rules and auditing outcomes.

**3.3.3 Summary**

Exhibit 3.2 summarizes each of the stages of the five-step methodology and the organizational and government responsibilities associated with each step.

**3.3.4 Available Data and their Use**

Using 1981 Census data, we can develop national, regional, and local goals. Exhibit 3.3 presents an example of a strategy for setting national affirmative action goals.

One issue that needs to be addressed is the forming of census data at a level appropriate for setting affirmative action goals. This may be subject to further experimentation and evaluation, but the key measures requiring a decision are education and occupation. Exhibit 3.4 shows what an education (training)/occupation matrix could look like. Indeed, these broad categories do not exclude analysis of specific occupations—by organizations or by regulatory agencies. However, for reporting and goal-setting purposes the proposed categories seem to improve on categories used in the U.S., while maintaining broad enough categories to be applicable across a wide range of organizations.

**4. CONCLUSIONS AND RECOMMENDATIONS**

The following are the principal conclusions and recommendations of this report. They are 11 in number.

1. In order to be effective, an affirmative action goal-setting strategy for Canada needs to be quantitative in form and based on data that are as current as possible.
2. This approach implies several types of quantitative measures and data needs:
  - a. For example, it is our view that in the type of goal-setting strategy presented here it is the responsibility of employers to prepare, in accordance with government guidelines, an affirmative action plan.
  - b. This plan should address the levels of the goal-setting process and mechanisms for goal achievement (including evaluation of that achievement). For example, the different goal levels should be set (long-term, intermediate, and short-term). The relevant labour pool or pools should be defined (and not in artificially restrictive terms).
  - c. The development of such plans requires intra-firm human resource data and planning systems that are likely to be underdeveloped. In this connection, there is an important consultative role for government to play vis-à-vis employers. There is a need to evaluate existing policy and program vehicles (for example, CEIC human resource planning initiatives) and assess their potential as delivery agents for providing support to employers. Specific types of support include

**EXHIBIT 3.4****Sample Education/Occupation Matrix from Census Data  
(White Males)**

| OCCUPATION                       | EDUCATION           |                        |                            |                           |                               |                                        |                                            |                                  |                       |                                   |                                       |                                          |                                              |                 |
|----------------------------------|---------------------|------------------------|----------------------------|---------------------------|-------------------------------|----------------------------------------|--------------------------------------------|----------------------------------|-----------------------|-----------------------------------|---------------------------------------|------------------------------------------|----------------------------------------------|-----------------|
|                                  | No formal schooling | Some elementary school | Finished elementary school | Some academic high school | Finished academic high school | Some vocational, technical high school | Finished vocational, technical high school | Some post-secondary trade school | Finished trade school | Some nursing or teachers' college | Finished nursing or teachers' college | Some junior college, technical, or other | Finished junior college, technical, or other | Some university |
| Upper-level managers             |                     |                        |                            |                           |                               |                                        |                                            |                                  |                       |                                   |                                       |                                          |                                              |                 |
| Middle managers                  |                     |                        |                            |                           |                               |                                        |                                            |                                  |                       |                                   |                                       |                                          |                                              |                 |
| Professionals                    |                     |                        |                            |                           |                               |                                        |                                            |                                  |                       |                                   |                                       |                                          |                                              |                 |
| Semi-professionals & technicians |                     |                        |                            |                           |                               |                                        |                                            |                                  |                       |                                   |                                       |                                          |                                              |                 |
| Supervisors                      |                     |                        |                            |                           |                               |                                        |                                            |                                  |                       |                                   |                                       |                                          |                                              |                 |
| Foremen/women                    |                     |                        |                            |                           |                               |                                        |                                            |                                  |                       |                                   |                                       |                                          |                                              |                 |
| Clerical workers                 |                     |                        |                            |                           |                               |                                        |                                            |                                  |                       |                                   |                                       |                                          |                                              |                 |
| Sales workers                    |                     |                        |                            |                           |                               |                                        |                                            |                                  |                       |                                   |                                       |                                          |                                              |                 |
| Service workers                  |                     |                        |                            |                           |                               |                                        |                                            |                                  |                       |                                   |                                       |                                          |                                              |                 |
| Skilled craft & trade workers    |                     |                        |                            |                           |                               |                                        |                                            |                                  |                       |                                   |                                       |                                          |                                              |                 |
| Semi-skilled manual workers      |                     |                        |                            |                           |                               |                                        |                                            |                                  |                       |                                   |                                       |                                          |                                              |                 |
| Unskilled manual workers         |                     |                        |                            |                           |                               |                                        |                                            |                                  |                       |                                   |                                       |                                          |                                              |                 |
| Not in labour force              |                     |                        |                            |                           |                               |                                        |                                            |                                  |                       |                                   |                                       |                                          |                                              |                 |

assisting employers to identify sources of systemic bias in their employment systems and assisting employers to put in place intra-organizational procedures designed to facilitate the achievement of affirmative action goals (for example, decision rules, flow analysis, etc.).

3. The affirmative action regulatory agency will require a data generation/research capability. In part this is for the purposes of assessing the reasonableness of the affirmative action plans developed by employers and also to provide the kind of consultative support alluded to in point c above. In addition, such a data generation/research capability will provide a basis for the design of government policy and program initiatives; for example, research on the "value of work" and wages designed to develop government initiatives (such as wage subsidy programs) to induce increased labour force entry by protected group members.
4. Consistent with the observations in point 3 above, the regulatory agency should be actively involved in working with other agencies and groups to define data needs. For example, close links with Statistics Canada would be clearly important from the point of view of optimizing the

affirmative action usefulness of data gathered in future census activity and the ongoing monthly Labour Force Survey. Effective liaison will also have to be established with representatives of native persons and the handicapped if currently missing data are to be put in place.

5. The guidelines to employers for the development of affirmative action plans and the related reporting/consultative procedures need to be structured so as to reinforce with employers the necessity of going beyond restrictive definitions of the relevant labour pools. It is of obvious importance that these procedures help to entrench the concept of the *qualifiable* worker.
6. The operationalization of the reporting procedures referred to in point 5 above will, as noted in this report, require the making of certain "detail" decisions with respect to such matters as the level of occupational specification for reporting purposes and the definition of geographic boundaries for different labour pools.
7. To be effective, the implementation of an affirmative action goal-setting strategy requires the presence of a monitoring and audit function to ensure compliance-oriented behaviour. The data sources for the monitoring



function include the reporting procedures referred to in points 5 and 6 and the regulatory agency's independent data generation initiatives (see point 3). As already noted, the monitoring function should not have a purely regulatory quality. It can and should be blended with consultative services to employers.

8. In light of U.S. experience with contract compliance, it is our view that the regulatory framework should be applied consistently to all organizations over a certain size. The contract compliance approach limits mandated affirmative action to the part of the occupational and industrial structure most involved with government work. This may not (necessarily) reflect areas of the occupational and industrial structure where the best opportunities are emerging. The regulatory framework should be capable of identifying critical areas, promising areas, and any areas where past discrimination needs to be addressed without regard to any economically and socially "artificial" criteria (such as the presence or absence of a government contract).
9. The goal-setting process outlined in Section 3 emphasizes the need for consultation between government and employers in a number of critical areas. The underlying philosophy of the process suggests that firms can benefit in other human resource and strategic planning areas by establishing an internal capability for identifying intermediate and long-term goals. Therefore, any enforcement procedures should contain a number of consultative mechanisms that are triggered before the question of legal sanctions arises. In our view, affirmative action should be regarded as a government human resource policy. Therefore government (not individuals) should initiate proceedings against offending employers. Of course, individuals should continue to have access to

human rights bodies with respect to employment discrimination. Definitions of discrimination at human rights bodies may well be evaluated in light of the data generated by a separate affirmative action regulatory agency.

10. The proposed goal-setting strategy can be evaluated and altered in the light of findings from applications and case studies. Indeed, in some cases, it may be necessary to make simplifying assumptions at some stages. However, certain major data collection decisions can be made now to meet the needs of the proposed goal-setting strategy and any alternatives. Specifically, many of the proposed data needs can best be met with census data. We consider it important that the data needs we have outlined be included in the 1986 Census.
11. Finally, the proposed goal-setting strategy appears to be a long and complicated process. This appearance should not discourage firms and government from acting in the short run, for much of the process can be implemented immediately. Long-term goals can be established and published. Canadian policymakers and business representatives can resolve to avoid a costly adversarial approach to the implementation of affirmative action by setting in place consultative mechanisms to set guidelines for identifying relevant national, regional, and local labour pools. These consultative mechanisms can be expanded to improve base-line and intermediate goal-setting strategies. The process benefits from an accumulation of data-based research. No doubt, the notion of qualifiability—the key component of an affirmative action strategy designed to increase the supply of persons in protected groups—will evolve and be strengthened by this accumulation of research. In the final analysis government, business, and the academic community all have a responsibility for ensuring that this data base is created and that it is accessible to all interested parties.

#### NOTES

1. See "An Introductory Guide to Human Resources Planning" and "Human Resources Planning Manual", Employment and Immigration Canada in collaboration with the Ontario Ministry of Labour, March 1982.

2. For example, this can be done by weighting the labour pool in terms of the geographical dispersion of applicant's place of residence from their place of work.

3. The exclusions were persons under 16 or over 65 years of age, persons in the armed forces, students, retired persons, inmates of institutions, and persons with long-term physical or mental illnesses or disabilities.

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## EDUCATION AND TRAINING: EQUAL OPPORTUNITIES OR BARRIERS TO EMPLOYMENT?

Lin Buckland

### Sommaire

L'étude sert de document de référence pour les questions d'inégalité en matière d'enseignement et de formation au Canada. Il y a un lien étroit dans les pays industrialisés entre le niveau de scolarité et les cours suivis, le genre d'emploi exercé et le rang social. C'est pourquoi, dans les sociétés démocratiques libérales industrialisées, la notion d'égalité d'accès à l'enseignement et à la formation est perçue comme essentielle pour garantir à tous les mêmes possibilités de promotion sociale. Les cours de formation et les programmes d'enseignement sont également perçus comme une façon de supprimer la discrimination à l'égard des groupes défavorisés, lesquels, grâce à l'éducation, auront des chances égales de se tailler une place sur le marché du travail, compte tenu de leurs capacités.

Les études sur l'accessibilité à l'enseignement et à la formation au Canada révèlent que plusieurs facteurs combinés, notamment un faible revenu, une situation inférieure au sein de la population active, une scolarité insuffisante et le besoin d'aide spéciale, gênent les femmes, les personnes handicapées, les autochtones et les minorités visibles. L'auteure fait valoir que la discrimination en matière d'étude et de formation à l'endroit des membres de ces groupes découle de la discrimination structurelle qui existe dans le marché du travail et la société en général. Ainsi, l'éducation et l'enseignement ne pourraient suffire à aplanir les difficultés auxquelles font face ces groupes sur le marché du travail.

Néanmoins, les futurologues avancent que dans l'ère post-industrielle, la clé du succès sera la capacité de faire preuve de souplesse et d'acquérir de nouvelles connaissances et compétences de façon continue. Le modèle d'une société qui se recycle, c'est-à-dire, où alternent des périodes de travail et de formation, est présenté comme l'avenir qui nous attend. Ainsi, il est probable que l'enseignement et la formation resteront des questions très importantes et que la possibilité de se prévaloir des diverses occasions qui se présentent exigera une attention continue.

Si des mesures concrètes sont adoptées pour supprimer la discrimination en matière d'enseignement et de formation à l'égard des femmes, des personnes handicapées, des autochtones et des minorités visibles et pour garantir leur participation future, il faudra, comme le laisse entendre l'auteure, que de telles mesures soient complètes et multidimensionnelles, et qu'elles prévoient l'établissement des services de soutien essentiels pour permettre aux groupes cibles de saisir les occasions qui se présentent.

### Summary

The purpose of this paper is to provide a background analysis of issues of inequality in education and training in Canada. There is a close relationship in industrial societies between the level and type of education that people acquire, their employment status, and their overall social status. For this reason, in liberal democratic industrial societies, the concept of equal access to education and training is regarded as key to ensuring equality of social opportunity. Provision of education and training opportunities is also looked on as a mechanism to redress inequalities for disadvantaged groups, based on the assumption that individuals in these groups will thereby be assured of an equal chance of securing a position in society, each in accordance with personal abilities.

A review of studies of accessibility to education and training opportunities in Canada indicates that the interaction of factors on a number of fronts—those related to low income, low labour force status, lack of appropriate educational qualification, and special support needs—creates compounded barriers for women, disabled persons, native people, and minorities. The analysis suggests that the inequalities in education and training faced by members of these groups have their roots in the structure of inequality in the labour market and in society as a whole. Consequently, it would be insufficient to attempt to redress the inequalities that these groups have experienced in employment by focusing only on the provision of education and training for them.

Nevertheless, futurists suggest that in the emerging post-industrial context the key to survival will be flexibility and the ability to acquire new knowledge and new skills on an ongoing basis. The model of a learning society, where people move back and forth between education or training and work, is being held up as the direction of the future. Thus, it is likely that education and training will continue to be a significant force in society, and the issue of accessibility to those opportunities will demand continued attention.

If concrete measures are to be developed to address the inequalities in education and training that have been faced by women, handicapped persons, natives, and minorities in the past, and to ensure their participation in the future, then the implications of the discussion in this paper are that such measures must be multi-pronged and comprehensive, and must include essential support services to enable members of these groups to actually take advantage of the opportunities that are provided.



## EDUCATION AND TRAINING: EQUAL OPPORTUNITIES OR BARRIERS TO EMPLOYMENT?

Lin Buckland\*

### 1. INTRODUCTION

#### Background

This paper examines the relationship between education and training and equality in employment — a complex relationship woven with economic, social, political, and ideological strands and bound up in the history of industrialization and the institutional developments that have accompanied its advance.

The terms of reference for the Commission on Equality in Employment refer to a growing awareness of and commitment to principles of equality, as evidenced in the passing of the *Canadian Human Rights Act* of 1977. The terms also cite current demographic trends which indicate that women will constitute the majority of entrants into the Canadian labour force in the 1980s. Reference is made as well to the analyses of the Special Parliamentary Committee on the Disabled and the Handicapped (1981), the Parliamentary Task Force on Employment Opportunities for the '80s (1981), and the Labour Market Development Task Force established by the Minister of Employment and Immigration (1981), all of which demonstrate the need for attention to employment issues concerning women, disabled persons, native people, and visible minorities. It is noteworthy, therefore, that each of these reports as well as other recent studies by the Economic Council of Canada (1982), the Labour Canada Task Force on Micro-Electronics and Employment (1982), the Science Council of Canada (1983), the Task Force on Skill Development Leave (1983), and the National Advisory Panel on Skill Development Leave (1984) have underscored the need for attention to issues of education and training as they pertain not only to employment but to even broader questions about the future world of work and learning.

Some of the conclusions that might be summarized from these various task forces and studies are as follows:

- The structure of Canadian industry and the basis of the economy is going through a major transformation, the net effect of which is not yet entirely clear. Simultaneous to dislocation for certain sectors, industries, occupations, and the workers within them, there is likely to be the emergence of new industries and occupations, with intense demands for new types of skills and expertise. It is not possible at this stage to define the precise nature and timing of these changes.

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- The Canadian labour force is on the whole inadequately and inappropriately prepared to meet the challenges of a technologically dynamic society. A complex network of factors have contributed to this situation, including a lack of coordination between education and training systems and the demands of the labour market, due to constitutionally defined jurisdictional differences; an historical reliance on immigration rather than indigenous training to meet labour market needs; related patterns of insufficient training on the job in Canadian industry, and inadequate or ineffective vocational training programs; and what all actors agree is an underdeveloped labour market information capacity.

- Within the labour force, there are certain groups that are liable to feel the impact of technological change more severely, coincidentally the same groups that have traditionally suffered from disadvantage both in employment as well as in education and training experience. For example, women are currently concentrated in the clerical and service sector, where severe displacement is anticipated as a result of technological change; yet as a group they tend not to have acquired the particular vocational training experience, or even the training prerequisites, for new technology-related demand sectors and occupations. Another example is the undereducated population; people with low levels of education and few marketable skills will fall even further behind in a "post-industrial" or "information society", where higher and higher levels of qualification will be required. Yet the recent census shows that one-fifth of the Canadian adult population has less than a Grade 9 education.

- The aging of the labour force and the fact that a majority of labour force growth during the 1980s will come from these disadvantaged groups mean that, both from the perspective of economic growth and social equity objectives, there will be a pressing need for training, retraining, upgrading, and opportunities for lifelong learning.

Taken together, such findings and recommendations present a picture of political, social, and economic concern of significant proportions and considerable urgency. Our industrial and social context is undergoing a major transformation, and it is inevitable that in such a context some fundamental assessment be undertaken as to the effectiveness and appropriateness of our institutions. In the case of the role of education and training, such an assessment involves examining some of the fundamental assumptions and beliefs underlying social thought and social policy during the past several decades, particularly those revolving around the economic theory of "human capital" and the concept of "equality of opportunity".



### **The Role of Education and Training in Recent Social Thought**

During the 1960s, the influence of economic theories based on the concept of "human capital" became more and more pervasive in Western industrialized countries. According to these theories, economic development and growth could be expected to follow from, and in proportion to, the social investment in the education and training of society's "human resources". It thus became important for a society to enhance its overall productivity and standard of living by investing heavily in its native "brain power". Such underlying beliefs resulted in a dramatic expansion of the education and training capacity in Canada during the 1960s, particularly in the post-secondary sector.

Along with the promulgation of human capital economic theories in Western liberal democracies was an emphasis on the concept of equality of educational opportunity. The logic of this perspective was that, in order to tap each individual's potential talents and abilities for maximum contribution to overall social growth, it would be necessary for each individual to have the opportunity to develop those abilities regardless of economic background, sex, ethnic background, or any other mitigating circumstances. Thus, the question of accessibility to educational opportunity became a key policy issue at the same time that there was an expansion of educational provision. In pursuit of equality of educational opportunity, governments in Canada introduced student loan programs and created local community colleges as measures to increase the availability and accessibility of post-secondary education.

The concept of equal access to educational opportunity is inevitably closely related to the fundamental principle of equality of social opportunity in industrial societies, and particularly in those with a liberal democratic political framework. In such a society, the economic role and social status of individuals is no longer assigned on the basis of their birth, but rather through the occupation they carry out, in theory, according to their innate individual talents and abilities. As the locus of training of young people for their occupational tasks and social roles, education institutions are therefore seen as serving an "allocative" function: part of the social sifting and sorting of people takes place as the education system identifies, enhances, develops, and taps individuals' abilities. For this reason, it is held that all aspects of the education and training system should be equally accessible to all individuals, such that they can each develop their personal potential and hence assume their appropriate social role.

During the 1960s the concepts of human capital theory, accessibility of education and training, and equality of social opportunity meshed in prevailing social thought. Reforms based on the objectives of social equity as well as economic growth looked to the principle of equality of access to educational opportunity; the assumption was that, through education and training, individuals who began from very different circumstances would be able to transcend inequalities of condition by virtue of and in proportion to their own innate capabilities. Social scientists and social policymakers thus became preoccupied with measuring the extent of social mobility and openness related to educational access and opportunity in society.

The climate of slower growth in the middle and late 1970s, culminating in a severe recession in the early part of the 1980s, brought with it pause for sober reflection and the beginnings of much questioning of the precepts that had held sway in the previous decades. Faced with the paradox of increasing unemployment and underemployment for large numbers of Canadian workers, and simultaneous shortages of needed skilled workers in other sectors of the economy, government policymakers and advisers began to re-examine the question of whether the investment in education and training had really — and could really — bear the expected results. The vastly expanded education and training systems began to be scrutinized both in terms of their effectiveness in developing human resources and in terms of their capacity to create social opportunity, for it was clear that educational disadvantage, employment disadvantage, and social disadvantage for certain groups in society persisted.

In current analysis, the debate over the efficacy of human capital assumptions continues. Some studies have implied and some critics have suggested that the massive levels of social and individual investment in advanced education and training has raised levels of expectation but not the real prospects for many young people. Others suggest that this problem has resulted from insufficient focus on the specific labour market implications of higher education, and that there needs to be more emphasis on targeting of higher education opportunity. Critical respondents to these arguments maintain that it is impossible to effect a match between higher education and the labour market because of the inadequacy of labour market projection and information systems. Some argue also that such a direct linkage is not even desirable, since it subsumes the principle of the intrinsic value of human development through education to the materialistic base of economic objectives.

However, far less diversity in results and interpretation has emanated from inquiry into issues of educational access and equality of opportunity. On the contrary, there has been a consensus of findings confirming that, despite the expansion of educational provision and the stated effort of social policy to ensure access to such facilities, the goal of equal access to educational opportunity has not been met and the promise of social equity that it seemed to hold has not been fulfilled. As we shall see in the next section, studies have revealed a consistent pattern, whereby in Canada the likelihood of opportunity to participate in higher education increases sharply if you are male, of Anglo origin, from an upper-middle- to upper-class family with parents who have received higher education and have professional occupations, and if you live in an urban centre in a province and region with a high per capita income. Conversely, your chances for attaining higher education are reduced if you are female, if you belong to certain ethnic groups — particularly if you are a native person — if your family has a low income and/or low socio-economic status, if your father is employed as a manual worker or unskilled labourer, if your family is being supported by a mother, whether she is in the labour force or working at home, and if you live in a rural or remote area in one of the "have not" regions or provinces. These factors have been found consistently to hold a stronger influence than measured intellectual ability.

Viewed from within the framework of assumptions described above, such patterns of educational inequality would hold significant implications for inequalities in employment. If the education and training system has been seen as playing a key role in preparing and allocating young people in their occupations, and ultimately in their position in the social structure, then we need to understand more about that process and the way in which it has affected certain social groups.

In the discussion that follows, therefore, the patterns of educational inequality in Canadian society are reviewed at a broad level before an analysis is made of the barriers to education faced by the four disadvantaged groups that are the focus of the Commission on Equality.

## II. PROFILE OF INEQUALITY OF EDUCATIONAL OPPORTUNITY IN CANADA: HISTORICAL TRENDS AND CURRENT PATTERNS

Inequality of educational opportunity has been a marked feature of the Canadian social structure, posing a stubborn challenge to the liberal democratic ideal and the explicit efforts of policymakers to meet that ideal. Indeed, inequality of educational opportunity and hence social opportunity emerged as one of the most striking findings in John Porter's classic and seminal analysis of the Canadian social structure, *The Vertical Mosaic*, published in 1965.

Porter's critical study documented a pattern of educational access and attainment enjoyed, not on the basis of individual ability, but rather on the basis of factors such as socio-economic background, location of residence, ethnicity, and gender. Within this structure, certain social groups displayed clear patterns of advantage and disadvantage. Since *The Vertical Mosaic*, social scientists in Canada have continued to study the issue of inequality of educational opportunity and access, and through the application of increasingly complex hypotheses and refined methodologies have provided us with a detailed picture of what we now understand to be structural inequalities in Canadian society. Some of the key findings of analysts over the years, as well as current data and patterns, are summarized below along several dimensions, including years of basic education, access to post-secondary education, adult education, and vocational training.

### Inequalities in Basic Education and Years of Schooling

Questions of accessibility to education are obviously correlated, to a certain degree, to the actual availability of education facilities. Thus, it seems understandable to us that at the turn of the century, when a majority of the population was still living in rural areas where facilities for secondary education were relatively sparse, less than half of Canadians aged 5 to 24 were enrolled in school full time (Statistics Canada, Catalogue 81-568, p. 15). Historical variations in provincial education expenditures and differences in the size of urban and rural school board budgets have also had implications for the level of quality in educational services available to populations in different regions. Provincial and urban/rural variations in retention rates (the number of years the child cohort entering Grade 1 stays in school) have reflected inequalities related to these factors (Porter, 1965; Pike, 1970).

Moreover, patterns of inequality of access to available facilities were formed even during the initial stages of industrialization and urbanization in Canada. In particular, the factor of socio-economic status has been particularly significant in this process. For example, one historical study of the conditions of the working class in Montreal at the turn of the century cites the enrolment figures of "the children of the masses" compiled by the Provincial Association of Protestant Teachers in 1916-17 as part of an argument for compulsory schooling: while there were 25,792 children in Grade 1, only 2,848 were in Grade 5 and only 560 in Grade 8. The figures also revealed a pattern of ethnic inequality between anglophones and francophones, with the Protestant schools showing a less sharp early dropout rate (Copp, 1974: pp. 60-61).

Patterns of relative inequality of access and participation in education according to socio-economic status have persisted all the way through the twentieth century. In his analysis of the Canadian social structure, John Porter found that in 1951 the percentage of children from the lowest socio-economic class in school full time was 34.8 per cent, compared to 71 per cent for the highest socio-economic class (Porter, 1965: p. 180). Although Porter's study could not be precisely duplicated and updated because of census differences, Robert Pike (1970) used a similar approach in his analysis of educational issues. His study suggested that even though there was an improved trend for educational attainment in the population from 1951-1961, this seemed to have taken place "without effectively disturbing existing class differentials in educational opportunity, at least not at the extremes of the class spectrum" (Pike, 1970: p. 61).

It is important to note that educational attainment and social opportunity are connected in a framework of relativity. At the turn of century, the minority of the population with grade school completion would have represented a relatively well-educated group. As the industrial economy has become more formalized, however, so too have educational requirements. Thus, when Porter found that half the male workforce in the 1950s had only public or elementary grade school, he saw this as already insufficient for the increasingly technical occupational world of the post-World War II industrial boom (Porter, 1965: p. 155).

Now, when experts use the measure of years of formal education in their analyses of basic education issues, they tend to refer to a minimum of Grade 9 as necessary for functional literacy in our society. They point out, however, that much of the printed information with which Canadians have to cope is written at a Grade 10 readability level or higher, and that attainment of at least Grade 10 is necessary for entry to most skilled jobs (Thomas, 1983: p. 55).

It is a matter of concern, therefore, that according to the 1981 Census 3.7 million Canadians aged 15+ had less than a Grade 9 education (see Table 1). Experts also note that while the undereducated group has been declining as a percentage of the total population 15+, that population is increasing in absolute numbers; the size of the problem, therefore, is still considerable (Thomas, 1983: p. 62). The current incidence of undereducation or functional illiteracy also follows historical patterns of inequality; higher rates per population are found in the Atlantic provinces, Quebec, and

TABLE 1

## Population 15 Years and Over, Highest Level of School, Males and Females, 1981

| Population 15+       | Elementary / Secondary Only |            |                         | Other Non-University Only                                                                  | University                                                             |                                |
|----------------------|-----------------------------|------------|-------------------------|--------------------------------------------------------------------------------------------|------------------------------------------------------------------------|--------------------------------|
|                      | Less Than Grade 9           | Grade 9-13 | Trades Cert. or Diploma | Includes Without Cert. or Diploma, With Trades Cert., With Non-University Cert. or Diploma | Includes Without Cert.: With Univ. or Other Non-Univ. Cert. or Diploma | With Bachelor Degree or Higher |
| Total Population 15+ |                             |            |                         |                                                                                            |                                                                        |                                |
| 18,609,285           | 3,731,305                   | 7,609,715  | 632,730                 | 3,666,340                                                                                  | 1,479,020                                                              | 1,490,180                      |
| 100 %                | 20.1                        | 40.9       | 3.4                     | 19.7                                                                                       | 7.9                                                                    | 8.0                            |
| Males 15+            |                             |            |                         |                                                                                            |                                                                        |                                |
| 9,151,595            | 1,796,045                   | 3,464,310  | 466,630                 | 1,762,090                                                                                  | 754,370                                                                | 908,155                        |
| 100 %                | 19.6                        | 37.9       | 5.1                     | 19.3                                                                                       | 8.2                                                                    | 9.9                            |
| Females 15+          |                             |            |                         |                                                                                            |                                                                        |                                |
| 9,457,690            | 1,935,260                   | 4,145,405  | 166,100                 | 1,904,250                                                                                  | 724,660                                                                | 582,030                        |
| 100 %                | 20.5                        | 43.8       | 1.8                     | 20.1                                                                                       | 7.7                                                                    | 6.2                            |

Source: Statistics Canada. 1981 Census of Canada. *Population: School Attendance and Level of Schooling*. Catalogue 92-914. January, 1984. Calculated from Table 1-1.

Note: Percentage totals might not add to 100 due to rounding.

the Northwest Territories, for example, and in those regions rates are higher yet for rural populations and for groups such as native people and other minorities such as blacks in Nova Scotia (Thomas, 1983; Strath Lane, 1983; Stoodley, 1983).

Inequalities in levels of secondary school achievement and completion have wide-reaching ramifications because of the connections that have been observed between low levels of education, low rates of labour force participation, high levels of unemployment, high rates of dependency on social assistance, and high levels of associated social problems. Functional illiteracy and low levels of education are thus related to the cycle of socio-economic disadvantage. This relative disadvantage is likely to become even more pronounced as the process of "credentialism" and the requirement for ever higher levels of formal education continues. Lack of formal qualification at a lower level, such as high school, effectively seals off access to most forms of higher and advanced education or training. Consequently, the undereducated remain the unskilled, and occupy the marginalized, vulnerable sectors of the labour market, the economy, and the social structure.

#### Inequalities in Access to Post-Secondary Education

As suggested in the earlier discussion, industrial societies since the 1960s have tended to measure their degree of social openness, mobility, and equality of opportunity in terms of the issue of accessibility to post-secondary education, since it is post-secondary education that is assumed to enhance the individual's abilities and talents and develop them beyond a basic level. In Canada, the issue of access to post-secondary education has a particularly important relation to the question of equality in employment, since we do not have one national comprehensive education system

which incorporates vocational preparation along with general education. Post-secondary education therefore tends to serve as a major vehicle for labour market preparation and "allocation" in Canadian society, as well as being the main vehicle for preparation of those highly qualified human resources that are in demand, and hence occupy the most advantaged positions in terms of income and status in a highly industrialized or post-industrial society. It has been a concern to social analysts, therefore, to examine whether those young Canadians who do obtain a post-secondary education represent the talent that is present throughout all social groups in society, and whether all individuals have the opportunity to develop their potential and find their niche in the social structure.

Given the existence of marked inequalities in attainment of the level of formal schooling required for admission to the higher education institutions, it is perhaps not surprising to find that there are similar patterns affecting access to the post-secondary stream of the education system. For example, urban/rural or regional variations in quality of educational facilities, levels of teacher qualification, availability of special programs, etc., produce ramifications of advantage and disadvantage for youth when they are competing for places in post-secondary institutions. Such factors will intersect with ethnicity in the case of native youth in rural and remote areas, an issue that is demonstrated in statistics such as the report that in 1981 only two per cent of the native population 15+ had a university degree (*The Globe and Mail*, December 13, 1983).

However, the most striking and consistently revealed basis of inequality of access to post-secondary education in Canada has been socio-economic status or class. Indeed, it is the way in which this factor intersects with inequalities across other dimensions, including geographic location, ethnicity,



and, as we shall see, gender as well, that makes it such a significant focus for analysis of equality of educational opportunity.

**Socio-Economic Status:** Social scientists have used a variety of measures (parents' education, family income, father's occupation) to depict class and status differences. Whatever the definitions or methodology, the findings of a wide gap in accessibility to post-secondary education between children from higher socio-economic groupings and those from groups on the lower end of the scale have been consistent. In his analysis of the social class origins of almost 8,000 university students in the mid-1950s, John Porter found that children from high socio-economic status were significantly "over-represented" in the university student population. Using a scale of seven classes defined through father's occupation, Porter found that even though the children of the two highest social classes represented less than 12 per cent of the relevant population, they made up 45.9 per cent of university students. On the other hand, the lowest two classes, which represented 31 per cent of the relevant population, provided only 11.1 per cent of university students (Porter, 1965: pp. 186-187).

Since that time, researchers into the issue of university accessibility have seen a stubborn repetition of this pattern. Robert Pike's (1970) analysis of "Who doesn't get to university...and why" suggested that while there had been an overall increase in university attendance, and a possible narrowing of the "accessibility gap" between the children of highly paid professional workers and those of relatively well-off white-collar and skilled workers, it was questionable whether in relative terms there had been a similar improvement for the children of semi-skilled and unskilled manual workers — and in fact there might even have been a widening of the gap for the disadvantaged class (Pike, 1970, p. 62). Recently, Paul Anisef (1982) examined trends in post-secondary attainment during the 1970s, using parental education level as a measure of class. He found that social class background was still an extremely important determinant in university attainment and that it persisted over time. In 1976, for example, less than 10 per cent of males whose fathers were in the "no schooling" census category attained university, compared to well over 40 per cent of those whose fathers had a university degree, while a woman whose father had a university degree was about five times as likely to attain university as a woman whose father had no schooling (pp. 100-103).

Anisef's conclusion was that no narrowing of the gap between advantaged and disadvantaged groups had taken place, echoing the refrain of other social scientists that "hopes of achieving greater equality in educational opportunity have not been realized; social barriers seem to have been more formidable than originally anticipated" (von Zur-Muehlen, cited in Anisef, 1982: p. 166).

In their search to learn more about this perpetuation of inequalities of access to educational opportunity — and hence social opportunity — from one generation to the next, social scientists have probed deeper into differences in high school program choice and aspirations in relation to post-secondary attainment. Here again, they found that socio-economic status had a marked effect on whether students

were in the five-year "university preparation" academic stream or the shorter, more general, and high school terminal one (Anisef, 1980).

Differences in high school students' aspirations and expectations concerning long-term education plans have been found to be more distinctly related to socio-economic status than to mental ability. For example, in a survey of Ontario high school students, Porter, Porter, and Blisshen (1973) found that of children with high mental ability, 82 per cent from high socio-economic backgrounds expected to complete Grade 13, while only 59 per cent of children from low socio-economic status did (p. 86).

Measured in terms of the goals of human capital theory, such findings on the loss of valuable human resources have added to the concern about persistent inequality of opportunity. In particular, such "wastage" has been highly marked on the basis of gender differences. In the study cited above, the researchers concluded that "the most deprived group in Ontario as far as educational opportunity is concerned are lower class girls, particularly those with high mental ability" (Porter, Porter, and Blisshen, 1973: p. 124).

**Gender:** Gender has served as a significant determinant of post-secondary attainment in Canada and, like socio-economic status, it is an inequality with deep historical roots. When women students were first admitted to the University of Toronto in 1884, for example, it was only through an Order in Council imposed by the provincial legislature and after fierce resistance from the university authorities to such a "radical change"; the president of the university kept insisting that the college buildings had been planned "so entirely in anticipation of their exclusive use by male students" that "extensive and costly additions" would be required to accommodate an experiment "condemned by so many experienced educators" (Ontario *Sessional Papers* #58, 1886). Male student colleagues were equally resistant. As the number of women students increased during the 1920s, for example, student newspapers editorialized about the imminent downgrading of the university to "a ladies' finishing school" (*Acta Victoriana*, October, 1929).

Such cultural norms and attitudes can certainly be seen as having affected women's participation in higher education over the century. The historical enrolment patterns in university undergraduate arts and science faculties, for example, show that while women represented more than 30 per cent of students during the 1920s and 1930s, their percentage declined during the late 1940s, 1950s, and early 1960s, when the image of women's role as housewife, mother, and consumer rather than producer of industrial goods prevailed. Since the mid-1960s women's enrolment in post secondary education has increased steadily, so that in 1982-83 they represented about 48 per cent of post-secondary enrolments (Statistics Canada, Catalogue 81-229, 1982-83, p. 28). Nonetheless, much of the increase in female representation has been in the non-university college stream, and while the proportion of women at the upper levels of the higher education system has increased from less than 20 per cent of MAs and 9 per cent of PhDs in the 1960s to 37 per cent and 23 per cent respectively in 1980, women are still under-represented at these higher levels (von Zur-Muehlen, 1982: p. 11), as can be seen in Table 2.

**TABLE 2**  
**Full-time and Part-time Post-Secondary**  
**Enrolments, by Sex, 1982-83**

| Sector                                       | Male    |      | Female        |      | Total   |       |
|----------------------------------------------|---------|------|---------------|------|---------|-------|
|                                              | #       | %    | #             | %    | #       | %     |
| Full-time Undergraduate University Enrolment | 200,131 | 53.2 | 176,085       | 46.8 | 376,216 | 100.0 |
| Full-time University Graduate Enrolment      | 31,283  | 62.4 | 18,890        | 37.6 | 50,173  | 100.0 |
| Part-time University Undergraduate Enrolment | 91,873  | 39.4 | 141,268       | 60.6 | 233,051 | 100.0 |
| Part-time University Graduate Enrolment      | 19,232  | 57.7 | 14,097        | 42.3 | 33,329  | 100.0 |
| Full-time Community College Enrolment        | 143,317 | 48.5 | 152,269       | 51.5 | 295,586 | 100.0 |
| Part-time Community College Enrolment        |         |      | Not Available |      |         |       |

Source: Calculated From Statistics Canada, *Education in Canada, A Statistical Review for 1982-83*, Tables 24, 25, 26, 27, and *Enrolment in Community Colleges 1982-83*, Catalogue 81-222, Table 2, p. 31.

However, the educational issue most crucially related to women's inequality in employment involves the patterns whereby women tend to enrol and to obtain their qualification in a narrow and specific range of fields. As one analyst has put it, "the majors and programs selected in university and CAATs [Colleges of Applied Arts and Technology] seem to feed into, and reinforce, the sex segregation of occupations" (Anisef, 1982: p. 71). Tables 3 and 4 show not only that women's concentration in certain disciplines and professional programs parallels the pattern of their concentration in certain fields in the labour market, but also that these patterns have remained remarkably persistent throughout the twentieth century. Women's representation as virtually 100 per cent of such traditional "women's" fields as household science and nursing has barely changed since 1920, while their representation in such traditionally "male" fields as engineering remained at less than one per cent for more than 50 years. Even with recent dramatic increases, it is still only 11.2 per cent. Women community college student enrolments show similar trends, as can be seen in Table 5.

The fact that women accounted for only one out of three university graduates in the sciences and fewer than 10 per cent of engineering graduates during the 1970s (von Zur Muehlen, 1982: p. 42) is being raised as a cause for concern

by labour market analysts in view of the simultaneously anticipated demand for highly qualified personnel in these fields, and of the demographic trends that indicate women will likely account for two-thirds of the labour force growth in the 1980s (CEIC, 1981). Attention is being turned to the issue of why girls in elementary and high schools are not pursuing study in mathematics and science, which form the prerequisite for advanced training in the emerging demand fields (Science Council of Canada, 1982). Recent studies show that girls are seriously under-represented in high school physics and chemistry and advanced mathematics (Suderman, 1979, cited in Science Council of Canada, 1982).

There is also concern that large numbers of women graduates are coming into the labour market with backgrounds in areas (such as education) that are decreasing in demand because of demographic or economic trends. Labour Force Surveys show that the unemployment rate for women with a degree is higher than that of their male counterparts—6.7 per cent for women compared to 5.4 per cent for men in December, 1982, for example (Statistics Canada, Catalogue 71-001, December, 1982, Table 10). However, findings from surveys of post-secondary graduates also suggest that the relationship between educational differences, educational inequalities, and employment inequalities for women is part of a complex structure in which enrolment patterns, sex-typed occupations, a sex-segmented labour market, and cultural stereotypes all become interwoven. A survey of 1976 graduates found, for example, that female graduates were likely to earn less than male graduates at every qualification level, from a one-year college diploma up through to graduate university degrees (Devereau and Rechnitzer, 1980: pp. 94-95). Women graduates earned less than their male counterparts with the same level of qualification and in the same field (*Ibid.*, p. 103). In fact in some instances, women graduates earned less than men with lower levels of qualification and less experience. For example, the median 1978 salary for women graduates with a three- or four-year college diploma and three to four years of work experience before graduation was \$12,300, compared to \$13,270 for a male with a one-year college diploma and no full-time work experience (*Ibid.*, p. 99).

Such inequalities cannot only be explained in terms of women's tendency to enrol in certain programs, but seem to be related to much deeper structural inequalities in the labour market. It is notable that the survey cited above also found that not only were more female bachelor's degree recipients overall employed full time in clerical occupations in 1978 (10 per cent of the female graduates versus 5 per cent of the males), but that 23 per cent of female graduates with a degree in business, management, and commerce ended up in clerical occupations, compared to 12 per cent of males with the same degree (*Ibid.*, p. 153). Such findings underscore the fact that the issue of accessibility to post-secondary education has to be probed beyond the level of equality of representation in numbers.

There is also the need for more analysis of the meaning of post-secondary access achieved through expansion of non-university facilities. Recent studies (e.g., Anisef, 1982) have shown that post-secondary non-university (i.e., community colleges, technical institutes) populations are drawn fairly evenly from across the socio-economic spectrum and, as

**TABLE 3**  
**Female Percentages of Full-time University Undergraduate Enrolment,**  
**By Field of Specialization, Selected Years, 1891-1975**

| Field of Specialization                   | Female Percentage — Year |        |        |        |        |        |        |        |        |        |
|-------------------------------------------|--------------------------|--------|--------|--------|--------|--------|--------|--------|--------|--------|
|                                           | 1891                     | 1920   | 1930   | 1945   | 1955   | 1961   | 1965   | 1971   | 1975   | 1981   |
| Arts, Science, Letters                    | 21.8 %                   | 31.6 % | 32.6 % | 26.6 % | 25.9 % | 29.3 % | 34.6 % | 40.6 % | 44.4 % | 49.1 % |
| Agriculture                               | —                        | 1.3    | 1.1    | 4.0    | 3.7    | 4.2    | 7.7    | 13.1   | 25.9   | 36.6   |
| Commerce and Business                     |                          |        |        |        |        |        |        |        |        |        |
| Administration                            | —                        | 3.0    | 14.3   | 8.9    | 10.8   | 7.0    | 7.5    | 13.9   | 22.3   | 38.7   |
| Education                                 | —                        | 61.8   | 64.4   | 48.0   | 51.0   | 48.1   | 55.6   | 55.8   | 61.9   | 69.2   |
| Engineering and Applied Sc.               | 0.0                      | 0.1    | 0.2    | 0.6    | 0.5    | 0.7    | 1.1    | 2.4    | 5.5    | 10.6   |
| Fine and Applied Arts                     | —                        | —      | 91.7   | 80.6   | 74.6   | 66.4   | 62.9   | 53.9   | 60.8   | 62.2   |
| Dentistry                                 | 0.0                      | 1.8    | 1.3    | 1.2    | 3.8    | 4.5    | 5.1    | 7.5    | 13.0   | 22.7   |
| Medicine                                  | 3.1                      | 4.6    | 4.2    | 7.3    | 6.7    | 9.8    | 12.4   | 20.3   | 27.2   | 38.5   |
| Nursing                                   | —                        | 100.0  | 100.0  | 100.0  | 99.6   | 99.8   | 98.7   | 97.9   | 97.3   | 97.4   |
| Pharmacy                                  | 0.0                      | 5.9    | 6.1    | 25.9   | 17.8   | 27.3   | 38.3   | 52.5   | 60.5   | 64.2   |
| Misc. Health Professions                  | —                        | —      | —      | 100.0  | 85.5   | 82.6   | 84.6   | 72.7   | 81.8   | 82.8   |
| Household Science                         | —                        | 100.0  | 100.0  | 100.0  | 100.0  | 100.0  | 99.4   | 98.9   | 97.8   | 97.2   |
| Law                                       | 0.4                      | 3.7    | 3.4    | 4.4    | 4.5    | 5.3    | 6.1    | 14.9   | 26.7   | 39.9   |
| Religion and Theology                     | —                        | 1.9    | 1.9    | 2.4    | 3.3    | 1.3    | 1.5    | 28.7   | 34.0   | 30.9   |
| Veterinary Medicine                       | 0.0                      | 0.0    | 0.0    | 2.3    | 3.8    | 5.9    | 9.0    | 16.1   | 29.5   | 48.8   |
| Unclassified                              | 0.0                      | —      | —      | —      | 45.5   | 55.2   | 61.8   | 34.0   | 43.3   | 48.1   |
| Female % of Total Undergraduate Enrolment | 11.6                     | 16.3   | 23.5   | 20.8   | 21.3   | 26.2   | 32.7   | 37.7   | 42.4   | 46.7   |

Source: Calculated from Statistics Canada, *Historical Compendium of Education Statistics*, Catalogue 81-568, Table 23, pp. 214-217. 1981 column calculated from *Education in Canada: A Statistical Review for 1982-83*, Table 3, pp. 59-60.

noted above, seem to have provided opportunity for women to increase their numbers in post-secondary education. The question is whether these represent a genuine reduction in inequalities or whether the improvements are illusory. Are there marked differences in social opportunity for college graduates compared to university graduates, and if so, is the concentration of previously disadvantaged groups in the non-university stream evidence of a new version of the same pattern?

#### Adult Education Opportunities and Inequalities

Considerable attention has been focused recently on the opportunity for access to education through adult education and part-time study as a possible second chance for those groups who have faced educational disadvantage in the past and as a vehicle for continuous upgrading and skill improvement (Adams *et al.*, 1979; CAAE/ICEA, 1982; Skill Development Leave Task Force, 1983; National Advisory Panel on Skill Development Leave, 1984). Opportunities for post-secondary adult education have been available since the turn of the century in Canada, when correspondence and summer courses offered by institutions such as Queen's University provided an opportunity for working adults, including, for example, women school teachers, to upgrade their qualifications in order to meet rising professional standards. Early

adult education services through the Workers Educational Association and the Canadian-pioneered Frontier College have also created a tradition of community-based, volunteer-delivered adult basic education and upgrading.

Participation in adult education opportunities has burgeoned dramatically over the past decade, and can be expected to continue expanding because of demographic trends. A recent Statistics Canada study refers to part-time university degree students as "Tomorrow's Majority" (Belanger *et al.*, 1982). Data for community colleges are not available nationally, but figures for some institutions show that their part-time enrolment is double and triple the full-time student body.

Research on the question of accessibility to adult education is not extensive at this stage, and the results of available studies carry mixed implications. Waniewicz (1976), Humphreys and Porter (1978), Pike (1978), and more recently the Canadian Association for Adult Education and Institut canadien d'éducation des adultes (1982) have found that post-secondary adult education seems to represent an important opportunity for women. On the other hand, it has been consistently documented that the likelihood of participation in adult education increases with the level of education already attained. Indeed, the profile of Canadian part-



TABLE 4

**Female Percentages of Full-time University Undergraduate Enrolment By Field of Study, 1982-83**

| Program                                            | Female Percentage of Enrolment |
|----------------------------------------------------|--------------------------------|
| Arts                                               | 55.5%                          |
| Science                                            | 37.9                           |
| Arts or Science                                    | 51.1                           |
| Agriculture                                        | 37.2                           |
| Commerce and Business Admin.                       | 40.4                           |
| Education                                          | 68.3                           |
| Engineering and Applied Science                    | 11.2                           |
| Environmental Studies                              | 35.2                           |
| Fine and Applied Arts                              | 61.8                           |
| Dentistry                                          | 23.8                           |
| Medicine                                           | 40.0                           |
| Misc. Health Professions                           | 84.7                           |
| Nursing                                            | 97.3                           |
| Pharmacy                                           | 65.4                           |
| Household Science                                  | 96.3                           |
| Law                                                | 42.4                           |
| Religion and Theology                              | 30.9                           |
| Veterinary Medicine                                | 51.1                           |
| Unclassified                                       | 48.3                           |
| Female Percentage of Total Undergraduate Enrolment | 46.8                           |

Source: Statistics Canada. *Education in Canada: A Statistical Review for 1982-83*. Catalogue 81-229. Calculated from Table 24, pp. 112-115.

time, post-secondary students confirms that the majority are from those income, occupational, and social status groups that already have higher levels of education—a pattern consistent with studies of adult students in other countries (Rubenson, 1983). A survey conducted by the Canadian Association for Adult Education and Institut canadien d'éducation des adultes in 1982, for example, found that the incidence of being an adult "learner" (adults who have taken some kind of course since leaving school initially) was close to 60 per cent for those who already had post-secondary education versus 11 per cent for those with public school education or less. The incidence of being a "learner" by family-income level rose from 17 per cent for those with family incomes of \$10,000 or less, to 29 per cent and 39 per cent for the categories of \$10,000 to \$29,999, and to 48 per cent for those with \$30,000 or more (CAAE/ICEA, 1982: p. 5). Surveys conducted for recent provincial and federal commis-

sions and task forces have shown similar patterns (CAAE, 1983; Caron, 1983).

In addition to displaying the general pattern of relationship between socio-economic status and access to education, inequalities in access to adult education are aggravated by a number of factors. For example, there are few sources of financial support for part-time study. While some provision for student loans for part-time students has been made at the federal level the full range of grants and bursaries is still not available to them. There are pronounced differences in the availability of part-time learning opportunities, depending on urban/rural location or regional location and the proximity of facilities. A lack of coordinated information systems about adult learning opportunities has also been frequently cited as a barrier (CAAE/ICEA, 1982).

To a considerable degree the differences in access to adult education depend on the flexibility and commitment of a nearby institution—if there is one nearby. A point raised by

TABLE 5

**Female Percentages, Full-time Enrolment in Career Programs of Community Colleges, 1982-83**

| Program                              | Female Percentage of Enrolment |
|--------------------------------------|--------------------------------|
| Arts                                 | 58.4%                          |
| Business: Secretarial                | 99.4                           |
| Management and Admin.                | 51.2                           |
| Data Processing                      | 47.8                           |
| Financial Mgmt.                      | 58.2                           |
| Other                                | 55.1                           |
| Community and Social Service         | 71.9                           |
| Education                            | 74.3                           |
| Engineering: Architecture            | 15.7                           |
| Mechanical                           | 2.1                            |
| General                              | 10.9                           |
| Other                                | 10.8                           |
| Medical: Nursing                     | 93.1                           |
| Medical Treatment Tech.              | 75.9                           |
| Other                                | 68.9                           |
| Natural Resources                    | 27.3                           |
| Technologies: Chemical               | 42.0                           |
| Electronic/Electrical                | 2.9                            |
| Transportation                       | 8.3                            |
| Other Misc. Programs                 | 40.1                           |
| Female Percentage of Total Enrolment | 52.7                           |

Source: Calculated from Statistics Canada, *Education in Canada: A Statistical Review For 1982-83*, Table 23, pp. 108-111.

researchers and critics in the field is that because adult education is still regarded as an ad hoc and frequently "second best" aspect of educational programming, the needs of adult students are not always incorporated in educational planning. Pike (1978) notes that while some university courses might be offered at night or in off-campus locations, the required courses for a full-degree program might not be available, in sequence, or at all, for part-time students. Many professional degrees cannot be obtained through part-time study, and many programs at the graduate level have full-time residency requirements. Moreover, a part-time student taking evening courses at a rate of two per year must make a commitment of many years to earn a degree. This is compounded by the fact that an education system still oriented toward the traditional youth population has few mechanisms for recognizing and accrediting other valuable learning experience obtained by adults over the years, in order to help reduce the time required to earn a degree.

Access to literacy training, basic education, or high school completion is also dependent on the availability of facilities and the priorities assigned to such services by various levels of government. While current national data are not available, indications are that a significant amount of adult education activity is going on at the school board and community level (see Table 6). One local Ontario school board that opened an adult day school had a 200 per cent increase in adult enrolment in just one year, for example. However, depending on provincial and local education policies, such opportunities may again suffer from "second best" funding and facilities, creating a further inequality for those people attempting to gain a "second chance" in educational opportunity.

Many of the existing adult basic education, literacy training, English or French as a second language coaching, and lifeskills opportunities across Canada are provided by voluntary associations and community-based groups. Again, the level of funding and support for these services varies from province to province, municipality to municipality, and project to project, since there are no nationally coordinated policies on the provision of this kind of education. Such services are also particularly vulnerable to cutbacks, which have taken place in several provinces recently.

It is possible, therefore, to point to a paradox in the field of adult education. While many would agree that the strength of

the adult education movement, especially in reaching the most educationally disadvantaged in society, lies in its local and non-institutionally defined nature, the ad hoc and inconsistent trends in its provision and support could be compromising its effectiveness. One researcher has estimated that only 6 per cent of the adult illiterate population in the Prairie provinces is being reached because of limited funding for programs, and as he points out: "At this rate it will take over 17 years to provide literacy training to these people. By then we will most certainly have revised our definitions of literacy upward. . . ." (Stoodley, 1983: p. 4.)

While many creative, locally developed efforts are going on, researchers and social policy analysts are hampered in their efforts to identify and define gaps or areas needing support because of a lack of basic information on questions such as the scope and characteristics of adult education activity at the school board and community college level. Once released, the results of a recent Statistics Canada survey on adult education will therefore be of assistance in the analysis of adult education issues in Canada. Meanwhile, there is an escalation of the call for national attention to adult education in Canada (Thomas, 1983; CAEE/ICEA 1982; National Advisory Panel on Skill Development Leave, 1984).

#### Vocational Training

In 1979, the Commission of Inquiry on Educational Leave and Productivity concluded that "the opportunities available to working Canadians to prepare for occupational careers, to advance upward in organizational hierarchies, and to upgrade and maintain their skills are inadequate" (Adams *et al.*, 1979: p. 219). A complex network of factors underlies this problem, beginning, as some critics point out, with the nature of constitutionally defined jurisdictional differences. As mentioned earlier, Canada has no comprehensive educational and vocational training system, wherein occupational skills and general knowledge are acquired together in a developmental progression through the years. Instead, education and training institutions at all levels fall under provincial jurisdiction, while at the same time employment and human resource planning and development are under federal jurisdiction. The difficulties of trying to achieve a coordinated response to education and training and labour market issues within these frameworks—and the difficulties resulting from

**TABLE 6**  
**Participation in Continuing Education Courses by Type of Institution, 1976-77\***

| School Boards |            | Departments of Education, Correspondence |            | Colleges |            | Universities |            |
|---------------|------------|------------------------------------------|------------|----------|------------|--------------|------------|
| Credit        | Non-Credit | Credit                                   | Non-Credit | Credit   | Non-Credit | Credit       | Non-Credit |
| 215,569       | 882,215    | 107,060                                  | 10,755     | 175,458  | 423,246    | 481,689      | 301,865    |

\*Last year for which complete data on colleges are available.

Source: Statistics Canada, *Education in Canada, a Statistical Review for 1977-78*. Catalogue 81-229 Annual. Table 28, pp. 106-107.

the lack of such a coordinated response—have always been the bane of Canadian social analysts and critics, and have been noted as well by outside observers (see OECD, 1976).

Vocational preparation of young people through apprenticeship programs has been very limited. As mentioned earlier, the tendency has been for the post-secondary system to serve as the major vehicle for career preparation and advanced occupational skill development in Canada, a phenomenon that has been questioned in terms of its effectiveness and its appropriateness (Adams *et al.*, 1979; CEIC, 1981; House of Commons/Allmand 1981; Selleck, 1982). Yet, as we have seen, a majority of the adult population in Canada does not receive post-secondary education and, consequently, large numbers of young people are continuing to enter the labour force directly, joining other workers without any formal vocational preparation.

Presumably, therefore, a certain amount of informal, unidentified, but nevertheless necessary training and learning on-the-job must be going on in Canadian workplaces. However, studies that have tried to quantify this activity have found that, except for very short-term or task-specific training, the percentage of training in industry is quite low; that which goes on tends to be uneven in quality and does not usually provide comprehensive skills, a finding seen as a source of concern for labour market policy (Litvak and Maule, 1979; House of Commons/Allmand, 1981; CEIC, 1981; Economic Council, 1982; Betcherman, 1982; Social Program Evaluation Group, 1983).

The findings of surveys on training in business and industry also indicate that there are inequalities in availability of opportunities between employees in the public sector and the private sector, and in different industrial sectors. Also, the incidence of training opportunities is much higher in large establishments, compared to small ones (Litvak and Maule, 1979; Betcherman, 1982).

Very little long-term comprehensive training or educational leave appears to be available and, where it does exist, it tends to represent opportunity for the minority of already well-educated or highly trained employees at the executive, professional, and managerial levels. Line employees, or employees in low-skilled jobs, have fewer opportunities for upgrading or skill training, or career developing opportunities (Litvak and Maule, 1979; Lachlan, 1983). With the exception of a few isolated experiments, adult literacy and English/French as a second language training are not available in the workplace.

The federal government has had programs in place for a number of years to encourage employers to provide training in industry, and the policies of the National Training Act passed in 1982 have placed increasing emphasis on this issue. Under the National Institutional Training Program, employers who provide training are subsidized for training costs and trainees' wages. In 1982-83, a total of \$72.5 million was expended through contracts covering 30,631 trainees under this program. A majority of the training was for the higher blue-collar occupations. An additional 6,197 trainees were trained in skill areas deemed to be in critical shortage; 1982-83 expenditures for this higher level trade training were \$37.7 million (CEIC Statistical Bulletin, 1982-83).

The federal government also supports vocational training in non-university, post-secondary institutions, such as community colleges, and this National Institutional Training program is much larger in scale than the industrial training program. The program comprises a range of training including basic education, language learning, upgrading in preparation for skill training, work adjustment and occupational orientation, as well as skill training and apprentice training. Under the National Institutional Program \$482.3 million was expended in 1982-83 on the purchase of program seats in post-secondary institutions. Another \$315 million was expended for unemployment insurance benefits, training allowances, and other types of assistance to the trainees in the program. In that year 174,242 trainees started full-time training, and another 60,544 part-time trainees were in the program (*ibid.*).

With its industrial and institutional components, the National Training Program can be seen as the major identifiable framework for vocational skill training in Canada. As such, the program comes under considerable scrutiny for its effectiveness in meeting labour market demands from the perspective of both "human capital" and "equality of social opportunity" objectives. With regard to the latter, despite the presence of measures in the programs to address target groups disadvantaged in the labour market, a number of criticisms about inequalities of access have been raised.

In 1982-83, for example, women comprised only 25.7 per cent of the trainees in the institutional-delivered component of the training program and 22.7 per cent of the trainees in the Industrial Training Program, despite their proportion as 41 per cent of the labour force in that year. Closer examination of the enrolment patterns raises more issues on inequalities of access. As can be seen in Table 7, for example, under the institutional program in 1982-83, women made up 92.2 per cent of the trainees in clerical occupations but only 4.4 per cent of those in machining. Women's representation in apprentice trainees has persisted at around 3 per cent, and of these a majority have been in traditional "women's" occupations, such as cook and hairdresser, leading critics to suggest that if these categories were excluded, the figure for women's participation in apprenticeship training would be around one per cent (Cohen, 1979).

A number of reasons have been cited for the persistence of such patterns in the National Training Program and its predecessors. Analysts and critics have pointed out that training allowances have been insufficient to cover childcare and associated costs of taking training. Training subsidies based on unemployment insurance benefits represent a disadvantage for women because their average wages when working (either full-time or part-time), and hence their benefit rates, are lower. The fact that part-time trainees have not been eligible for allowances and the fact that in some instances allowances are lower than social assistance benefits have been seen as additional barriers to participation in training programs, particularly for low-income women. Lack of employment and career counselling and lack of conscious breakdown of sex-role stereotyping in Canada Employment Centres have also been cited as reinforcing traditional patterns (Cohen, 1980).



TABLE 7

**NATIONAL TRAINING PROGRAM**  
**Female Percentage in Institutional Skills Training and General Industrial Training, 1982-83**

| Occupational Designation<br>By Two-Digit CCDO   | Female Percentage            |                             |
|-------------------------------------------------|------------------------------|-----------------------------|
|                                                 | Institutional Skill Trainees | General Industrial Trainees |
| Managerial, Administrative and Related          | 55.8%                        | 44.3%                       |
| Natural Science, Engineering and Mathematics    | 22.3                         | 17.1                        |
| Social Sciences and Related                     | 61.6                         | 58.1                        |
| Religion                                        | —                            | —                           |
| Teaching and Related                            | 55.9                         | 58.3                        |
| Medicine and Health                             | 78.8                         | 84.8                        |
| Artistic, Literary, Performing Arts and Related | 48.8                         | 53.3                        |
| Sport and Recreation                            | 14.4                         | 19.5                        |
| Clerical and Related                            | 92.2                         | 69.1                        |
| Sales                                           | 35.8                         | 33.5                        |
| Service                                         | 50.4                         | 50.3                        |
| Farming, Horticulture and Animal Husbandry      | 17.6                         | 12.8                        |
| Fishing, Hunting, Trapping and Related          | 9.1                          | 1.0                         |
| Forestry and Logging                            | 3.4                          | 2.3                         |
| Mining, Quarrying, Oil and Gas Related          | 0.3                          | 5.8                         |
| Processing                                      | 29.0                         | 11.8                        |
| Machining and Related                           | 4.4                          | 6.6                         |
| Product Fabricating, Assembling and Repair      | 16.8                         | 15.3                        |
| Construction Trades                             | 4.7                          | 4.4                         |
| Transport Equipment Operator                    | 4.6                          | 7.8                         |
| Material Handling and Related                   | 1.1                          | 17.5                        |
| Other Crafts and Equipment Operations           | 12.1                         | 29.5                        |
| Occupations not Elsewhere Classified            | —                            | 19.9                        |

Source: Employment and Immigration Canada, Annual Statistical Bulletin, National Training Program, 1982-83, Tables 4.4 (p. 72) and 7.2 (p. 97).

Recent policy and program initiatives, including the introduction of special measures to increase women's representation in training in non-traditional and demand occupations, have attempted to address some of these issues. Nevertheless, the patterns of inequality persist. In fact, women's participation in both the institutional and industrial sections of the training program has actually been declining each year since 1978, as can be seen in Table 8. Of particular concern is the low level of female representation in critical skills training (2.2 per cent) and skill training in occupations of national importance (8.9 per cent), since these are the programs that are considered to be leading to the jobs of tomorrow.

The thrust to meet critical skills demands under the *National Training Act* has also been accompanied by a leaning away from the adult basic education and upgrading elements of the programs. Many analysts point out that this reduces accessibility for the traditionally disadvantaged groups. Although women, native people, and disabled persons have not generally been equal participants in the training programs, they have tended to be major participants in preparatory courses such as Basic Training for Skill Development, Basic Job Readiness Training, and Work Adjustment Training. The reduction of emphasis in these areas is therefore

seen as narrowing avenues of accessibility and upgrading (CAAE/ICEA, 1982; Thomas, 1983; CLOW, 1983).

TABLE 8

**National Training Program: Female Percentage in  
Institutional, Industrial, and Critical Skills Training,  
1978-79 to 1982-83**

| Year    | Female % in<br>Institutional<br>Training | Female % in<br>Industrial<br>Training | Female % in<br>Critical<br>Skills |
|---------|------------------------------------------|---------------------------------------|-----------------------------------|
| 1978/79 | 33.4%                                    | 28.8%                                 |                                   |
| 1979/80 | 32.5                                     | 27.4                                  |                                   |
| 1980/81 | 30.8                                     | 27.3                                  |                                   |
| 1981/82 | 29.1                                     | 27.1                                  |                                   |
| 1982/83 | 25.7                                     | 22.7                                  | 2.2                               |

Source: Employment and Immigration Canada, *Annual Statistical Bulletin*, 1982-83, National Training Program (March, 1984), Table 3, p. 58, Table 6, p. 85, Table 9, p. 113.

### III. HOW THE INEQUALITIES AFFECT WOMEN, DISABLED PERSONS, NATIVE PEOPLE, AND VISIBLE MINORITIES: IDENTIFYING THE BARRIERS

In the previous section we saw that there are patterns of inequality in access to and participation in education and training opportunities in Canadian society. In that discussion, the broad dimensions of inequality of educational opportunity were sketched. In this section, the discussion will focus on how these patterns of inequality affect the four groups that are the subject of the Commission on Equality: women, disabled persons, native people, and visible minorities.

As we have seen in the previous section, inequalities in education have their roots in the unequal nature of the social structure — the fact that people do have unequal incomes, status, geographic advantages, as well as different aspirations and expectations. In analysing the barriers faced by women, disabled persons, native people, and visible minorities, what we must look for is an intersection between the characteristics of the structure of educational inequality and the characteristics of the social location and experience of each of the groups.

It might be useful to first summarize the themes that emerged in the previous section. There, it was seen that inequality in education and training opportunities are related as follows:

- There are inequalities in access to educational opportunities on the basis of socio-economic status — family income and education — at the childhood and youth stage as well as at the adult stage.
- There are inequalities in access to educational opportunities on the basis of geographic location: whether one is in a "have" or "have not" region or community, whether one lives in an urban area or a rural or remote one. These inequalities will obviously affect low-income, low-socio-economic groups more severely, since people in these groups lack the financial means to transcend such difficulties.
- There are inequalities in access to education and training opportunities in relation to the amount of formal education and training a person already has. Thus inequalities experienced because of socio-economic status or geographic location, or both, create further inequalities in access to education and training.
- There are inequalities in access to further education and training in relation to employment status. Workers in certain industrial sectors (such as service sectors), in small firms, and in low-skilled jobs have few opportunities for access to adult education, employer-sponsored training, etc. Low-skilled, low-paid workers are, of course, frequently in that position because of their low levels of education and training, which might in turn be related to any or all of the factors listed above, thus completing a circle of disadvantage.
- There have also been patterns of inequalities in social experience for different ethnic groups in Canadian society. Patterns of ethnic stratification in educational opportunity persist in particular for native people.
- There are inequalities in access to education and training depending on gender. Women as a group have experienced unequal access to training and education opportunities, and inequalities on the basis of gender compound inequalities based on all of the factors described above.

• Finally, all of these patterns of persistent inequalities and the real life experience of the groups who face them have further contributed to inequalities at a psychological level, so that the aspirations, expectations, confidence, and encouragement associated with education and training opportunities are felt differently by different social groups.

All of these factors, it will be noticed, are related to one another, and it is by understanding this relationship that we can best come to appreciate the question of inequality of social and educational opportunity. In the discussion that follows, we will examine in more detail the implications that the structure of inequality has for the types of disadvantage and barriers faced by each of the four groups.

#### Women

If a pattern has been set whereby inequalities in educational opportunity are related to socio-economic status, it must be expected that women would be highly represented in the disadvantaged group by virtue of their position in the socio-economic structure. Women experience great economic disadvantage in our society: they have lower average incomes; they are employed predominantly in sectors and jobs that are the lowest paid; they do not earn the same amount as their male counterparts in performing the same job or one of similar value. Therefore, women are heavily represented among all low-income groups, the "working (i.e., employed) poor" as well as the low-income group on social assistance (Armstrong and Armstrong, 1978 and 1983; Swan, 1981; National Council on Welfare, 1979). Thus to a considerable degree, women's inequality in educational opportunity can be seen as a result of their inequality in the economic structure.

An example of a barrier resulting from women's unequal position in the labour market can illustrate this connection. Women in the Canadian labour force are overwhelmingly concentrated in the service sector in "female ghettos" such as clerical work. They also make up a majority of part-time workers. Not only do such jobs tend to be low paid, they are also jobs that carry few benefits, few opportunities for upgrading and promotion, and, in close relation to these disadvantages, are generally not unionized (Armstrong and Armstrong, 1978 and 1983; Swan, 1981).

It will be recalled from the previous section that studies have found that low-level employees have fewer opportunities for training in business and industry. Several studies have shown that women are much less likely to receive educational leave or to have their courses paid for by employers (Harvey and Elliott, 1983: pp. 37-40; CAAE, 1983: p. 42.). Thus, a woman who wants to upgrade or retrain is unlikely to be given the opportunity within her job or to have her efforts in her own time covered by her employer. The issue of limited assistance for part-time students, mentioned earlier, will therefore contribute to the barriers she will face.

Surveys on adult education have found that, overall, women tend to take fewer programs related to their jobs than men; on the other hand, some researchers have suggested that a larger percentage of women than men take training related to a desire to change jobs, retrain, enter, or return to the labour market (Caron, 1983: pp. 11-13). This pattern is understandable since women's current status in

the labour market and the jobs in which they are concentrated offer them little career development potential in any case. However, women's enrolment in non-credit or general interest courses results in a further narrowing of financial assistance available to them, whether through employer-sponsored programs, student aid (which is tied to credit programs), or more skill-focused training programs.

Women who are not in the labour force face compounded barriers in education and training. It has been found that a significant proportion of women on social assistance have low levels of education (National Council on Welfare, 1979). The restricted availability of adult basic education programs affects such women, but low training allowances and a lack of daycare facilities also inhibit women who might wish to prepare themselves for re-entry into the labour market.

The cost and scarce availability of childcare is an added economic barrier for many women. One estimate of the annual cost of daycare in 1980 was between \$1,740 and \$2,544 per child (White, 1981, cited in *Status of Women Canada, 1982: p. 44*). While subsidy is available to low-income parents, this is dependent on securing space in a licensed daycare facility. The priority, provision, and availability of licensed daycare varies from province to province, and despite an increase in the overall number of spaces across Canada in the past decade, a survey in 1980 showed that only a small proportion of children of working mothers are in licensed facilities: 3.8 per cent of children under two, 15.7 per cent of children aged two to six, and 0.7 per cent of children six to 16 in 1980, for example (Health and Welfare Canada, 1980, cited in *Status of Women Canada, 1982, ibid.*).

The economic barriers faced by women are further complicated by the barrier of limited time. Women in two-parent families still bear the heaviest load of childcare and household duties, while women in sole-parent families must carry the full weight of these responsibilities. For women who are employed either full-time or part-time, this results in a "double burden" of time commitment. Studies have noted that the pattern of women's part-time work differs from that of male part-time workers, in that it consists of fewer hours per day though the same number of days per week as a full-time worker; this means that time is still involved in preparing, taking children to daycare, travelling, etc. (Harvey and Elliot, 1983: p. 29). Thus, the findings of Labour Force Surveys are not surprising: while 55.8 per cent of male part-time workers cite going to school as the reason for working part-time, only 20.3 per cent of women gave this reason; on the other hand, 17.3 per cent of women but no men gave "family responsibilities" as the reason (cited in *Status of Women Canada, 1982: p. 8*).

Barriers of cost for low-income women, compounded by the need for childcare and a lack of time, can together serve as a formidable inhibition to women who might wish to upgrade their education, improve their qualifications, gain skills, or attain post-secondary education. In the case of "doubly disadvantaged" women, such as native women, disabled women, immigrant women, or women who live in rural

areas, these barriers can become insurmountable, and the perception of that reality can add a further layer of inhibition.

A significant issue in the case of women, however, is that even access to and attainment of higher education and training does not assure equality of social opportunity. Some of the findings on differences in employment rates and earnings for male and female post-secondary graduates were cited in the previous section (Devereaux and Rechnitzer, 1980). Other studies have found that women who have undertaken training in federal programs have made significantly fewer gains in employability than male counterparts (CEIC, 1981: p. 174). Critics have pointed out that this is likely because so much of that training is in traditional "women's jobs" in non-demand areas (Cohen, 1980).

It is true that some inequalities are related to differing male/female patterns of choice in programs and faculties. However, the source of these patterns of choice must be traced to cultural norms and values that have persisted throughout much of the twentieth century in Canada. Returning to the historical background of women's participation in higher education, we learn that during the period of rapid industrialization at the turn of the century there were certain prevailing beliefs about the differing "natural" qualities of men and women. It was considered that certain roles and occupations in the new industrial order would be appropriate for women, and certain others appropriate for men. Table 3 on women's university enrolment illustrates the patterns resulting from these beliefs: men would be lawyers and engineers while women would be nurses, teachers, household scientists. Moreover, "women's work" has tended to carry with it a connotation of service; thus, just as professional women have become nurses, teachers, and social workers, but not dentists, lawyers and engineers, so women in other occupational categories became clerks, secretaries, and hairdressers but not tool and die makers, mechanics, or computer technologists. These patterns are still being played out in terms of current vocational training of women; ideas about female jobs and male jobs are still so strong that the concept of women in non-traditional occupations has to be introduced as a new, consciously transformative program—and the women who enter such a program as a tiny minority must contend with the social-psychological pressures of being an anomaly in the workforce (Cohen, 1980).

In such a context, it is little wonder that girls and young women who are making choices about their education and occupational future find it more comfortable to repeat the patterns. The belief that "girls can't become scientists" because there are so few women scientists, together with stereotypes that "girls can't do mathematics" because it is "unfeminine", act as powerful barriers that affect self-concept, self-confidence, and the choices that young girls make even in high school. Moreover, the still prevailing myth that a female's primary goal is to marry and raise children, even though it flies in the face of the reality that most women work and have to work for the majority of their adult lives, still exerts such a strong influence that high school girls choose terminal non-academic streams, young women take the shorter post-secondary community college programs, and female university students still decide to do general arts, so they "can always teach".



### Disabled Persons

When most of us think of barriers faced by disabled persons, what comes to mind are physical or architectural barriers. If schools and universities do not have ramps and elevators, it is clear that accessibility to those educational opportunities is effectively cut off for people who use wheelchairs.

It is true that architectural barriers do prevent accessibility for physically disabled persons to many opportunities in our society. However, we are becoming more aware that these are relatively easy barriers to address and overcome, and that they form only part of the complex and compounded disadvantage faced by physically, mentally, and psychiatrically disabled persons.

A fundamental basis for inequality in educational opportunity for the handicapped population, as for women, is their representation in the lowest socio-economic groupings. While little comprehensive data is available on the disabled population in Canada, available studies indicate that, to begin with, disabled persons suffer from extraordinarily high unemployment rates. Some estimates have been as high as 85 per cent (Sampson, 1981), and comparative figures have shown that even when the participation rate of disabled persons in the labour force is not that far below that of non-disabled persons, their unemployment rates are still more than four times as high as that of the non-disabled population (Ontario Manpower Commission, 1982: p. 6). When disabled people are employed, they tend to be concentrated in the low-paying, part-time, marginalized sectors of the labour market and therefore face correspondingly low incomes (House of Commons/Smith, 1981; Ontario Manpower Commission, 1982).

Paradoxically, while disabled persons have low incomes, they also have expenses that the non-disabled population does not face: medications, assistive devices, and special transportation, for example. While programs do exist to assist with such expenses, significant gaps in support also exist. One survey found, for example, that 29.4 per cent of respondents had to incur extra expenses for drugs and medicines not covered by assistance programs (Ontario Ministry of Health, 1982: p. 90). Moreover, the range and availability of support services for disabled persons vary widely from province to province, region to region, and community to community. Disabled persons who live in rural areas, for example, might not receive transportation services.

All of these issues create additional barriers to education and training opportunities for disabled persons, even before they contend with the physical accessibility of a building. An additional layer of disadvantage for disabled persons in terms of education is that frequently the education and training they possess has been obtained in alternative or sheltered settings. Regardless of the intrinsic quality of their educational experience, it is not as easily recognized or accommodated by the established system, so that barriers against participation in other "mainstream" education and training opportunities are created. Then, because so few disabled persons can overcome these hurdles, educational institutions do not gain the experience or develop a perspective that would foster an orientation toward the provision of accessible services. Admissions criteria and assessment tests might then unnecessarily exclude a disabled person

because they are developed for a norm based on "mainstream" experience.

Moreover, while mainstreaming education policies are currently being implemented in a number of jurisdictions, it will require some time and experience before educational institutions, the people who work within them, and society as a whole can effect a change in attitudes and practices that have served as a barrier to disabled persons' participation for so long. It is by no means automatic for educational program planners to incorporate into their considerations the needs of someone who is mentally disabled, just as it is not yet automatic for educational building planners to incorporate into their considerations the needs of someone who is physically disabled.

The area of vocational training presents even more complex barriers for disabled youth and adults than those described earlier for the population as a whole. In a society just beginning to come to terms with providing education for disabled children within regular education institutions and programs, policy perspectives and practices have not yet begun to encompass the concept of a full range of comprehensive education and training services for the disabled. For example, there are relatively few services for disabled youth who have completed their schooling and are ready to make the transition into work or further training. Policy attention to the question of adult and continuing education needs of the disabled population is virtually non-existent.

Vocational training for disabled persons tends to take place within the framework of vocational rehabilitation — a context that, regardless of its intrinsic effectiveness, evokes the concept of a separate, different stream for the disabled population. Frequently, such rehabilitation is provided in sheltered workshops. This results in further isolation from the mainstream of industrial training and work experience, since by legislation, jurisdiction, practice, and perception, such centres tend to be categorized as social services rather than as integral aspects of the industrial labour market. As a result, such centres tend not to have developed a strong ongoing production base. There is, therefore, less opportunity within them for development of current and marketable skills (Canadian Council of Rehabilitation Workshops/Laventhold and Horwath, 1980-81).

These issues create additional barriers to employment for disabled persons, leading many vocational rehabilitation specialists, placement officers, and disabled advocacy and consumer groups to argue that training on the job in industry is the most pressing need of disabled persons. However, the circle of disadvantage is completed here, since, as we have seen, a large percentage of the disabled population is unable to find a job, and those that are employed tend to be concentrated in the low-skilled, marginalized sectors of the market — where industrial training opportunities are scarce. Additionally, we have not yet reached a point in Canadian society where our expectations and priorities in either social service provision or progressive employment practices are such that we insist on the availability of technical aids, devices, and assistance required by the physically handicapped population, or the specialized time- and support-intensive training needed by many mentally disabled persons.

Finally, as with women, some findings indicate that even with educational accessibility and attainment, disabled persons bear the effects of deeply rooted structural inequalities. One study comparing the labour market experience of the disabled and non-disabled population found that the unemployment rate for those disabled persons who had a university degree was 26.3 per cent — compared to 2.7 per cent for the non-disabled university graduate group (Ontario Manpower Commission, 1982: p. 64).

### Native People

For as long as social scientists have been studying the Canadian social structure, any analysis of income and living disparities, health and disability incidence, employment disadvantage, and inequalities of educational opportunity has revealed the extreme condition of the indigenous native populations: Status Indians, non-Status Indians, Métis, and Inuit. The attention of policymakers began to be particularly drawn to these conditions during the 1960s, when the findings of public studies such as the Senate Report on Poverty and critical analyses by social scientists converged to produce an alarming picture of social suffering. Surveys revealed that one-third of Indians lived in areas inaccessible by road or rail and that a majority lived in crowded, unserved housing conditions. These conditions were reflected in health statistics — Indian infant mortality rates were twice those of the national population, and the average life expectancy of Indians was 10 years less than that of the non-native population. They were reflected as well in education statistics: only 6 per cent of Indian children who had entered school in 1951 stayed through to Grade 12, and in 1963 in all of Canada only 57 Indians were enrolled in university (cited in DIAND, 1980: p. 46). Current analyses indicate that while there has been some improvement over the past 15 years, for the most part the native population continues to experience severe social and economic disadvantage relative to the non-native population.

From the point of view of educational opportunity, the native population faces barriers at almost every juncture that was identified in Section II of this paper. To begin with, a majority of indigenous people live in rural and remote areas: a recent survey found that 65 per cent of Indians live in rural and remote areas, compared to 25 per cent of the national population (DIAND, 1980: p. 12). The native population therefore contends with all the educational inequalities associated with urban-rural differences. Moreover, the problem of remote location was addressed for many years by a policy of sending native children away from their homes and communities to residential schools run by either religious organizations or government officials. Like disabled people, therefore, many native children went through a separate school system that alienated them from their own culture but did not eliminate the level of racial discrimination that they encountered in non-native society.

More recent policies have emphasized the provision of education on reserves and in home communities. However, the capacity for provision of comprehensive, advanced, or specialized education services in rural and remote areas is still limited, and is further hampered by the shortage of native education professionals. Thus, for example, while recent data on participation in elementary school education for Indians have been found to be close to the national level, retention to

the end of secondary school is less than one-quarter of the national rate (DIAND, 1980: p. 49). It has been reported that recent census data indicate that 37 per cent of the native population have less than Grade 8 (*The Globe and Mail*, December 13, 1983).

The geographic isolation, lack of services, and poor living conditions of many indigenous people have resulted in a much higher incidence of illness and disability. Many native persons therefore face the additional barriers to education that are related to disability. The Special Parliamentary Committee on the Disabled and the Handicapped considered the situation of the native disabled population so extreme that they produced a special follow-up report focusing on these compounded disadvantages (House of Commons/Smith, 1981).

It is also obvious that the native population endures the full burden of educational inequality that comes as a result of economic inequality. Native unemployment rates are persistently higher than those of the non-native population; their reliance on social assistance is therefore proportionately higher and their average incomes relatively lower (DIAND, 1980). Because of certain features of native demographic and labour market trends, this situation is likely to become even more severe during the 1980s. The timing of the native "baby boom" in the early 1960s means a surge of young native entrants into the market during the early 1980s; in some areas these are estimated to account for as much as 20 per cent of the labour force growth (CEIC, 1981). Analysts indicate that there is insufficient capacity on reserves to employ the young native workers, with the result that there might be a doubling of need for social assistance (DIAND, 1980: p. 64).

The shortage of jobs in indigenous communities will also contribute to an increase in the trend to migrate to urban centres. Yet the patterns of experience in these migrations bear ominous signs. Young native people who migrate to cities are competing in an already difficult market from a basis of severe disadvantage: low levels of education, no skills, and the added psychological shock of being in a different, alienating, and frequently discriminatory culture. Consequently they experience high levels of unemployment—five times higher than the non-native population in one city studied—and when they are employed they are concentrated in the lowest unskilled sectors of the labour market. The result, again, is disproportionately low incomes, as little as half that of non-native households, and a high dependency on social assistance (Clatworthy, 1981b).

The toll of such patterns of inequality is reflected in the alarming statistics on the suicide rate of young native people, as well as those on the incidence of alcoholism, incarceration, and family breakdown (DIAND, 1980). Notably, studies have found that a very high percentage—53 per cent in one city—of native families in urban centres are supported by single young women (Clatworthy, 1981a: p. 4). These women face almost insurmountable barriers on a number of dimensions and, as we have seen, the cycle of inequality is likely to be perpetuated for their children as well.

The potential crisis proportions and implications of the social and economic conditions of native people are being confronted in a political context that is, at the very least, in a state of flux. The myriad of jurisdictional roles and ap-

proaches according to whether Status Indian, non-Status Indian, Métis, or Inuit issues are at stake has already contributed to inequalities in the range of policies, programs, and services available to indigenous people of the different groups. Moreover, although in general the thrust is for autonomy, the specific positions taken by the representatives of different indigenous groups also vary.

The question of education and training carries with it particularly complex connotations in this political context, since on the one hand it can be seen as crucial for ensuring that the young native population is equipped to take an equal place in the post-industrial labour market of the 1980s, while on the other hand it can be seen as threatening a further erosion of traditional native economic pursuits and the cultural values that accompany them. Nevertheless, the barriers and patterns of disadvantage developed through a long historical relationship of inequality, and perpetuated and exacerbated with the increase of industrialization and its political-ideological framework, have clearly left a legacy that both native and non-native policymakers must inevitably confront.

### Visible Minorities

If the term "visible minorities" refers to "visibility" on the basis of colour of skin or other physical characteristics, and as such is intended as an analytically relevant distinction, then some problems of definition and theory are raised in the Canadian social science context. This is not to suggest that inequalities based on ethnic minority status are not a significant feature of the Canadian social structure. On the contrary, the title of John Porter's *The Vertical Mosaic* captures precisely the image of an ethnically diverse but highly stratified society that his study described.

Canadian social scientists have used extensively the theoretical framework known as "ethnic stratification" to describe inequalities in the social structure. However, because of particular historic demographic and political features in the Canadian context, the language of an ethnic group has tended to be a much more significant variable than physical "visibility". Even where physical or racial characteristics are a part of ethnic distinction, as in the case of the native peoples, the starting point for analysis of inequality in Canada has tended to be the historic patterns of relations between these groups and other ethnic groups that have gained economic and political power during the 300-year course of those relations, rather than their racial "visibility" per se. Analysis of ethnic stratification in Canada has also focused on the inequalities that have occurred in the experience of various immigrant groups arriving from different countries at varying points in Canadian history; in some cases, such as the Chinese at the turn of the century, these coincide with "visibility", and in other cases, such as the Eastern Europeans in the early twentieth century, they do not (that is, assuming that "visibility" refers to non-Caucasian physical features).

However, ethnic stratification has certainly intersected with inequality in socio-economic status in Canadian history in the case of francophones and native people, both of which groups were found to be at the most disadvantaged levels of the social structure. Patterns of socio-economic inequalities have also been found to intersect with "visibility" in the case of the black population in Nova Scotia. Thus attitudinal and ideological patterns, including racial and ethnic stereotyping,

can constitute significant barriers for members of ethnic minorities in Canada. Some understanding of the historical source of this kind of discrimination can therefore prove useful. (See Porter, 1965, Chap. II; Hughes and Kallen, 1974; Curtis and Scott, 1979; Forcese, 1980, for examples of the discussion that follows.)

The theoretical framework of "ethnic stratification" describes hierarchical patterns of status and social condition based on distinctions of ethnicity. In Canada, patterns of unequal power, status, and social opportunity became established with the arrival of European immigrants in the sixteenth century and their assumption of a relationship of dominance/subordination with the indigenous peoples, as well as a similar development in the relations of French and English settlers.

These patterns were reinforced for other ethnic groups through the role that immigration played in the industrialization process. Until the 1960s and the influence of human capital theories, labour market policies had rested implicitly and explicitly on the basis of selective immigration. Very frequently, these policies coincided with ideologies of racial superiority and inferiority and beliefs about the "suitability" of certain ethnic groups for certain types of work. Thus, the Chinese were brought in to build the railroads, the Ukrainians to pioneer and cultivate the Prairies, and so on.

These established patterns of occupational — and hence social — allocation on the basis of ethnic background continued to reinforce racial stereotypes, which in turn created barriers of accessibility to education. Porter (1965) found that in 1951 and 1961 some ethnic groups, including Italian, French, and Indian, were "under-represented" in the school attendance patterns for males aged 5-24; that is, these ethnic groups' participation in education was not equivalent to their representation in the population (p. 88). Moreover, accessibility to education and training of certain types was restricted on the basis of ethnicity in an explicit way in Canada through professional licensing regulations affecting Orientals, Jews, and other groups.

The relation of immigration to labour market priorities over the years also resulted in certain patterns in the skill and education levels of immigrants. Requirements in the economy for highly skilled and professional expertise on the one hand, and unskilled labour pools on the other, meant that the education levels of immigrants tended to be skewed at either end of the spectrum. Such patterns were inevitably accompanied by racial resentment over perceived and real "usurped" opportunity, as well as downgrading of conditions for Canadian workers.

With the discarding of previous racially related immigration selectivity for an "open door" policy in the 1960s, and the simultaneous shift to development of domestic human resources rather than reliance on imported skills, the framework of ethnic stratification, in terms of education and training, became less rigid. Except in the case of the native population, differences in access on the basis of ethnicity have been less marked (Anisef, 1982). However, the established modes of racial stereotyping persist and appear to bear influence for some of the more recently arrived immigrant groups. One study of West Indian students in a metropolitan high



school, for example, found that they encountered discrimination and were often termed "slow learners", and consequently tended to be discouraged from entering academically oriented programs (Ramcharan, 1972, cited in Anisef, 1982).

In the case of visible minorities who are recent immigrants and in the workforce, barriers to vocational training opportunities are experienced because such groups are frequently concentrated in the lowest-paid, low-skilled, and vulnerable sectors of the labour market. An added barrier is created by insufficient language training opportunities; people who cannot function in either English or French are cut off from being able to participate even in those opportunities for upgrading, skill training, or adult education that do exist, let alone gaining access to higher education. Experts point out that the barrier of lack of language training is a particularly severe one for immigrant women, who tend to work in the most marginalized sectors of industry or in the "hidden economy" of household cleaning or childcare. As such, their access to government-sponsored language training opportunities is limited. Meanwhile they are hindered from pursuing other opportunities that might be offered by community groups or local school boards by the double burden of paid work and their own household and childcare responsibilities, as well as, in some cases, particularly restrictive norms about women in their own culture.

These barriers, it might be noted, are not necessarily linked to "visibility", but they would obviously be exacerbated by experience of racial prejudice or overt hostility. Moreover, the escalation of racially related incidents of conflict in urban centres where immigrant groups of "visible" ethnicity are concentrated brings to the forefront the presence of historically based racial ideologies. The experience of native people in Canada, and that of groups such as blacks in Nova Scotia, suggests that we need to do much more research and analysis to gain a clearer understanding of how deeply rooted prejudices can contribute to disadvantage in the social structure.

#### IV. IMPLICATIONS FOR CHANGE

Policymakers doubtless often wish that analysts could produce tidy lists identifying discrete numbers of issues that lend themselves to swift and obvious solution. As the preceding analysis shows, issues of inequality in education and training cannot be addressed quickly and straightforwardly. The analysis of barriers reveals a picture of compounded disadvantage characterizing the experience of the four groups. The key aspects of these inequalities might be summarized as follows:

- Women, disabled persons, native people, and other minority groups all suffer from marked economic disadvantage in Canadian society. They all have higher rates of unemployment and higher rates of need for social assistance than the national averages. When employed, they tend to be concentrated in the low-skilled, low-paid, and most vulnerable sectors of the labour market.
- This economic disadvantage automatically throws up the key barrier to education and training opportunities; it forms a structural basis for further disadvantage. The unequal status of these groups in the labour market also creates barriers against educational upgrading or skill training, since mem-

bers of these groups are generally ineligible for employer-sponsored opportunities and their low economic base means that they do not have the means to pursue efforts at their own expense on their own time.

- The lack of sufficient or appropriate education and training background that results from the economic and labour market disadvantage in turn acts as a barrier to participation in further education and training opportunities. Inequalities in the provision of adult education, and the lack of or insufficiency of basic education and upgrading services, exacerbate this disadvantage.

- Each of the four groups faces additional barriers related to particular situations: a lack of time and childcare for women; a problem of geographic isolation in rural and remote areas for native people; a need for physical accessibility, assistive aids and devices, or assistance such as sign interpreters for the disabled; a lack of language facility for new immigrants.

- At the same time, the educational experience that the members of the groups have had is frequently treated as inappropriate, inadequate, or inconsistent with established educational requirements; an additional barrier is created because of the time, economic means, and sheer perseverance necessary to overcome all the other barriers in order to satisfy institutional regulations.

- Education and training policies tend not to take into account these needs and considerations, with the result that institutions are even less accessible for these groups, and the support services that do exist are fragmented or uncoordinated.

- Finally, cultural norms, attitudes, assumptions, and stereotypes play a role in the creation of compounded barriers for all of the groups as well.

This "list" indicates that the issues of inequalities in education and training for the four groups are not only complex but are tightly interrelated with the inequalities of the industrial socio-economic structure. If Canadian society is in a process of transformation that some say will have an impact as fundamental and as far-reaching as the Industrial Revolution, then inevitable questions are raised about the role of education and training in such a transformed context. Will education and training maintain the same relationship to employment and, in turn, to social opportunity as it has in the industrial model? If so, how will the groups on which the Commission's study are focused be affected? Will the same patterns of inequality be carried into the post-industrial order, the Information Society? In this concluding section of the paper, some of the emerging trends will be examined with such questions in mind.

#### Scenarios of the Future

It is becoming customary for discussions around issues of the future to be set out in the parameters of "the optimists" and "the pessimists". Some futurists argue that the new economic and industrial order brought about by micro-electronic and computer technologies will open up possibilities for widely diffused social and economic benefits. They describe an employment world freed from the drudgery and onerousness of the production line and the mass offices and factories of the industrial age, a world that consists instead of decentralized, creative, "electronic cottage" information industries.

Others, on the other hand, talk of the collapse of work, the "deskilling" of the majority of the employment that is left, and the plunging of the overwhelming mass of people into unemployment, poverty, and the psychological devastation accompanying the erosion of the entire human value system.

Some signs of both scenarios are evident, yet at this stage no one really knows what the net outcome will be. Certainly, the displacement effects of the new technologies are more obvious and have a more negative effect in the immediate and medium term. Yet shortages of skilled workers in growing industries are already being cited as a problem, and some analysts predict severe shortages in newly emerging areas. It seems, therefore, that the only constant feature that can be identified is simply the fact of change — coupled with uncertainty.

Nevertheless, the ramifications of some trends are beginning to take shape. For example, the area where the most obvious change is taking place is in information processing — and in the office sector where such work goes on. Banks, insurance companies, financial institutions, telephone companies, and other large bureaucracies are automating at a rapid rate, and the sphere of clerical activity that used to centre around the generation and processing of information is undergoing dramatic transformation — as the proliferation of automated bank "tellers", computerized billing and record-keeping, and electronically "processed words" attest.

Since the majority of clerical workers are women, and a large proportion of the female work force is concentrated in clerical occupations, it is women workers who are inevitably going to feel the initial impact of automation (Labour Canada, 1982; CEIC, 1981). At least in the immediate term, indications are that this will be a negative impact. While the introduction of advanced technology into the white-collar sector has not resulted so far in widespread and highly visible layoffs, case studies in the insurance and banking industries and other large bureaucracies have shown that automation in the office has been accompanied by a steadily decreasing number of clerical jobs overall in terms of new vacancies and replacements, even while there has been an increase in productivity (Menzies, 1981). Some suggest that the noticeable increase in part-time employment relative to full-time employment growth in recent years is both a result of automation and masks its effects on the labour market (Menzies, 1981; Canadian Advisory Council on the Status of Women, 1982).

As the pace of technological diffusion in the office quickens, the effect of the shrinking of employment in the "women's sector" of the labour market will become stronger. While estimates of the percentage of displacement vary according to forecasters' assumptions, most analysts agree that women in the labour force are "at risk" (Menzies, 1981, 1982; Werneke, 1983).

Of course, the new technologies will bring new kinds of roles and processes in office work as well. Studies of the effect of automation in offices suggest that there are simultaneous trends, some of which open up challenging possibilities and others of which narrow the scope of office work (Abt, 1982). For example, on the one hand there is a tendency for a "deskilling" effect when the multi-function job of the secretary — typing, filing, answering phones, setting up documents, taking notes, etc. — is replaced by the single-function job of the word processing operator — "inputting".

In the latter, it is pointed out, the use of judgement and initiative is reduced in favour of an emphasis on "keystrokes per minute" (Menzies, 1981, 1982; Werneke, 1983).

Moreover, the fact that computerized equipment is capable of monitoring the productivity of the operator not only raises the spectre of alienation and loss of self-pacing and control for these workers, but also eliminates the need for low- and middle-administrative/managerial positions, thus closing off one of the few avenues of potential upward career mobility for clerical workers (Humphreys, 1981). On the other hand, there is also discussion about the potential for "professionalization" of senior secretarial functions to a role of information management and organizational coordination, a role requiring initiative, judgement, communication, and problem-solving skills — and possibly higher levels of education and training (*Ibid*).

The crucial policy question is whether those women in the clerical sector who are displaced will have access to these new opportunities and roles, or whether the persistence of barriers — and the creation of new ones such as higher formal qualification requirements — will contribute to their being relegated in the new work world to new types of "female job ghettos", or permanent unemployment. Certainly the limited availability of employer-sponsored training for women clerical workers as well as the tendency for the training that they do receive to be task-specific (how to operate a certain piece of equipment rather than what the overall process is) are barriers restricting women's ability to benefit from technological change (Werneke, 1983). However, it is not just retraining in skills that appears to be the major policy issue developing with the imminent impact of technology on women in the workforce. Some analysts suggest that the workers applying automated systems and using computers must shift from "passive support" roles to initiating and coordinating roles — roles for which girls have not traditionally been socialized in our society (Menzies, 1983). Thus, of equally pressing magnitude is the question of re-education and a re-orienting of cultural norms and expectations surrounding women.

There are also related issues for women who are in highly qualified and professional positions. These women workers are also concentrated in the service sector, particularly in "helping" professions, and there is considerable debate about the status of this sector over the coming decades. Some suggest that if technology creates higher productivity in industrial and agricultural sectors, with less and less need for labour, then as a society we should be able to use the freed human resources and energy to create a better quality of life. There could, therefore, be an expansion of the human services sector, such as health care, education, counselling, and social work.

A demand for human services such as care for the elderly would seem to be inherent in the demography of the aging population bulge. As well, the need for such services as counselling might be expected to increase in the context of a rapidly changing, "dislocating" social order. There is concern, however, that priority-setting in the face of recession and technological change is associated with cutbacks in these areas. For example, there has already been a decline in the traditional educational sector because of the decrease in the size of the youth population. Yet, as we have seen,

female post-secondary students are continuing to prepare for careers in these "oversupplied" fields rather than the scientific and technical areas, where demand for expertise is expected to increase.

At the same time, the current state of knowledge about the actual occupations and skill requirements in "high-technology" industries and in a high-technology industrial order is still limited, even on the part of labour market experts. Clearly, training everyone as a computer programmer will not fill the need for workers in biotechnology, fibre optics, and other potential growth areas. We can deduce that there will be a need for mechanics and technicians to maintain and service new types of and new applications of high-technology equipment, yet planners are hampered by the difficulty of predicting specific needs because the technologies themselves are evolving so quickly. Debates rage about whether the current and expected shortages of engineers are real (Akhtar, 1981), and whether the actual needs can be filled by graduates of traditional engineering faculties. The argument is made that the experts of the new "hi tech" world will have a need for a wide base of general knowledge, an understanding of social and economic issues, communication skills, and "people managing" skills, as well as their technical expertise (Rose, 1983).

It is not only a question of what the high-technology jobs will be, but how applications of technology in the entire productive process will affect the world of work. Futurists point out that a new production mode is emerging with the diffusion of micro-electronics technology and its applications: the old industrial style of large volume, standardized production will be replaced by "flexible manufacturing systems". Instead of fragmented, separate processes, the research, design, engineering, purchasing, manufacturing, distributing, marketing, and sales aspects of production will be incorporated into highly integrated systems that can respond quickly and innovatively to new market opportunities or customized orders. In these flexible manufacturing systems, it is suggested, computers will take over the tasks that require only speed and accuracy, thus freeing workers from the production line in order to apply decision-making and problem-solving skills to the new and constantly changing requirements. Robert Reich (1983) talks about this production mode as requiring a radically new organizational and managerial approach — not the old-style, rigid industrial hierarchy with sharp distinctions between those who plan work and those who execute it. Work relations will become "collaborative, participatory and egalitarian". By their nature, flexible manufacturing systems — and the new production mode — will require teamwork and cooperation; recognizing problems and finding solutions will become a collectively shared task and role (Reich, 1983: p. 246).

In stark contrast to this vision of computers serving to free human creativity and contributing to an egalitarian work world are projections released recently by the U.S. Labor Statistics Bureau. These indicate that the service sector will provide the most employment growth over the coming decades and that the demand occupations will for the most part consist of the least skilled and lowest paid jobs in society, such as janitors, food servers, hospital workers, etc. (cited in Serrin, 1983; Maeroff, 1983). Such findings feed into the pessimist scenario of a labour market segmented into a tiny

elite of technical experts and a large unskilled mass doomed to push buttons — or brooms. These concerns are reinforced by other observations about the coming impact of automated and computer-controlled industrial production. Analysts point out that the global base of multinational corporations combined with the features of new technologies such as microchips (which cost little to transport) means that automation can be applied in high labour cost processes in North America, while the remaining labour-intensive aspects of production can be shipped to low labour cost Third World countries, resulting in a massive loss of jobs here (Serrin, 1983).

In the immediate term, such prognoses raise serious issues about the extreme vulnerability of traditionally disadvantaged groups in the labour market. For some time now, social scientists have been developing the concept of the labour market as a dual, or segmented, system. The dual labour market is seen as having a core of advantage and security in a relatively small number of highly skilled, well paid, and protected jobs, and a periphery characterized by unskilled, or low skilled jobs, low pay, low benefits, few unions, high numbers of part-time jobs, high turnover, and vulnerable employment status. If this segmented structure is expected to become more sharply distinct in the future, it raises serious cause for concern about those groups that tend to be already concentrated in the periphery, including women, disabled persons, native people, and disadvantaged members of minority groups. Opportunities in the core have been traditionally precluded for such groups in any case, but if, as a result of technological change, the number of jobs in the core becomes further reduced — and traditionally "core" occupations in some white-collar professions and middle management are increasingly threatened — then the further influx of displaced workers into the periphery will have the effect of creating even more competition for even fewer low-level and vulnerable jobs.

Moreover, patterns of inequality along additional dimensions are likely to develop as well. It can be observed that high-technology industries tend to locate in communities that include universities for research and development proximity and conveniences to serve the lifestyle of highly paid professionals. Regions across Canada and within provinces might therefore be expected to experience marked disparities in terms of the benefits of high technology industry. This complicates further the issue of whether the net number of new jobs created will outweigh the immediate loss of jobs in sectors and in communities declining because of technological change. Certainly, these issues provoke the need for debate around the whole question of income redistribution, and whether, in a highly productive, technologically dynamic society, the income and standard of living of individuals can or should continue to be tied to their employment.

#### **Planning on the Basis of Change: A Role for Education and Training**

Ironically, in such a context it might well be the notion of flux that can provide the most solid base from which to develop policies. Certainly education and training would seem to represent a potentially significant force for coping with the future. Training and retraining are already being cited as crucial in order for people in the labour force to adapt to constant change. Education is key to enhancing flexibility and



mobility; even during the recession, higher-educated groups continued to experience relatively lower unemployment rates. Moreover, people who have a solid grasp of the theory and generic aspects of an industrial process are obviously better equipped to stay on top of the process as it changes. Additionally, along with computer literacy, the skills that are cited with some confidence as essential for work in the information society are those of communication, analysis, writing, facility to grasp new concepts, and problem solving, along with math, scientific, and technical skills — all skills that are enhanced and developed with education and training. Above all, a solid educational base on which to build continuous learning will be crucial for survival in a constantly changing context.

This means, then, that access to higher education opportunities, encouragement of extended and continuing education, opportunity for frequent skill updating, and assurance of a firm educational base in literacy, numeracy, and technical principles, and, most of all, enhancement of the desire to learn as an ongoing process, will all continue to be major issues in the decades to come. The issue of inequality of education and training opportunity experienced by the groups we have been discussing will therefore become even more urgent, particularly since they are concentrated in the peripheral sector of the labour market which is most vulnerable to changes effected by technological developments.

We have seen, however, that the inequalities in education and training experienced by women, disabled persons, native people, and other disadvantaged minority groups are so deeply rooted in the social structure that strong and comprehensive efforts will be required to redress the patterns and ensure equality of access. Thus, while it seems that the immediate shortage of technical and scientific expertise is creating a high profile concern about the "wastage" of female human resources, the measures that are developed out of this concern must take account of a wide range of factors, including the sex-segregated nature of the labour force, women's low-income status, and the inadequacy of childcare provisions in society, as well as the persistence and perpetuation of traditional sex stereotypes in cultural norms. Retraining schemes that do not take account of the particular reality of both the employment and education experience of each of the disadvantaged groups will simply result in the more privileged group of one type of social order being prepared to assume the more privileged positions in a new type of social order.

It should go without saying that providing women with training or retraining in non-growing, traditionally "female" occupations will only deepen their disadvantage in the changing labour market, and in a manner that will invoke great social, economic, and individual cost. Clearly, close attention to the changing features of the economy and labour market are essential to ensure that women are trained in new and developing occupations, not industrial categories that are becoming obsolete or marginal, and that new types of "female job ghettos" are not created in the emerging work world.

Measures to increase access to non-traditional occupations will have little effect if they are not tailored in concrete integral terms to the needs of women for basic preparation

and upgrading in scientific, mathematical, and technical principles. Moreover, the psychological-motivational needs of women moving into non-traditional areas must also be acknowledged as a central aspect of such measures; otherwise the burden of representing the reversal of an entire system of cultural beliefs will fall solely on individual women.

Additionally, while girls in school need to be deliberately encouraged to pursue "non-traditional" occupations in order to break the patterns of industrial society, simultaneous steps must be taken to ensure that all the occupations of the new order are presented as a viable range of choice for all children. This requires close attention at the earliest levels of the education system and in the most fundamental aspects of all curriculums.

In the same way, measures that fail to take account of the previous patterns of disadvantage and concrete learning needs of native people and of disabled persons will fall short of addressing inequalities. Promoting targeted higher education opportunities will be useless without providing the key to such opportunities through literacy, basic education, academic upgrading, and recognition of previous "non-mainstream" experience. Additionally, such redressing of previous inequalities needs to be provided in a realistic and individually tailored way, instead of leaving people to take on the onerous struggle of satisfying institutionally defined standards and formal credential requirements. Again, the long-term social, economic, and personal costs of not focusing on individual needs, and not recognizing and building on previous individual efforts, would far outweigh the immediate cost savings of less comprehensive — and more shortsighted — strategies. At the same time, to prevent the continuation of inequalities in the future, education and training systems need to integrate considerations of all groups into all of their planning, so that accessibility of all buildings and programs to disabled persons, and provision of a full and varied range of programs to groups in rural and remote native communities, will become part of normal education and training provision rather than "special". The potential of technologies can in fact be harnessed to assist in expanding accessibility, whether through distance education systems or through new kinds of aids for the disabled.

Policies and institutional practices designed to enhance accessibility will not achieve these goals if policymakers do not come to grips with the true nature of the barriers facing some groups. Measures to redress patterns of educational inequality must, therefore, take account of the economic and labour force status of women, disabled persons, natives, and visible minorities, and the awareness of the way such factors affect these groups must be integrated at the policy development stage.

The analysis presented in this paper indicates that initiatives to reduce educational inequalities must be comprehensive and multi-pronged, incorporating the need to assist the undereducated, unskilled, or inappropriately educated and trained groups to move into and beyond various levels of qualification, as well as the need to provide the necessary supports in order for such people to participate in these opportunities. In concrete terms, such measures would translate into programs deliberately tailored to provide required preparatory, upgrading, bridging assistance, as well as generic and comprehensive skills training, and "non-traditional

knowledge". Equally important, however, would be supports including income support, economic assistance, childcare, technical and assistive aids and services for disabled persons, language coaching for immigrants, paid time off work for educational leave, and community-based information, referral, and counselling services.

### **Towards a New Framework for Education and Training**

Such measures might begin to redress some of the inequalities in education and training that have been experienced in industrial society, but what of education in a "post industrial" society? Will it too contain inherent and persistent barriers? Current analysis and debate point increasingly to the inevitability of a radical restructuring of the education and training system. The arguments are frequently based on the premise that the industrial system of education — prescribed, mass organized, hierarchical, and resembling a production line — will be hopelessly inappropriate in the age of information explosion and post-industrialism (Berghofer, 1982). Education and training, it is suggested, will itself become deinstitutionalized, decentralized, less hierarchical and authoritarian, and more oriented to self-directed learning and individual pacing — the principles that coincidentally are at the heart of adult education philosophy.

It can certainly be expected that as institutions are continually confronted by the demographic reality of an adult student population, they will inevitably be reshaped and changed from within. However, strong arguments are being put forward that fostering of the concept of lifelong education and development of a recurrent education system must begin to be actively pursued now. These arguments are based not only on the notion of providing a "second chance" for the disadvantaged, but also on the rationale of the need to pursue flexible models within which a new relationship between education and training and employment can be forged. Analysts point to the inappropriateness of the conventional industrial model of a rigid sequence whereby people attend school in youth, move from the education system into years of employment as an adult, and then move from employment into retirement. Instead, they argue that in a post-industrial society there should be an ongoing movement back and forth between education and work throughout life (Adams, 1979; House of Commons/Allmand, 1981; CEIC, 1981; Economic Council, 1982; Labour Canada, 1982; Skill Development Leave Task Force, 1983; National Advisory Panel on Skill Development Leave, 1984).

For the most part, these arguments have been postulated as a rational response to the extremely rapid rate of change. People in the workforce will need to be continually updating their knowledge and skills in pace with changes in the process of production. It is argued also that such a framework will create closer links between the education and work worlds, and the efforts of formal education institutions and informal training on the job will become mutually reinforcing (CEIC, 1981). More discussion is developing on the complementary roles that can be played by the formal and informal components, with education and training institutions seen as providing a solid base of learning and academic skills, as well

as a foundation in both general knowledge and generic vocational skills, while training in industry could provide specific skill acquisition and applications. Certainly, such a system would go a long way towards addressing the gaps and inadequacies of Canadian vocational preparation, though, as is being increasingly recognized, a great deal of cooperative effort between all of the social partners will be required to bring it about.

Some analysts suggest that the presence of a recurrent education framework would represent a major — and crucial — response to the possibility of "the collapse of work". The argument is made that the only way to avoid the scenario of an elite core and severely disadvantaged periphery is to have all members of society moving continually back and forth between the different spheres (Emmerij in Blaug, 1983). Furthermore, a true reaping of the benefits of technologically enhanced production would imply that, since it is no longer necessary for the majority of people to spend the majority of their time in the process of survival, and food and goods production, there would be room for the full exploration and development of human potential. Therefore, going one step further, the argument would be that people should be able to move at different phases of their life and according to their various interests and abilities into productive activities, learning activities, exploration and discovery activities, and leisure activities.

### **Conclusion**

Almost every task force, commission, and study cited in this paper has taken some account of these possible broad directions of change, and several of them have made specific recommendations toward the development of a recurrent education framework. Such recommendations are invariably accompanied by additional recommendations around the specific measures required to ensure accessibility for traditionally disadvantaged groups. The pursuit of objectives and implementation of such recommendations that centre on the learning needs of disadvantaged groups would clearly lend support toward the resolution of many of the issues of education and training that relate to the subject of the Commission on Equality in Employment, and for that reason would be welcome.

Nevertheless, the analysis of this paper calls into question the belief that inequalities in employment can be completely redressed through education and training. We have seen, rather, that inequalities in education and training have their roots in the very structure of social inequality; analyses of inequality in employment reveal similar patterns. Thus, while inequalities in education and training and inequalities in employment reinforce each other and contribute to compounded disadvantage and insurmountable barriers for the groups we have studied, in a sense they are all manifestations of a fundamentally unequal social structure. Seen in this light, the pursuit of equality of opportunity through education is rendered ineffective if the basic issue of inequalities of condition and status are not addressed. It is these issues with which policymakers for the post-industrial age will have to grapple.

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## DAYCARE AND EQUALITY IN CANADA

Kathleen Mahoney

### Sommaire

Toute tentative pour réaliser l'égalité des chances doit nécessairement comprendre la question du soin des enfants, d'autant plus qu'un nombre croissant de mères d'enfants d'âge préscolaire travaillent. L'information que nous possédons sur le développement des jeunes enfants indique que la question d'égalité ne touche pas simplement les parents, mais englobe également les enfants. En effet, ceux-ci souffrent du point de vue alimentaire, affectif et intellectuel lorsque les soins qui leur sont dispensés à meilleurs frais sont de qualité inférieure.

Le gouvernement fédéral, les gouvernements provinciaux ainsi que les administrations municipales subventionnent des garderies. À l'heure actuelle, toutefois, une faible proportion seulement de ceux qui ont besoin de garderies abordables et de qualité y ont accès, et ce sont ceux qui en ont le plus besoin qui reçoivent le moins d'aide.

Les gouvernements peuvent compter sur plusieurs formules pour offrir les services de garde d'une façon plus équitable et en plus grand nombre, y compris des mesures directes ainsi que divers programmes de réglementation et d'incitation.

Les employeurs comme les syndicats ont tout intérêt à ce que des garderies offrant de bons services soient établies. Diverses formules directes et indirectes peuvent être utilisées, surtout par les employeurs, pour soulager le fardeau financier des parents qui doivent faire garder leurs enfants. L'établissement de telles formules doit se faire en collaboration avec les syndicats et les employé(e)s.

Les garderies du secteur privé et les garderies privées non réglementées sont les plus nombreuses, car elles sont moins coûteuses que les garderies à but non lucratif exploitées par le secteur public. Il reste à savoir si les soins offerts par les garderies commerciales sont suffisamment de qualité.

En vertu de la *Charte canadienne des droits et libertés*, les citoyens sont égaux devant la loi et ont droit à la même protection de la loi. Toutefois, on se demande si la Charte pourrait servir soit à obliger les organismes gouvernementaux à créer des garderies, soit à faire voter des lois aux termes desquelles certains parents seulement auraient droit aux garderies subventionnées par l'État.

Toutes ces questions sont traitées en détail dans l'étude, des conclusions sont tirées et des recommandations sont présentées.

### Summary

Any attempt to achieve equality of opportunity in the workplace must involve the issue of daycare, particularly as numbers of working mothers with children of daycare age continue to increase. Information about early childhood development indicates that the equality question goes beyond the parents to the children themselves. When daycare services are unequal in cost and quality, some children suffer nutritionally, emotionally, and intellectually.

Governments at federal, provincial, and municipal levels are involved in the provision of daycare, but at the present time good-quality, affordable daycare is available only to a small number of those who need it. Those who appear to need help the most are treated the least favourably.

A number of alternatives exist to governments for their use in making the delivery of daycare services more widely available and more equitable. These include direct action as well as a variety of regulatory and inducement schemes.

Employers and unions are stakeholders and beneficiaries of good daycare. Various alternatives are available, especially to employers, to ease some of the financial burden of daycare on parents both directly and indirectly. Co-operation with unions and employees would be essential in this process.

Private-sector daycare centres and private unregulated services predominate the caretaking services available for children in Canada because they are less expensive than non-profit, public services. The commercialization of the care of children is questionable in terms of quality of care.

The *Canadian Charter of Rights and Freedoms* provides that individuals are equal before and under the law, but there is some question as to whether or not the Charter could be effectively used to either require government employers to provide daycare for employees or to strike down legislation that directs government support to some parents but not to others.

All of the above issues are dealt with in detail in the paper and conclusions and recommendations are made.





## DAYCARE AND EQUALITY IN CANADA

Kathleen Mahoney\*

### I. INTRODUCTION

Is provision of daycare an essential requirement for achieving equality of opportunity in the workplace? If so, can it be supported legally? What methods of daycare delivery should be adopted? At what cost? To whom? How can daycare best be delivered? What tax questions arise from alternative forms of daycare delivery? What tax incentives and subsidies currently exist in the area of childhood dependency? Are they equitable? What new proposals are feasible? These are the questions that arise when the topic of daycare comes up for discussion. It is a complex subject for which there is no easy or single solution. This paper attempts to address these questions by looking at potential providers of daycare and options open to them. Many of these options are being used at the present time and an attempt will be made to evaluate them critically. Legal implications that arise in terms of equality of opportunity in the workplace will also be examined, as will the issue of whether or not the *Canadian Charter of Rights and Freedoms* or other legislation can provide remedies for women who have no access to daycare or who have access to inadequate daycare.

"Daycare" is a very difficult term to define. It has become a catchword for a diverse set of needs and services for children and their parents. Generally it refers to care provided to children under 12 years of age by persons other than their parents. Facilities providing the care vary enormously in terms of hours of operation, location, fee structure, and service provided. It can be provided inside or outside the home by one person or several persons. Daycare can be provided free, it can be highly subsidized, or it can be left entirely with the parent(s) with no interference or support from outside sources. Government subsidization of daycare can take a variety of forms dependent on income, whether one or both parents are working, whether there is only one parent, whether one or both parents are attending school, whether the child is handicapped, and so on.

Daycare centres can be operated as non-profit public, non-profit private, or profit-making private businesses. They may be located in supervised, registered day-homes by qualified care-givers or in private homes by informal arrangement between parents and unqualified care-givers.

Another term it is necessary to define or describe at the outset is "parental benefits". The term includes or describes any benefits given to parents in connection with childbirth or child-rearing responsibilities. Family allowance payments, tax exemptions or tax credits, daycare vouchers, clothing allowances, or parental leave are examples of parental benefits which could come from government, unions, employers, or philanthropic sources.

The last 20 years of history in Canada indicate profound cultural change in the role of women. No longer are the vast

majority of women living their lives as homemakers, tending solely to the needs of husbands and children to the exclusion of any other full-time activity outside the home. As of 1981, women comprised more than 40 per cent of the labour force. Of this working group, 40 per cent were single, separated, widowed, or divorced women.<sup>1</sup> In 1980, mothers of about 760,000 children under six years of age were in the labour force.<sup>2</sup> The probability of women being employed during child-bearing years is obviously very high, yet statistics indicate the role of women as mothers has not changed significantly. Canadian women by and large still want to bear children and still have the prime responsibility for their nurturing and care. Herein lies the problem. In today's world, the role of mother must be reconciled with the role of the working woman. The social value of maternity and child rearing must be considered in tandem with, rather than in competition with, occupational activity of women if we are to pay any attention to the statistics at all and acknowledge the inter-relationship between work and family life.<sup>3</sup>

### 1. Preliminary Considerations

#### a) Rationale for Daycare

Before any decisions can be made as to the best or most advantageous policy or strategy in designing methods of daycare delivery service, the rationale for daycare must be examined. The immediate questions that need to be answered are what type of care, for whom, and for what purpose? Is its only purpose to encourage women to work or acquire an education, or are there other purposes which society wishes to encourage?

It has been broadly thought that organized daycare enhances children's development in addition to encouraging women's participation in the workforce. In France, for example, universal, free daycare is provided for all children three to five years of age. Ninety-five per cent of French children in this age group attend, yet only 44 per cent of their mothers are employed outside the home.<sup>4</sup> Obviously, the daycare system in France has been developed for reasons other than encouraging women to work.

Masaru Ibuka in his book *Kindergarten is Too Late*<sup>5</sup> postulates that human creative and learning potentiality is at its greatest between birth and three years and that society can greatly benefit by providing learning opportunities for children at ages when they are traditionally thought to receive the greatest benefit from being at home with their mothers. Numerous other studies on early childhood development clearly illustrate that the first few years of life are of critical importance to the emotional and cognitive development of the child.<sup>6</sup> The Canadian Pediatric Society supports this view and adds, "... children of this age group [under five] are critically affected by environment which they experience during their early development years".<sup>7</sup> Polly Hill, consultant with the Children's Environment Advisory Service, CMHC,

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Ottawa, has observed, "... no country in the world ... has given proper priority to the needs of children in the modern city environment ... children comprise over 40% of the population and are the largest potential asset of any country ... Canada can no longer ignore the contribution and substantial findings made by our research and those from other countries."<sup>8</sup>

Research on the effects of different forms of daycare on children is limited, but the available research does not suggest negative effects from centre-based care, whereas significant potentially negative effects have been suggested from care received in informal settings.<sup>9</sup>

Deciding why we want daycare will greatly influence the decision of how it should be provided. If it is concluded that one particular form of daycare is the best possible care children can receive, and that it is in society's best interest that they receive it, then the goal to be achieved is universal free daycare of that type for all children rather than some other methods which may encourage some women to work.

If the predominant rationale for daycare is to make it easier for women to work and to remove barriers to equality, then the question whether or not availability of daycare is determinative of the participation and equality of women in the workforce must be answered.

In her work, "Parental Leave—A Comparative Study", Reva Landau came to the conclusion that in European countries provision of comprehensive, high-quality, inexpensive daycare is not a determinative factor in female labour force participation rates. She writes:

*Certainly, East Germany with its excellent comprehensive day care for all pre-schoolers has a high female labor force participation rate. But Finland, which has a high overall female labor force participation rate, and the highest labor force rate when one discounts part-time workers, has a very poor day care system. It is much poorer than France's or East Germany's, and significantly poorer than West Germany's.*

*Hungary has poor day care for children under 3, yet a higher full-time female participation rate than East Germany. France has an excellent day care system for children 3-5, yet its female participation rate is not significantly different from that of Denmark, or the U.S., which have inferior systems. However, the U.S. and the U.K. have relatively poor day care systems, and low female participation rates.<sup>10</sup>*

She concludes that while government policies are not decisive factors, they can be influential factors in affecting female participation in the workforce. Better daycare and better maternity leave increase the possibility of high female participation in the workforce, though they do not guarantee it.<sup>11</sup> The unfortunate result is that many families are forced to take whatever, if any, childcare happens to be available to them.<sup>12</sup> Access to subsidized care, on the other hand, has been demonstrated to have a positive effect on entry to the labour force by women whose earnings are low.<sup>13</sup>

If participation of most women in the workforce is not affected by availability of daycare service, the next question must be, is equal opportunity affected by its availability?

A survey conducted by a Senate task force at the University of Calgary found that lack of adequate childcare facilities on the campus acted as a major constraint on the ability of some members of faculty to participate fully in all aspects of university life. If more flexible daycare facilities were made available, the task force felt that more faculty members would be involved in spontaneous, *ad hoc* academic activities, and would be able to participate in frequent and lengthy meetings associated with university administration.<sup>14</sup>

In a study on women in the public service,<sup>15</sup> it was found that more than 80 per cent of married women surveyed would not be prepared to make more than an occasional trip on official business. It was thought by the analyst that this result probably reflected the heavier family responsibilities that women carry. He further found that reluctance to travel would be a factor retarding these women's careers. If childcare services were readily available to accommodate women required to travel it seems reasonable to assume this barrier to equal opportunity would be removed. Other studies have found that seminars, conferences, in-service training, and other activities crucial to job promotion take place after working hours or on weekends when daycare is usually unavailable, thus denying many women, especially single parents, the opportunity to participate in the benefits that result from attendance.

## b) Cultural Considerations

Another consideration is the cultural issue of family responsibility. The fact that the female has the responsibility of bearing children is unchangeable but the traditional societal attitudes to work and parenting roles are not. If the concept of a broader sharing of family responsibility involving fathers in childcare is desired as a social objective, it can be encouraged through legislation and government action on maternity, parental leave, and daycare. For example, if tax deductions for childcare were available to either parent, no matter the income level, the legislation would encourage the belief that childcare is the responsibility of both parents.

## II. GOVERNMENT INVOLVEMENT

At the present time, federal, provincial, and municipal governments are all involved in daycare. The setting of standards and licensing, subsidization, and tax legislation all have an impact on daycare services. The issues that arise are adequacy of standards and whether or not they can be monitored and enforced; scope of licensing standards, i.e., whether they should be expanded to career family daycare homes, nursery schools, or private arrangements; the adequacy of subsidization, whether it benefits those who need it the most, and whether it unfairly discriminates in favour of one group over another; the fairness of the tax laws, whether they encourage or discourage development of new daycare facilities, whether they are discriminatory in application, and whether they adequately reflect changing cultural norms.

A wide choice of techniques exists that governments use or may be able to use in dealing with daycare issues. The methods range from different types of regulation, coercion, inducement, and direct government action. Each of these approaches will be briefly discussed in their relationship to daycare issues.



## 1. Regulation

### a) Self-Applied Regulation

One technique of government control involves the "positive assertion of a private duty or the conferring of private powers to create positive private duties".<sup>16</sup> This method of self-applied regulation is a loose form of control. Depending on the subject matter for the control, this may be a good or a bad thing. Where provision of daycare for young children is concerned, the scheme is probably not a satisfactory method of control. Leaving it up to individual operators to define a "general competence" in staff and facilities, for example, would likely not lead to a good result. Self-applied regulation, however, may be structured in such a way that greater controls are imposed.

Some specific methods of applying more structural self-regulation are set out below.

### b) Prerequisites

The requirement of a prerequisite is a form of check. The effect of a prerequisite is to allow people the freedom to proceed with a plan once they have concluded satisfactory dealings with a government official. This is usually a simple and straightforward method of control, self-applied and easily enforceable. Ensuring that would-be daycare workers are properly qualified for employment in a proposed centre, for example, suits this form of control well. Each separate application for certification or licensing or approval would come to the attention of an official before the daycare centre could open for business.

Advantages of this prerequisite approach are many. A list of licensees provides a register of those enterprises involved in daycare subject to any regulations applicable to them, and potential revocation of licenses for non-compliance or violation of self-applied provisions provide the sanction needed for effective administration. This method also has the benefit of allowing scrutiny in advance of proposed transactions in order to determine whether or not they should be permitted. This advance ability to assure competence or other qualifications would be especially important in the daycare field in order to prevent those things being done which once done are very difficult to undo. For example, structural prerequisites would prevent windowless daycare centres being built, and construction of daycare facilities in high-pollution areas would be avoided if environmental concerns were prerequisites. Planned distribution of limited resources is also possible through a system of prior checks.

Disadvantages of prerequisite control are the heavy administrative burdens it creates on government. Many examples exist of how prerequisites can bog down government administration to the extent that delays may result in stopping desired development.<sup>17</sup> Only prior checks that are justifiable and simple to expedite administratively should be implemented in order to avoid indefinite delay problems which are not in the public interest.

### c) Postrequisites

The advantage of the postrequisite approach is to allow the free flow of private activity without government interference. When the subject matter of concern is daycare, however, concerns about the desired quality of service coupled with the pressing demand for spaces probably override the

benefits of allowing action first and government involvement later. The risks of non-compliance and poor-quality care will be too great.

### d) Exactions

An exaction is a requirement of rendering a described affirmative performance to the government in money, services, or property.

This method of control creates administrative problems, especially if employed on a large scale, because each individual compliance must be verified. Taxation is the most common example which comes to mind under this heading. Whether or not exactions are repugnant to the subject matter at hand is a question that must be addressed when considering this method of control, particularly when other alternatives are available and are more likely to meet with success. Exaction requires direct coercive techniques or legitimate force by government to ensure performance of the duty. Monitoring and enforcing standards would be difficult.<sup>18</sup>

## 2. Inducement

The view that the law is a system of commands backed up by governmental force to ensure compliance is a very narrow one. Control of private activity can be achieved in many ways other than regulatory ones. If the goal of government is to maximize valid human wants and needs, particularly in the area of the care of children, tools other than force may better suit the purpose.

### a) Persuasion

The opposite technique of coercion is the process of persuasion. Usually working in concert with an appeal to public opinion, the benefits, if successful, are a willingness to comply with regulations and self-application. A recent example of this technique is the government "6 and 5" wage control policy in the private sector. Coercive price and wage controls were avoided by embarking on the program of "voluntary control". The problems in a program such as this are approximately the same as those in a program of regulated conduct—that is, definition and communication of the desired conduct, making possible self-application and inducing compliance. The main difference is the lack of government clout to bring unco-operative citizens into line. There is also no means of protecting those who suffer a competitive disadvantage because of violations of others.

### b) Reward

A more effective method of persuasion other than command or appealing to a sense of duty may be the promise of a reward upon compliance. Hart and Sacks illustrate this effectively by citing the example of the need to populate the Great West in frontier days. Telling people they were under a duty to settle there could scarcely have accomplished the government's aim, but promising a homestead was effective.<sup>19</sup>

### i) Subsidies

The use of subsidies to observe stipulated practices is a form of persuasion that has proven effective in a variety of circumstances and is now a widely used instrument of government policy. In 1979, governments at all levels spent about \$95 million on daycare. Forty million of this was paid out under the Canada Assistance Plan and \$55 million in lost

revenues under the childcare expense tax deduction.<sup>20</sup> Subsidization is directly relative to accessibility of daycare—both physical availability of supply and ability to use what is available. Accessibility issues involve matters of cost and funding that enable parents to receive or purchase daycare services for their children. Proponents of high-quality care for children argue present government subsidization is not nearly enough and the basic funding mechanism is faulty.

The two methods of direct expenditure are the provision of financial assistance for costs of care on behalf of parents deemed eligible for assistance and direct grants to programs that reduce charges across the board for fee-paying parents.

Daycare comes under provincial jurisdiction, with federal funding provided under the Canada Assistance Plan through the Department of Health and Welfare. Under the terms of CAP, the federal government pays 50 per cent of provincial expenditures for daycare for low-income parents.

It is argued that this subsidization scheme is faulty because federal assistance is provided only to people of low income. There is no cost-sharing scheme to cover the majority of middle-income families who use daycare. Another criticism is that the federal cost-sharing depends on provincial initiatives. Some provinces are much more aggressive than others in initiating daycare programs, the result being uneven distribution of federal funding and access to daycare in the country.

Provincial governments have not been significantly involved in the provision of formal daycare programs.<sup>21</sup> The federal funding does not provide directly for capital cost-sharing. The implication that arises from this policy is that the private sector will initiate supply, in response to local demand. This factor also results in uneven accessibility, province to province and city to city.

## II) Tax Deductions and Exemptions

Significant problems have also been identified in the area of tax deductions and exemptions.

At the present time, the *Income Tax Act* allows a working parent to deduct childcare up to a maximum of \$2,000 per child up to four children or two-thirds of the taxpayer's earned income. The deduction is available to the spouse with the lower income, regardless of sex. No deduction may be made where the childcare expenses are paid to the taxpayer's dependant or relative.

A portion of these expenses is recovered through a reduction of personal income taxes but the present allowable deduction in no way reflects the true cost of childcare parents must pay in order to work and is most beneficial to those in the higher tax brackets. In 1980-81 the average cost of daycare in Canada was \$200 to \$250 per month or \$2,400 to \$3,000 per year.<sup>22</sup> Under the present level of deductions, a single parent earning \$10,000 per year receiving no child support will save between \$0 and \$100. The same single mother earning \$20,000 will save about \$500 in tax, and if she earns \$30,000 she will save about \$650. It is easy to see that very little relief is provided by the present allowable deductions, and the relief they do provide is greatest to those with the highest incomes. Only those who have the disposable income to pay out the expenses benefit from this system.<sup>23</sup>

## III) Family Allowance

The government also recognizes childhood dependency by providing a taxable family allowance to each dependent child of the family and a tax exemption for wholly dependent children. The monetary effect of these benefits depends on the income of the supporting parent. On the one hand, the value of the family allowance decreases as income increases but on the other hand the value of the tax deduction increases as income increases. The net result is, again, that those with the highest incomes benefit most.

## iv) Tax Credits

In the United States, the federal government provides an income tax credit for childcare costs. This method reduces the actual tax payable after taxable income has been determined. It allows a tax credit of 20 per cent of employment-related childcare costs up to \$2,000 for one child, or up to \$4,000 for two or more children, with no income ceiling.

In 1978 a tax credit program was introduced in Canada. In 1982, if the family income did not exceed \$26,330, a federal income tax rebate of \$293 per child was provided. For those families with an income above this level, the credit was reduced by 5 per cent of the portion above \$26,330. Recent amendments to the *Income Tax Act* have provided that this credit will be indexed for 1984 to \$343, and in subsequent years, having the effect of increasing the credit. In addition, the family income threshold will continue to be indexed. It should be noted that for purposes of this credit, the concept of family income will include the income of unmarried parents living together or the income of any other individual claiming the child as a personal deduction.

A criticism of the tax credit is that providing extra cash to needy parents with which they can purchase daycare services will not result in a good universal daycare system where all children reap the benefits. Research indicates that parents have difficulty in evaluating the quality of care provided to their children.<sup>24</sup> Reasons cited for this are that the necessary information about standards, variety of available programs, and long-term effects of different types of care is not readily available to them. Consequently, parents are more likely to choose centres offering low fees, thus defeating the goal of universal, high-quality daycare and perpetuating segregation of children by socio-economic group. In a study examining trends of childcare arrangements, it was found that only nine per cent of children from families that earned less than \$6,000 per year were in group care facilities, compared to 18 per cent of those with family incomes of more than \$20,000. This difference was attributed to the fact that group care facilities require payment, while care by relatives, friends, or other babysitters may be free, or at least less costly.<sup>25</sup>

It is often argued that lower-middle- and middle-income families are the real losers in the current funding and tax system. On the one hand, they are ineligible for income subsidies, but on the other they do not have enough income to pay for services that would entitle them to the benefit of a tax deduction. This portion of the population appears to be the predominant users of the informal type of daycare services for which there are no subsidies and often no tax deductions because receipts are often not obtained from care-givers. It has been suggested that the present tax system should be modified either to replace tax exemptions with refundable tax credits or to increase universal family allowances to more

realistically reflect the true costs of childcare.<sup>26</sup> This would make the system more equitable and would help those who need help the most.

#### **v) Income Support to Reduce Demand**

The demand for extra-parental care could be reduced by extension of paid maternity/paternity leave. Such a strategy would permit working parents to care for their own children without loss of income.

At the present time most federal and provincial labour legislation allows women 17 or 18 weeks of maternity leave. The one exception to this pattern is the federal public service, which allows 37 weeks' leave.<sup>27</sup>

Provisions for paid paternity leave do not exist in Canada, but two public service employers offer unpaid leave. The federal public service gives its male employees 26 weeks of unpaid paternity leave after the birth of a child<sup>28</sup> and the *Saskatchewan Labour Standards Act* allows six weeks of unpaid leave during the three months surrounding the birth. The federal public service also allows up to five years without pay for the care and nurture of preschool age children. It may be taken in one or more periods, not exceeding five years in total. These provisions go some way toward alleviating demand for daycare, but as long as paternity leave remains unpaid, the parent with the prime responsibility for nurturing will be the mother. Studies indicate few working fathers opt for unpaid paternity leave.<sup>29</sup>

#### **c) Bilateral Government Contracts**

Government contracts may serve a much wider function than merely "getting the job done". They may be used as instruments of control of private activity, as special conditions can be attached so that private obligations come into existence not by regulation, but by agreement. To ensure compliance, withholding payment under the contract or future agreements is usually effective. Each contract is individualized, but this factor should not cause administrative problems because the normal negotiation processes provide the necessary administration. The benefits of this technique are that it has its own built-in sanctions for non-compliance and is flexible because it lends itself to individualization in each case. It also has the benefit of being less stringent and thus more conducive to the daycare concept than a formally coercive arrangement. The applicability of this method of inducement may be limited as far as establishing daycare facilities is concerned, but where relevant it would likely be effective. Affirmative action programs have been successfully implemented in this way in some jurisdictions.<sup>30</sup>

### **3. Direct Action**

Rather than telling others what to do, by way of regulation, by direct coercion, or by persuasion, the government has the alternative of doing the desired activity itself by providing direct assistance in service as well as in money and property. Whether or not a government should involve itself directly must be answered in response to the question, how great is the need for the service? And further, are the existing private incentives and capacities sufficient to meet it?

If the answer to the second question is clearly in the negative, the provision of the service will probably not be contentious. The points of issue will more likely be the extent of and quality of the service offered. This will be tested in terms of cost-benefit to the government and to the public. In the case

of daycare, the need and the benefits seem plain. It has not as yet, however, reached the same level of acceptance that public education has, which amalgamates the technique of regulation with service resulting in compulsory school law. Some services governments could provide are outlined below.

#### **a) Provision of Information**

Dissemination of accurate information to the public so that parents can make their own decisions on choice of daycare is an important service government can perform effectively. Census information, business data, and weather and crop forecasts are examples of direct government action in the provision of information we take for granted. In the daycare field, accurate information would assist parents in making appraisals of the multitude of different services available in relation to their cost, quality, location, and programs offered. This is particularly important because research shows that parents have difficulty evaluating the quality of care provided in daycare centres.<sup>31</sup>

#### **b) Research**

Closely connected to services of information are research services. Early childhood development research conducted by or funded by government would greatly benefit the fund of knowledge now available and would assist in future planning of facilities.

#### **c) Governmental Assurances**

Instead of taking direct action in the present, government may provide effective support by promising action in the future under certain circumstances. One form of this type of action is the guarantee of loans. If loans are assured, money lenders may loan money to private investors who might otherwise be refused. Similar to government contracts, control can be exerted here by negotiating conditions with the borrower before the assurance is given. This service would help make daycare more accessible, but encourages commercial development.<sup>32</sup>

This form of government service is rendered in exchange for a consideration. The consideration may take the form of a fee which could range from nominal to market value. In provision of daycare, it is highly unlikely a government enterprise could be self-sustaining.<sup>33</sup> The question of establishing a government service of this kind is always closely tied to cost. Current tax burdens and their enlargement in relation to benefits will be instrumental considerations in deciding whether or not the service should be established, continued, or expanded.

The result of government enterprise is some displacement of private activity. Some say this is a good thing because daycare should not be in the realm of profit-making private enterprise. Others say more flexible service can be provided at a lower cost by private businesses.<sup>34</sup> To resolve this debate, careful analysis and calculation of social advantage must be made.

#### **d) Government Enterprises**

Many groups espouse the view that high-quality daycare should be universally available to all children under the age of six as a public service, i.e., publicly funded and monitored.<sup>35</sup> The rationale for this view would appear to be that the government has responsibilities to both parents and children. It



has a duty to protect the child from unsafe or inadequate living conditions and from commercial exploitation.<sup>36</sup> It is also based on the view that government has a responsibility to support parents with childcare services because of its role in the development of a socio-economic system that requires parents to abandon traditional family support systems. For example, the demand for a mobile workforce has largely removed grandparents from the critical support role they used to play. Therefore, it is argued, the state must help meet these new demands it has in large part created.

The government-supported daycare system recommended by the Ontario Coalition for Better Day Care is the family resource centre or neighbourhood hub model.<sup>37</sup> It proposes that centres be located in neighbourhoods, much as elementary schools are, and offer all-day group care, supervised private home care (which would include emergency care for sick children and for children whose parents are ill, or overnight care for children of shift workers), half-day nursery school, parent and child drop-in centre, and facilities for parent education. The coalition also recommends that public health services be located there with facilities to diagnose physical, mental, or emotional difficulties.

Some of these services are currently available but are not coordinated or offered on a large scale.<sup>38</sup> Other resources the neighbourhood model would provide include support for private home care, such as a toy-lending service, training and advice, and relief staff. Children cared for in private homes would also have access to the neighbourhood centre.

The advantage of the neighbourhood centre is its flexibility. Without imposing a specific mode of daycare, it centralizes essential social, educative, and health resources in individual communities.<sup>39</sup> Similar facilities would be available in rural communities, with efficient transportation service provided to users.

The criticism of this alternative is its expense. Its proponents acknowledge that daycare facilities would have to expand tenfold in order to make them widely accessible to the children of working parents and would have to be subsidized to a very high level to meet the needs of the people who require it the most. The Ontario Coalition for Better Day Care has recommended that the federal government pass a new National Childcare Act which would replace the Canada Assistance Act. The coalition would like to see federal funding on a universal basis as a public service, rather than providing assistance to low-income families only, as it currently does. The coalition also envisages that the Ontario and other provincial governments implement a \$5 per day space subsidy to all non-profit daycare centres, in tandem with the federal funding. The coalition's goal is to see daycare spaces in non-profit programs for 15 per cent of the child population by 1985, and universal access by 1990.

Bertrand and Colley in their Discussion Paper suggest that the long-term objective is for the federal government to pay 50 per cent of all operating, capital, and other associated costs of approved daycare centres in each province. They recommend that the provincial governments provide the balance of the fees, although they would allow for a small user fee. In the meantime, the authors suggest that the federal and provincial governments each contribute a \$5 per day supplement to non-profit centres for every child enrolled, prorated depending on age and type of service

required.<sup>40</sup> Exemptions would be made on the basis of regional disparity.

In times of huge government deficits, layoffs in industry, and controls on public spending, it seems somewhat optimistic to believe governments will commit themselves to the substantial outlays of money this plan requires. Indeed, as the federal government is talking openly about doing away with the principle of universality in existing social programs such as family allowances, it is difficult to perceive government's adopting a universal daycare policy.<sup>41</sup>

### III. EMPLOYER INVOLVEMENT

Employers are also beneficiaries of the efforts of working women. The Ontario Advisory Council on Day Care has recommended that employers in Ontario be encouraged and stimulated to become involved in the provision of daycare. The council states that contributions toward daycare cost by business and industry have not been forthcoming, although it is they who benefit most from having daycare available to their employees.<sup>42</sup>

#### 1. Work-Related Daycare

The definition of work-related daycare varies but two elements are common to any definition: the employee's need for childcare arrangements and the employer's involvement in providing this needed service. A third element may include the involvement of a labour group in the provision of daycare.

"Involvement" might mean establishment of daycare centres at or near the place of work, complete or partial subsidies by business or labour groups, cash allowances to employees with children, or counselling services to provide information, support, or guidance to working parents.

Employers become involved in work-related daycare for a variety of reasons which include both self-interest and good corporate citizenship. Reasons of self-interest usually have to do with control of high turnover rates, recruitment, absenteeism, and tardiness.

The premise that industry is indebted to the community underlies the notion of employer-supported daycare and good corporate citizenship. The programs motivated by this notion address larger social issues of education and the prevention of social problems and usually result in joint company-community efforts which go beyond servicing employees needs, providing programs open to the community as well.

Another rationale employers may have is consideration for the employee. Some employers may open a daycare centre with the intent of providing a service for mothers being trained for employment.<sup>43</sup> Other programs may be implemented with the view of developmental advantages that derive to the child. These educational and social benefits to society are difficult to measure, but the expectation is that the welfare rolls are reduced and a greater contribution is made to the economy as a whole when quality daycare is provided.<sup>44</sup>

Some employers provide daycare services as research demonstration projects, focusing on child development and providing a developmental curriculum.<sup>45</sup>

This section of the paper will review the various models of work-related daycare which have been or are being used in Canada and in the United States. The benefits obtainable will

be discussed as well as the advantages and disadvantages, and the role that work-related daycare can play in the present situation of unmet needs.

#### a) Workplace Daycare

Workplace daycare is a much narrower concept than work-related daycare. It is used to describe a centre located at the same site or in the same building as the employees' workplace. The concept of workplace or on-site daycare as a permanent service to employees is a relatively new one in Canada.<sup>46</sup>

In a recent study conducted by the Social Planning Council of Toronto, 38 workplace daycare centers were surveyed and it was found that 71 per cent of them had been in operation for five years or less.<sup>47</sup>

By far the largest number of employers involved in workplace daycare in Canada are hospitals and health centres. Fifty per cent of the centres in the survey had such application,<sup>48</sup> but recently other employers have begun to consider the feasibility of providing the service to employees. In Alberta, for example, a number of shopping malls have considered workplace daycare, as have a number of large companies in Calgary such as Trizec Corporation, Petro-Canada, and Imperial Oil.<sup>49</sup>

The advantages of on-site daycare are many. It meets needs other daycare centres do not. For example, daycare unrelated to the workplace does not take cognizance of shifts, weekends, and holidays for which many workers must have childcare; it permits contact between parent and child during the working day, a particularly significant advantage for nursing mothers; and it shortens travelling time to and from work. Effect on travelling time becomes a major advantage of workplace daycare if other centres are located outside the community in which the parent lives or works. When the employer subsidizes workplace daycare for operating or capital costs, then it also becomes a financial advantage to the working parent. This aspect is becoming increasingly important as inflation causes daycare costs, especially wages of daycare workers, to rise each year. At the present time, most daycare centres are accessible only to the poor who receive income subsidies, or to the upper-income groups who can afford to pay the ever-increasing fees. A 1979 survey on daycare costs reported:

*...an expressed preference among parents of virtually all classes and ethnic backgrounds, for supervised and licensed group care for pre-school children. ... under existing market conditions, only those parents at the top and the bottom extremes of the income scale can utilize this mode of child care.*<sup>50</sup>

The primary disadvantage of workplace daycare is location. Environmental hazards such as pollution and transportation problems in urban areas are cited as the main drawbacks.<sup>51</sup> In places such as universities, health centres, hospitals, government offices, and service industries where these drawbacks normally do not exist, workplace daycare functions well.<sup>52</sup>

Another disadvantage is cost. If the employer chooses not to contribute to operating costs, fees to parents are often prohibitive even though employer-sponsored childcare centres reduce costs to parents when compared to costs at other centres.<sup>53</sup> It is not uncommon today for parents to pay

\$100 per week per child for on-site, employer-sponsored daycare.<sup>54</sup>

#### i) Advantages to the Employer

Some research indicates that employers should be happy to provide on-site daycare to their employees if for no other reason than self-interest. In 1980, the Women's Bureau of the U.S. Department of Labor reported the results of a nation-wide survey of employer-sponsored childcare centres.<sup>55</sup> One of the issues examined was whether or not any benefits accrued to employers from their sponsorship of daycare centres and, if so, identification of those benefits.

The results of the survey indicated that many benefits resulted from the childcare centres. Those mentioned by the employers surveyed included: increased ability to attract employees, lower absenteeism, improved employee attitude toward work, favourable publicity to employer, lower job turnover rate, and improved community relations.<sup>56</sup> This was in contrast to an earlier study which disagreed in part.<sup>57</sup> From 1971 to 1974, American Telephone and Telegraph Company operated daycare centres at two of its locations, Washington D.C., and Columbus, Ohio. The purpose of the study was to determine whether or not industry-run daycare centres in large urban settings were viable. The questions posed were whether or not the centre could help retain good employees needing daycare for their two-and-a-half to six-year-olds; whether qualified mothers could be attracted to work if their childcare needs were met; and whether daycare costs could be balanced by savings in labour force turnover, hiring, and training costs.

Longitudinal research was conducted over a period of months among the experimental group of parents using two centres provided by the employer and a matched control group of non-users. The employer paid for half the cost of the service. The findings were:

1. Lateness could be reduced by provision of on-site daycare as compared to the control group, but lateness was not a major cost to the employer.
2. Absenteeism was higher among parents using the centre. The reason was that daycare mothers had no other resources lined up for when children became ill, unlike control mothers. Consequently, they stayed home when children became ill.
3. There was no saving to the company on hiring and training costs because there were no significant differences in turnover rates between the two groups.
4. The company was unable to ascertain whether or not recruitment was beneficially affected by provision of daycare.
5. The centres were under-used, averaging 65 to 70 per cent occupancy.

It is probably unsafe to generalize the experience of AT&T to other employer-sponsored daycare programs because of the sharp restrictions of its applicability. The centres were both located in large-city environments with substantial home-to-work travelling involved. Even though the employer subsidized 50 per cent of the cost, it was an expensive program because it was aimed at working parents rather than welfare parents and was thus ineligible for U.S. government daycare funding. It was also education-oriented rather than

custodial. The absenteeism factor would have been eliminated if back-up resources, such as a sick bay, were made available to the centre. The recruitment benefit would be extremely difficult to ascertain in the AT&T study because of the short period of time over which the study was conducted.

The University of Minnesota studied employees before and after they began to use a daycare facility provided by their employer.<sup>58</sup> It was found that the absenteeism of workers with children in the daycare facility was reduced by 21.4 per cent. The study also compared monthly turnover rates and found that the rate was 6.2 per cent for employees not using the centre, while the rate for those using it was only 2.3 per cent, thus saving the employers significant costs incurred in retraining personnel. The Hester How Day Care Centre in Toronto City Hall, an employer-subsidized project, has verified similar employee and employer benefits.

In a study done by the New Jersey Bell Telephone Company in Newark, New Jersey, it was found that close to 40 per cent of the employees who resigned in 1967 did so because they did not have adequate childcare.<sup>59</sup> The same study reported that Rochester Clothes Inc., of New Bedford, Massachusetts, recorded a drop in absenteeism from 12 to 3 per cent when a daycare centre was established on their premises in 1965.

Some of the on-site daycare facilities started in the U.S. in the 1960s and early 1970s have since closed, citing cost as the chief reason. Since that time, governments in the U.S. and Canada have provided more help to employers. Employer contribution in capital expenditures may be amortized and financial contributions toward start-up costs of any non-profit daycare centre are now eligible for government funding. An employer may also establish a non-profit daycare centre as a charitable organization as long as it is not for the exclusive use of children of employees. If it is open to participation for the entire community, the employer not only reaps the benefit of a tax write-off but also all the intangible benefits good corporate citizenship brings.

#### b) Employer-Provided Employee Benefit Packages<sup>60</sup>

At any level of employment, for the blue-collar worker to the executive, employee fringe benefits can form a substantial portion of remuneration for work done. If an employee can acquire a benefit by having its cost added to his/her income as a taxable benefit<sup>61</sup> rather than paying for the benefit out of disposable income, a very real impact is felt on earnings. Thus, employer-provided employee benefit packages that address childcare needs is another approach to daycare that should be examined.

To illustrate this concept, assume employee X has a yearly income of \$22,000. Assume her deductions are as follows:

|                  |        |
|------------------|--------|
| 3% of employment | \$ 500 |
| Personal         | 3,770  |
| Standard Medical | 100    |
| UIC, Pension     | 600    |

TOTAL DEDUCTIONS (\$4,970) or \$5,000<sup>62</sup>

As the total deductions allowable to employee X equal \$5,000, her taxable income amounts to \$17,000. At a tax rate of 20 per cent, employee X must therefore earn \$125 for every \$100 she spends. If employee X's earnings were in a

higher tax bracket, she would have to earn more to spend the same amount of money. The following table illustrates the point.<sup>63</sup>

| Taxable Income | Rate of Taxation | Number of Before Tax Dollars Required To Spend \$100 |
|----------------|------------------|------------------------------------------------------|
| (i) \$ 17,000  | 20%              | \$125                                                |
| (ii) 25,000    | 25%              | 133                                                  |
| (iii) 30,000   | 28%              | 139                                                  |
| (iv) 50,000    | 33%              | 150                                                  |
| (v) 100,000    | 40%              | 165                                                  |

There are a number of different ways the employer can provide childcare benefits to employees. One way is to provide a direct subsidy to cover the costs or to assist the employee in purchasing the benefit. Alternatively, the employer can pay for the benefit and pay the employee less salary. A third option would be for the employer to pay for the benefit without reducing the employee's salary. In terms of daycare services, these benefits may take the form of the purchase of spaces for employee use in existing centres; the provision of vouchers to the employee to go toward the purchase of childcare services; or provision of monthly childcare allowances to employees with children. For subsidies to be equitably distributed, the employer may have to take into account numbers and ages of children and income levels.

The subsidy approach has been adopted at the YWCA in Toronto. In 1976, CUPE Local 2189 at the YWCA negotiated a subsidy of \$15 per month for employees with children in daycare. The clause was recently renegotiated to \$30 per month to include children up to nine years of age.<sup>64</sup>

The value of the economic benefit of the subsidy varies greatly depending on whether or not the benefit is taxable. Section 6 of the *Income Tax Act* appears to characterize daycare as a taxable benefit to the employee if it is provided by, or supported by, the employer. The argument can be made, however, that employer-provided daycare qualifies as a non-taxable fringe benefit fitting the exceptions to the very widely stated rule in section 6(1)(a). It may be argued that regardless of the fact that the opening words of section 6(1)(a) are extremely wide and *prima facie* make any benefit received by the taxpayer taxable, the "benefit" of daycare is neither "received nor enjoyed" by the taxpayer. Rather, daycare is a service expense a parent must incur in order to earn an income and, in addition to being a service to working parents, childcare provides a service to employers and thus benefits the economy of the country. An analogous situation to provision of daycare for working parents is an employee's use of a company car. As long as the car is used for business purposes only, the benefit is not taxable. As the taxpayer does not receive daycare service as a personal enjoyment or benefit, he/she should not be taxed for it either. The *Arsons*<sup>65</sup> case may be authority supporting this argument. In



that case, employees were required to make a business trip to Disneyland. Even though the destination had a connotation of "enjoyment" because of its popularity as a holiday resort, the Tax Appeal Board found that the employees received no benefit from the trip because it was initiated at the direction of the employer, for business purposes.

It may be overly optimistic to assume courts or tax appeal boards will adopt such a benevolent attitude towards employer-provided daycare benefits, but even if the employer-provided or -supported daycare is categorized as a taxable benefit to the employee, it is still more beneficial to the employee to have the employer provide it rather than purchase the service in the marketplace. The key to this saving is understanding the difference between before- and after-tax dollars.

When a benefit is classified as taxable, the value of the benefit is added to the employee's before-tax income and then taxed in the normal way at the employee's rate. How does this approach save the taxpayer money? Assume that the cost of daycare in the marketplace is \$250 per month or \$3,000 per year. If the taxpayer earns an income of \$22,000 per year, in order to pay this \$3,000 per year, in her tax bracket of 20 per cent, she must earn almost \$4,000. This amount, which will be reduced to about \$3,500 due to the childcare expense deduction, represents more than one-sixth of her salary.

If the employer paid the same \$3,000 to the daycare on our individual's behalf, \$3,000 would be added to her income. This would increase her taxable income from \$17,000 to \$20,000 (minus \$2,000 for childcare expense deduction—\$18,000) and correspondingly increase her tax rate to almost 25 per cent. Her tax liability as a result of the receipt of this benefit would therefore be \$875.

If we compare the amount of disposable income she would have after tax and daycare expenses, in both situations, it becomes clear that the effect of receiving the taxable benefit is substantial.

| Employee Pays \$3,000<br>To Private Daycare | Employer Pays \$3,000<br>To Private Daycare |
|---------------------------------------------|---------------------------------------------|
| \$22,000 salary                             | \$17,000 taxable income                     |
| - 3,450 tax                                 | + 3,000 taxable benefit                     |
| - 3,000 daycare                             | - 2,000 childcare expense                   |
| <hr/>                                       |                                             |
| \$15,550 Disposable Income                  | \$18,000 Taxable Income                     |
|                                             | Tax = \$4,325                               |
|                                             | \$22,000 salary                             |
|                                             | - 4,325 tax                                 |
|                                             | <hr/>                                       |
|                                             | \$17,675 Disposable Income                  |

To complete this analysis, one must also consider the true cost of providing daycare that the employer would bear. If the employer provides the actual daycare service, the true cost to the employer may not really be \$3,000. From the

employer's perspective, the cost of providing the service is much less than what the employee would pay purchasing the service in the marketplace.

It is arguable that the value of a benefit under section 6 is the cost to the employer, not fair market value. If the employer provides the service, it is not paying toward a profit markup the employee pays to an outside profit-making daycare enterprise. In addition, an employer can usually provide space, maintenance, utilities, etc., more cheaply than they can be purchased in the marketplace as well as expert help such as legal, accounting, and tax assistance. The employer can also better afford to pay for or provide daycare services because corporations derive tax benefits from involvement in daycare. All costs to an employer are tax deductible, including childcare payments made to an employee, subsidies to an existing non-profit daycare centre, or operating losses.<sup>66</sup> To illustrate the point, assume corporation X is in the 50 per cent tax bracket and \$3,000 per employee per year is expended toward the cost of daycare. Fifty per cent or 50 cents for every dollar spent on behalf of employees is deductible from the tax that otherwise would be paid on the corporation's profits. In reality, then, the employer's cost to provide \$3,000 worth of daycare is really \$1,500, or less if the actual service is provided by the employer on a non-profit basis as discussed above.<sup>67</sup> Provincial, municipal, and federal government subsidies available to daycare operators would further reduce costs to the employer.

A potential problem underlying this analysis is section 63 of the *Income Tax Act*. This section sets out the formulae for calculating allowable deductions for childcare expenses by taxpayers purchasing daycare or babysitting services. This deduction is generally available to the supporting parent with the lower income or, where the incomes of two supporting parents are equal, they can each claim half the deduction. The question arises as to whether or not employees are excluded from the deductions available under section 63 if an employer is providing daycare benefits. The basis for the exclusion would presumably be based on an agreement that the taxpayer had not actually paid for the daycare services. Conversations with local representatives of Revenue Canada indicate that taxpayers receiving daycare as a taxable employment benefit could still avail themselves of the section 63 deduction. However, unless this assurance is verified by official action, it is a potential pitfall for those who qualify.

In a non-profit business the tax relief obviously does not exist, but benefits can still accrue to the employer through provision or support of daycare for employees. By offering daycare, the non-profit employer may be able to negotiate less salary for employees as a trade-off. This diminution in salary should not be dollar-for-dollar, however, because the employer can provide daycare at lesser expense than the employee can purchase it, as discussed above. Thus, a saving still accrues to the employer.

It may be somewhat optimistic to expect that an employer will voluntarily absorb the full cost of providing daycare services for its employees. It may also be undesirable for the employer to have full control over the childcare of its employees. Unions quite commonly are suspicious of workplace daycare solely run by the employer. The Ontario Federation of Labour position is that employer-run workplace daycare is often motivated by the need to keep female workers

in a company where wages are low and working conditions are poor. They fear trade-offs between daycare facilities and pay or other benefits and feel that employer-provided daycare could put parents in a subtle ransom position during potential strike situations. Parents and unions, in their view, should have control over care.<sup>68</sup>

A more realistic and practical alternative may be for employees to negotiate a partial deduction in salary or agree to forgo increases in return for daycare facilities that they would administer. The most equitable way of dealing with daycare expenses is probably somewhere near this middle ground. For example, a \$1,500 reduction in salary is still more advantageous to an employee than no reduction in salary but a fixed cost from earned income of \$3,750 for daycare services.

There is one other problem with compensation and benefit packages. Often they do not take into account the fact that two spouses are working, and hence they double up on benefits such as extended health care, dental care, and family insurance coverage.

After randomly checking with some employers in Calgary, it appears that in a number of cases there is a double coverage or overlapping coverage when both spouses work. Where employers make an effort to discover if coverage is in place through a spousal plan, the benefit is most often simply dropped from the other spouse's benefit package.

One solution to this problem is for employees to check what benefits their spouse has and if there is double coverage to negotiate a cash settlement or placement of the benefit elsewhere, such as a daycare subsidy. Some employers have instituted "cafeteria" benefit plans in order to achieve an equal benefit system.<sup>69</sup> Rather than providing workers with a limited number of benefits, some of which may be inappropriate to meet his or her needs, the employer instead offers a range of benefits. These may include employer payment for childcare, legal insurance, dental insurance, days off on school holidays, or house or car insurance.

The plan can work in one or two ways. An employer may add new benefits in addition to those already available or the employer may allow the employee to trade benefits. Under the latter approach, for example, an employee could forgo medical insurance if she is already covered by her spouse's policy and have the money directed toward a childcare benefit or some other alternative benefit offered. Since most employers pay a substantial amount per year into benefits for each employee, there is a considerable pool of money to draw upon if the employer adopts the "cafeteria" plan. This alternative is more attractive in the U.S. than it is in Canada because of recent amendments to U.S. tax laws which allow employers to offer a range of benefits, none of which are taxable.

If employers are unable financially to support daycare for their employees, there are other less costly contributions they can make to indicate their sense of social responsibility and awareness of work pressures on parents. Counselling and referral services are offered by some employers to inform their employees about daycare availability and cost. Some maintain a registry of daycare services and find and train babysitters willing to care for employees' children. If non-profit referral services already exist, they provide an excellent means for corporate support.

### c) Flexible Hours and Part-time Work

Perhaps the greatest source of assistance employers can offer to working parents is flexible working hours. This benefit can often be offered without any substantial cost to the employer and warrants further exploration and development, because in some instances it may provide an alternative to daycare services. Working husbands and wives could share the caring responsibility for their children if they worked different portions of the day. Another alternative deserving of consideration is the splitting of full-time jobs into part-time jobs without loss of benefits. This would have the effect of reducing demand for daycare services while allowing parents to maintain their jobs.

## IV. UNION INVOLVEMENT

### 1. Union Enterprises

In addition to their role as bargainer for direct negotiated benefits for childcare, unions can also play a role equally important to that of the employer in the establishment of childcare services for their membership.

In the United States there are unions that operate and administer daycare centres. For example, the Regional Joint Boards of the Amalgamated Clothing Workers of America in the Chicago and Baltimore areas run six centres. Financing is obtained from employer contributions to the union health and welfare fund, which are tax deductible, and small fees in some cases are contributed by users.<sup>70</sup> In 1972 the British Columbia Government Employees' Union initiated and operated a daycare centre in Victoria.

Alternatively, unions and employers may wish to jointly sponsor a daycare facility. In some situations, a better approach may be for unions to join forces with other unions in providing daycare service near, rather than at, the workplace. Many of the "on-site" advantages would still exist and a wider segment of the community would be served. This approach would be more practical where there are not sufficient numbers of parents with children requiring daycare on one job site to warrant implementing the service.

Some unions are in favour of on-site daycare. In its 1980 statement on daycare, the Ontario Federation of Labour reiterated its 1972 position paper recommending that the government of Ontario "promote the establishing of day care centers at places of work. In new plants every effort should be made to have facilities planned and built in".<sup>71</sup>

### 2. Negotiating Family Benefits

If provision of the service is impractical in the circumstances, negotiating with the employer to purchase spaces in existing centres in the community may be the preferred option. This was done by Manulife in Toronto. The employer donated \$12,000 to a nearby centre which used the money for renovations to expand its service. In return for the donation, the employees of Manulife were given priority at the centre.<sup>72</sup> CUPE Local 2189 at the YWCA in Toronto is a good example of the success that can be achieved in bargaining for family life benefits. Not only does the employer provide a monthly subsidy to assist employees in purchasing childcare, provisions such as cumulative sick leave to care for sick family members, maternity leave of six months, a

provision for paternity leave, and reimbursement of reasonable expenses for childcare when working unusual hours have been successfully negotiated.

There is no question that collective agreements are a valuable tool for women seeking parental benefits from employers. They give employees the ability to acquire benefits over and above those available through legislation. In a recent survey of provisions in collective agreements in Canada, it was found that 71.4 per cent of the maternity leave provisions negotiated exceeded legislative limits. The greatest number, 617 agreements affecting 792,242 employees, provide at least six months' maternity leave.

A plan negotiated in Quebec covering 200,000 public-sector workers includes the right to two years' unpaid maternity and paternity leave, during which seniority continues to accrue and fringe benefits can be maintained if the employee elects to pay for them.<sup>73</sup> In the private sector, the Steelworkers Local 7024 recently instituted two weeks of paid leave to care for their families upon the hospitalization of their spouse for maternity needs or other reasons. These breakthroughs may indicate trends for future negotiations. However, it must be remembered that the right to bargain collectively is not available to thousands of Canadian mothers who are employed as waitresses, sales clerks, and domestic employees. Only 24 per cent of women in Canada are unionized.

### 3. Union Lobby

In addition to negotiating for or providing daycare services as described above, unions are also a powerful lobby at all levels and can use their organizations to lobby governments to initiate childcare research and provide funding or tax incentives for better childcare. Unions can also play a very major educational role in the community. Within their own organizations they can ensure that daycare is provided so that members with children can attend meetings. They can also ensure that childcare becomes an important labour issue by including childcare as a bargaining goal.<sup>74</sup>

## V. BUSINESS INVOLVEMENT

### 1. The Commercial Daycare Centre

The predominant method of delivery of daycare in Canada today is the provision of a daycare service in return for a fee paid by the parent(s) of the children to a profit-making daycare enterprise. A national study on daycare was conducted by the Canadian Council on Social Development in 1972. It found that three out of four daycare centres and more than 50 per cent of nursery schools were privately operated.<sup>75</sup> In 1979, the Department of National Health and Welfare reviewed and updated the study and found that commercial daycare increased by 28.3 per cent over the previous year's spaces while growth in the licensed, subsidized sector increased by only 4.8 per cent. In Ontario and Alberta, municipally operated daycare decreased by 38.7 per cent in available spaces.

Business people have a very different attitude toward daycare than most other groups. Rather than focusing on children's or parent's needs, the point of concern is, above all, cost. A representative of Ohio Bell Telephone, involved in the establishment of a workplace daycare for the use of employees, made the following statement:

*We want to be sure ...that we're at least not harming the children. A positive effect on the children is a nice fringe benefit. But let me restate that the whole purpose of these programs is to determine whether industrial child care saves us money in the areas of hiring, training, absenteeism, tardiness and attitude.*<sup>76</sup>

In another study on workplace daycare, the Bureau of Municipal Research canvassed the Board of Trade of Metropolitan Toronto. It discovered that the board's planning and urban affairs committee was primarily concerned with improving effectiveness and efficiency of daycare. For example, the committee thought that child/staff ratios should be re-examined and increased if no "adverse consequences" resulted; that rather than create additional daycare centres, spaces should be purchased in private homes; and that daycare should not be an employer's responsibility.<sup>77</sup>

Proponents of quality daycare for children are alarmed at such statements. They feel that where money and profit are the central concerns, the quality of care suffers. Those who propose universal daycare would eliminate public funding of commercial centres altogether. It is their view that commercial centres cannot maintain the quality of care required for adequate daycare. The need to make a profit, they feel, results in low wages for underqualified daycare workers, high turnover rates, and poor care for children.

The quality of service in commercial daycare has been questioned by politicians as well,<sup>78</sup> as more American commercial chain operations move into Canada.<sup>79</sup>

Whatever the fears of daycare advocates, the commercial centres are fulfilling a need for daycare and are a financial success. They provide an alternative and less expensive source of daycare for middle-income parents who want their children in group-care facilities but can neither afford the rates nor gain access to non-profit centres. More government-regulated spaces are needed merely to catch up with existing need. In 1975, Phillip Hepworth reported that the deficiency of daycare facilities was enormous. At that time, there was an immediate demand for more than 200,000 full-time daycare spaces.<sup>80</sup>

In Quebec there exists only one space in daycare centres for every 10 children up to 6 years of age who require them. Over the past seven years an average of 1,400 new spaces were created annually, but the need is for 3,600 new spaces annually. In the year 1981-82, more spaces were developed in commercial centres (244) than in non-profit centres (400). In 1982-83 no government funds were earmarked for development of new spaces and inadequate funding for existing spaces has caused many centres to shut down.<sup>81</sup>

## VI. COSTS

Costs of daycare range widely, depending on the type of service selected. Daycare is offered as private non-profit, profit, public, and cooperative ventures. There are full-day, part-time, after-school, and drop-in services. Depending on which province the daycare is located, subsidies may be available to defray operating costs, but subsidies and standards do not apply to the private, informal childcare arrangements.

In 1970, the operational costs for good daycare in a group centre amounted to approximately \$4.60 per child per day.<sup>82</sup>



Today, these costs range from \$30 to \$56 per child per day. Clearly costs are rising much faster than the salaries of working parents. An attempt will be made here to give a sampling of the costs of a variety of services currently available.

### 1. The Non-Profit Centre Example

The University of Calgary Day Care Centre is a non-profit centre offering a high quality daycare service. Licensed daycare centres in Alberta are entitled to claim a monthly operating allowance for each child who attends for a minimum of 84 hours during the month. The amount of the allowance varies according to the age of the child. As of September, 1983, the actual cost of providing daycare per child per month to the daycare centre and the parent cost was as follows:

| Age of Child          | Actual Cost Per Month | Provincial Government Operating Grants Available to All | Cost to Parent |
|-----------------------|-----------------------|---------------------------------------------------------|----------------|
| 0 - 18 months         | \$565.00              | \$257.00                                                | \$308          |
| 19 months - 35 months | \$439.00              | \$131.00                                                | \$308          |
| 3 - 4 years           | \$386.50              | \$ 78.50                                                | \$308          |
| 5 years               | \$373.00              | \$ 65.00                                                | \$308          |

Lighting, heating, and security are provided free of charge by the university, as are the record and bookkeeping tasks. Use of the premises is provided rent free.

### 2. The Commercial Centre Example

The Kindercare chain of daycare centres in the Calgary area charges parents \$250 to \$275 per month for daycare depending on the age of the child. This is \$33 to \$58 less per month than parents pay at the university daycare. The Kindercare centres are licensed, so they receive the same subsidies as the university centre. Unlike the university centre, the Kindercare centres must pay utilities and property costs.

Fifteen workers are employed at the university centre to care for 65 children. This ratio conforms to the Alberta minimum standards, which are also met by the Kindercare centres. The commercial centres, in addition to offering significantly lower fees, are also making profits. In 1981, shareholders in the Kindercare chain were paid an estimated 87 cents per share dividend.<sup>63</sup> The university centre does not make a profit and operates on a balanced budget.

The major difference between the university centre and the private centre is in wages paid to employees. Kindercare pays its staff on an hourly basis, the range being \$4.35 to \$6 per hour, or \$696 to \$960 per month. Within this range are two overlapping pay scales for junior and senior workers. No formal training is required for employment, but on-the-job training is provided. The employer also has a training incentive program, which pays 50 per cent of the cost of further education in an early childhood care program leading to a certificate or diploma. Once a certificate or diploma is achieved, the employee automatically moves into the higher wage scale.<sup>64</sup>

The wage scale at the university, on the other hand, ranges from \$1,100 per month for junior inexperienced personnel to \$1,940 per month for senior program supervisors. At the university centre, all employees must be qualified daycare workers or have experience in the field and be in the process of achieving accreditation. As might be expected, the staff at the university centre tends to be stable and the majority of employees are in the experienced or senior category, whereas the commercial centre has a high turnover rate and most workers are at the junior level.

As continuity of care is a very important part of a high-quality program, it is difficult to maintain high standards with poor wages. In 1979, a study conducted in Toronto revealed that a turnover rate of 50 per cent existed in city daycare centres.<sup>65</sup>

### 3. Non-Profit Workplace Daycare in Ontario

Even though the cost at the University of Calgary centre is significantly higher when compared to the cost at the Kindercare centre, it is moderate when compared to other non-profit centres in Ontario. A recent study by the Women's Bureau on non-profit workplace daycare revealed that costs to parents ranged from \$220 per month to \$420 per month.<sup>66</sup> All of the eight centres surveyed expected operating costs to be covered by fees. Many of the employers provided non-refundable capital funding and some contributed toward maintenance, renovations, and rent, though contributions by employers do not seem to have any correlation on the fees payable by the parents. For example, the Mutual Life Assurance Company in Waterloo, Ontario, opened a centre in 1982. Operating costs are paid by fees. Capital costs were originally paid by the company, but they are to be repaid by the daycare centre over the next few years. The daycare centre is also responsible for maintenance and rent as well as salaries and food. The fees are currently \$60 per week or \$240 per month and were expected to increase in 1984 to \$65 per week or \$260 per month.

Sunburst Children's Center, at Environment Canada in Downsview, Ontario, on the other hand, requires that day-to-day operations, salaries, and equipment be paid by user fees but received a grant of \$12,000 to cover initial equipment cost and free renovations. The facility is rent-free and maintenance is free, yet the fees range from \$287.04 per month to \$351.68 per month, depending on the age of the child.

The most expensive centre in the survey is the Sunnybrook Crèche in Toronto. Grants and an interest-free loan provided start-up costs, and the crèche is self-supporting, as all operating costs are paid by user fees and donations. The fees range from \$300 per month to \$420 per month, depending on the child's age. These fees are significantly higher than those at the University of Calgary, and yet the university salaries of daycare workers were high when compared to other provincial averages, which range from a low of \$677 per month in P.E.I. to \$883 in Nova Scotia.

### 4. Informal Arrangements

Informal in-home care is not subsidized by any level of government. The cost for typical informal or home-care arrangements in Calgary ranges from being free to an average of \$200 per month or \$2,400 annually.<sup>67</sup> A more formalized arrangement with a live-in babysitter will cost from about \$469 to \$700 per month, plus room and board.<sup>68</sup> This salary

is based on a 45-hour week with two weeks' paid vacation and all statutory holidays. The babysitter must also have a private room. Agencies charge placement fees ranging from \$250 to \$600 and usually provide a guarantee, which can range from two months to one year.

Parents who hire a worker to come into their homes to provide daycare cannot deduct his/her salary as a cost of doing business—as other employers can. Rather, they are restricted to the childcare deduction. This inequity in allowable deductions is an issue that should be addressed in addition to the other reforms suggested under the *Income Tax Act*.

### 5. Cost Consequences

Many working parents find the assessed fees at group centres or the cost of a live-in sitter to be prohibitive. Daycare fees often amount to more than the cost of tuition at most major colleges and universities. As a result, parents often choose inferior daycare or babysitting arrangements. Costs are kept low at poor-quality daycare centres by paying low or minimum wages, by hiring unqualified personnel without offering in-service or further education incentives, and by purchasing inferior food and equipment for the children. Researchers have found that informal babysitting arrangements are often mediocre, neglectful, and abusive.<sup>90</sup> The children of parents able to afford the higher costs of the better daycare, on the other hand, enjoy the advantages of continuity of care because of low staff turnover, superior educational opportunities because of professionally trained staff and high quality equipment, and nutritionally superior nourishment because of better meals.

In 1982, licensed daycare centres in Canada provided only 90,000 spaces for children of working mothers,<sup>91</sup> yet more than 3,000,000<sup>92</sup> preschool and school-aged children in Canada require alternative care arrangements while their parents work. In other words, licensed, supervised care is available to only 3 per cent of the children even though research indicates most parents prefer group daycare to other kinds of childcare arrangements.<sup>93</sup>

## VII. EQUALITY ISSUES\*

It is clear from the previous discussion regarding government tax deductions, tax credits and family allowance that the availability of good quality daycare in Canada is very uneven. Government assistance, rather than supporting the concept of universal, good quality daycare for all children, supports the concept of good daycare for children of the very poor or the wealthy. The children of families in lower-middle- and middle-income brackets are losers in the current funding and tax system.

It is also apparent that those parents who do not have access or who cannot afford daycare for their children are disadvantaged in terms of equality of opportunity on the job, compared to those who do not have children requiring care. The question to be dealt with in this section is, when the employer is government, are there remedies in human rights statutes to overcome these inequities?

### 1. The Charter of Rights and Freedoms and Affirmative Action

The possibility that the *Charter of Rights and Freedoms* can be used to compel a government employer to provide

childcare for employees with children in order that their income from employment and opportunity to compete for positions may be brought to a level equal to that of employees without children is a question that must be addressed in considering potential forms of legal action available to a plaintiff who feels inequality of treatment in the workplace.

What it means "to provide childcare" is unclear but it may conceivably take the form of providing grants to allow employees to place children in established childcare centres, of establishing childcare centres for employees, or of any other scheme appropriate to the circumstances. The discussion is confined to government employers, since the Charter does not cover private activity.

Major obstacles to using the Charter in this manner are as follows:

- 1) Identifying an "action" that has been undertaken by the government or the legislature which is in breach of the Charter.
- 2) Establishing that people with children are an identifiable group whose rights are guaranteed by the Charter, and establishing that because of membership in this group, individuals have been discriminated against.
- 3) Establishing that the Charter grants the courts the power to provide the remedy of compelling government employers to provide childcare and, assuming such a remedy is technically available, persuading the court to exercise its discretion to use it.

The conclusion here is that the Charter is most likely not the most effective tool at this time to compel government employers to provide childcare to employees.

### a) Jurisdiction and Application (Sections 52 and 32(1))

The most serious problems in compelling government to provide daycare to its employees via the Charter are jurisdictional. Section 52(1) states as follows:

*The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.*

Section 32(1) states:

*This Charter applies*

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

The Charter acts as a limitation on the power of legislative bodies. Statutes enacted that are contrary to the Charter are *ultra vires* and invalid. The problem that arises in forcing employers to provide daycare on the basis of the Charter is that no law has been passed that effectively denies parents the right to childcare. There is no statute in effect that could be said to contravene the Charter. The denial of access to childcare results from a failure to act.

\* This section was prepared with the assistance of Lise Costa, Barrister and Solicitor, Legal Department, City of Calgary.

Some hope might be found in the opinions of major constitutional commentators who would interpret the Charter as applying not only to formalized laws, but perhaps also to administrative action, and even to certain government policies. Peter Hogg makes the following comments on section 32(1):

...any body exercising statutory authority, for example, the Governor in Council or Lieutenant Governor in Council, ministers, officials, municipalities, school boards, universities, administrative tribunals and police officers, is also bound by the Charter. Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority. That is the way in which limitations on statutory authority imposed by ss. 91 and 92 of the B.N.A. Act (and other distribution-of-powers rules) work. There is no reason to treat limitations on statutory authority imposed by the Charter any differently.<sup>93</sup>

Katherine Swinton states as follows:

Does the Charter apply to the area of "quasi-law"—directives of the Commissioner of Penitentiaries regarding inmate discipline, the internal policy manuals of the Immigration Department, the terms and conditions of employment or other contracts imposed by a government department? It might be argued that all such forms of governmental activity are swept within the Charter, whether or not authorized by formalized regulations or legislation. Indeed, in my submission that is the correct conclusion. Section 32(1) expressly states that the Charter refers to "matters within the authority of Parliament", not just to laws or regulations. This suggests that the courts should focus on the issue of whether there is governmental activity, in deciding whether the Charter applies, rather than focussing on the form thereof.<sup>94</sup>

If these interpretations of the applicability of the Charter are accepted by the courts, the government could conceivably be attacked on the basis of its internal policy of not providing childcare for its employees, assuming that a formal policy on this matter could be said to exist. If, as Swinton argues, no "formalized regulations or legislation" need exist before government action can be attacked via the Charter, it might be possible to use, for example, the *Public Service Employment Act*<sup>95</sup> to force the federal government to state a policy on the provision of childcare. This legislation provides for the establishment of a Public Service Commission whose duties include (section 5(a)) appointing qualified persons to or from within the Public Service. Section 12(2)<sup>96</sup> states as follows:

*The Commission, in prescribing or applying selection standards under subsection (1), shall not discriminate against any person by reason of sex, race, national origin, colour, religion, marital status or age.*

Section 21 provides:

*Where a person is appointed or is about to be appointed under this Act and the selection of the person for appointment was made from within the Public Service*

*(a) by closed competition, every unsuccessful candidate, or*

*(b) without competition, every person whose opportunity for advancement, in the opinion of the Commission, has been prejudicially affected,*

*may, within such period as the Commission prescribes, appeal against the appointment to a board established by the Commission to conduct an inquiry at which the person appealing and the deputy head concerned, or their representatives, are given an opportunity of being heard, and upon being notified of the board's decision on the inquiry the Commission shall,*

*(c) if the appointment has been made, confirm or revoke the appointment, or*

*(d) if the appointment has not been made, make or not make the appointment,*

*accordingly as the decision of the board requires. (1966-67, c. 71, s. 21.)*

If an opportunity for advancement within the public service were to become available for which a female public servant was qualified, but of which she was unable to take advantage because it involved, for example, relocating to an area in which childcare was not available, she could appeal to the Commission on the basis that failure on the part of the government to provide childcare was discrimination on the basis of sex contrary to section 12(2) of the *Public Service Employment Act*. This could force the Commission to make a pronouncement of government policy not to provide daycare for employees. A door would then be open to an argument based on the Charter.

The above example, however, is based on a very narrow fact pattern and the problem exists that the Commission would first have to accept that failure to provide childcare was discrimination on the basis of sex before it would be necessary to make a pronouncement of government policy. The possibility that the Charter could be made to apply to the type of action contemplated by this paper is very dubious unless some other "legislative hook" were to be found.

#### **b) The Equality Provisions (Sections 15 and 28)**

Assuming that, through an argument such as the one outlined above, the problem of the applicability of the Charter could be overcome, the next step would be to establish that some right or freedom guaranteed by the Charter had been infringed.

Since failure to provide adequate and subsidized childcare adversely affects so many more women than men, it would be possible to argue that this amounts to "discrimination on



the basis of sex". Full-time working women in Canada earn 58 cents for every dollar earned by men. Two-thirds of all minimum wage earners in Canada are women.<sup>97</sup> In the U.S. (presumably these statistics would approximately reflect the Canadian situation) in 1978, nearly two-thirds of working women were single, widowed, divorced, or separated, or their husbands earned less than \$10,000 per year. One out of every seven families was headed by a woman. In 1978, 53 per cent of mothers of children under 18 worked.<sup>98</sup> One out of every seven families, or 8.2 million families, are headed by divorced, separated, widowed, or unmarried women, while 1.6 million families are headed by single men.<sup>99</sup>

When combined with the prevalent social notion that women have the primary responsibility for childcare in our society,<sup>100</sup> it becomes obvious that one of the major obstacles to women achieving economic parity with men in Canada is lack of available, flexible, and subsidized childcare.

Alternatively, it could be argued that, although not a category enumerated in section 15, discrimination on the basis of "family status" nevertheless violates the Charter. According to Hogg:<sup>101</sup>

*Section 15 enumerates a number of grounds of discrimination . . . but it makes it clear that these grounds are not exhaustive, so that laws discriminating on other inadmissible grounds (for example height, sexual preference) would also be in violation of s. 15.*

An argument based on one of the enumerated grounds would, however, for reasons outlined below, likely be stronger (see discussion on the American "levels of scrutiny" *infra*).

It would also be necessary to show that one of the "equalities" guaranteed by section 15(1) has been denied. Section 15(1) provides that:

*Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.*

Section 28 provides:

*Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.*

Because section 15 of the Charter does not come into force until 1985, it is impossible to predict exactly how the equality provisions will be interpreted by the courts. Nevertheless, it is useful to consider some cases decided on section 1(b) of the Canadian Bill of Rights. This section referred only to "the right of the individual to equality before the law and the protection of the law". In *Regina v. Drybones*<sup>102</sup> the phrase "equality before the law" was interpreted by Mr. Justice Ritchie as follows:

*...I think that s. 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of the opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something*

*which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.*<sup>103</sup>

In *Bliss v. A.G. Canada*<sup>104</sup> a pregnant woman had worked eight weeks, long enough to apply for regular unemployment benefits, but not long enough to qualify for special maternity benefits. She was denied any benefits at all on the basis that she was not available for work. She alleged that this provision of the *Unemployment Insurance Act* contravened the "equality before the law" provision of the Bill of Rights. In the Supreme Court of Canada, Ritchie, J. held as follows:

*...There is a wide difference between legislation which treats one section of the population more harshly than all others by reason of race as in the case of R. v. Drybones (1969), 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355, [1970] S.C.R. 282, and legislation providing additional benefits to one class of women, specifying the conditions which entitle a claimant to such benefits and defining a period during which no benefits are available. The one case involves the imposition of a penalty on a racial group to which other citizens are not subjected; the other involves a definition of the qualifications required for entitlement to benefits . . .*<sup>105</sup>

W.S. Tarnopolsky argues that this interpretation implies a distinction between "equality before the law" or "equal protection of the law", and "equal benefit of the law". This gap, according to Tarnopolsky, has been closed by the inclusion of the "equal benefit of the law" provision in the Charter.<sup>106</sup>

Another major test applied by the Court in *Bliss* in deciding the "equality before the law" clause had not been contravened was the "valid federal objective" test formulated by the Supreme Court of Canada in *Regina v. Burnshine*.<sup>107</sup> This test was outlined by Martland, J. in *Prata v. Minister of Manpower and Immigration*:

*...this Court has held that s. 1(b) of the Canadian Bill of Rights does not require that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective.*<sup>108</sup>

This test implies that, equality provisions aside, legislation may still be valid if it pursues a "valid federal objective". The test was elaborated by McIntyre, J. in *McKay v. The Queen* as follows:

*...[the] question which must be resolved in each case is whether such inequality as may be created by legislation affecting a special class — here the military — is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective.*

*...whether any inequality has been created . . . rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive to the provisions of the*

*Canadian Bill of Rights, and whether it is a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective . . .*<sup>109</sup>

Although Hogg feels that this test will still be applicable to the interpretation of sections 15 and 1 of the Charter,<sup>110</sup> Tarnopolsky posits the argument that this test will no longer be sufficient for section 15(1) of the Charter, even though section 1 does provide for "reasonable limitations". He contends that what are acceptable legislative distinctions should be decided in a manner similar to that used by U.S. courts in cases relating to the 14th Amendment.

The U.S. courts have defined three levels of scrutiny in considering whether a law is discriminatory: strict, intermediate, and minimal. The first is applied to cases that involve "inherently suspect categories" which are those based on race, religion, or nationality. When one of these classifications is involved "close judicial scrutiny" must be applied and proof must be advanced that the classification was for an "overriding state interest" which could not be accomplished in a less harmful way.

The intermediate scrutiny test requires "an important governmental objective" that is "substantially related to the achievement of those objectives".

The minimal scrutiny test applies where no inherently suspect class or fundamental constitutional right is involved. The classifications are usually made for economic or social reasons, and the onus is on the person challenging the legislation to show that the classification chosen did not have a rational relationship to the object of the legislation.

Tarnopolsky argues as follows:

*Applying this American experience to the Canadian situation one could suggest the following. The inclusion in section 15(1) of four equality clauses must have been intended to cover all possible interactions between citizens and the law, not just for protection, but for benefit as well. Since section 15(1) now lists a number of grounds upon which these clauses are to be interpreted and applied, without discrimination, and since section 28 guarantees the rights and freedoms in the Charter equally to male and female persons "notwithstanding anything in this Charter", the listed grounds must now be considered "inherently suspect" and subject to "strict judicial scrutiny".<sup>111</sup>*

He goes on to state that in the case of legislation not based on distinctions enunciated in section 15(1), particularly legislation having an economic or social purpose, the courts should defer to legislative opinion unless the challenger can show that "there is no rational relationship between the means and ends chosen and valid legislative activity".

Since section 15 is not yet in effect it is not possible to know how broadly the courts will interpret the equality provisions. However, in view of the fact that four equality clauses have been included, which as Tarnopolsky argues "must have been intended to cover all possible interactions between citizens and the law, not just for protection, but for benefit as well", it is almost certain that some degree of broadening of the interpretations enunciated in the Bill of Rights cases will be involved. The following points will have to

be made in arguing that inadequate childcare constitutes discrimination on the basis of sex:

- 1) Women as a group are more prejudiced by inadequate daycare than any other group. Hence failure to make adequate daycare available is "discrimination on the basis of sex".
- 2) In its policy of not providing childcare to employees in need of it, the government is denying to these employees "equal benefit of the law".
- 3) In order to overcome the "valid federal objective test" it must be shown that the policy is "arbitrary, capricious, or unnecessary" rather than "rationally based and acceptable as a necessary variation from the general principle of universal application of law to meet special conditions and to attain a necessary and desirable social objective".

If Tarnopolsky's suggested "strict scrutiny test" is accepted, it will have to be shown by the government that the policy exists for an "overriding state interest" which cannot be accomplished in a less prejudicial manner.

### c) Remedies

Section 15(2) would serve to protect any program to institute childcare that the court might compel from attack under the Charter. However, it does not empower the courts to compel such a program as a remedy.

Section 15(2) provides:

*Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

It is possible, however, that the power could be found in section 24(1), which provides as follows:

*Anyone whose rights or freedoms as guaranteed by the Charter have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.*

Hogg suggests that this section is so broadly worded that:

*... a court which is competent as to subject matter and parties is probably not confined to remedies which are within its usual jurisdiction; the section itself confers the authority to grant an appropriate remedy ....*

*The remedy authorized by section 24(1) is "such remedy as the court considers appropriate and just in the circumstances". This could no doubt include damages, injunctions, declarations and prerogative remedies such as mandamus, prohibition, certiorari and habeas corpus. As suggested in the previous paragraph, it is probable that the court could grant remedies which were not within its usual jurisdiction. Conceivably, totally new remedies could be invented. In any event, a court of general equitable jurisdiction can tailor the injunction to meet new situations, as is illustrated by the development since 1954 of the civil rights injunction to enforce the*

provisions of the Bill of Rights in the United States (Fiss, *The Civil Rights Injunction* (1978)).<sup>112</sup>

Even if this section were interpreted by the courts as giving them the power to invent "totally new remedies", including one that in effect compels a government to institute a program, it must still be remembered that all remedies are discretionary. In a discussion of the relationship between section 27, which protects Canada's multicultural heritage, and section 15, Tarnopolsky creates a scenario where a claim for grants for cultural activities equal to those given to the two "founding peoples" is made by another ethno-cultural group, on the basis that it is entitled to "equal benefit of the law". In a situation such as this, Tarnopolsky finds it "impossible to envisage a court being prepared to order a government as to whether such money should be spent and how much should be expended in total".

In attempting to convince a court that the power to order mandatory affirmative action programs exists and should be used, it could be argued on the basis of the *Canadian Human Rights Act*<sup>113</sup> that such a remedy would not be out of the ambit of the intent of the legislature in granting wide powers of relief to the courts in section 24(1).

Section 41(2)(a) of the *Human Rights Act* provides as follows:

*If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:*

*(a) that such person cease such discriminatory practice and, in consultation with the Commission on the general purposes thereof, take measures, including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future...*

Section 15(1) states:

*It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status or physical handicap of members of that group, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.*

By virtue of section 63(1), the *Human Rights Act* is binding on Her Majesty in right of Canada.

Thus, the federal Human Rights Commission is expressly given the right to compel the institution of an "affirmative action" program where discrimination has occurred. The legislature obviously believes that such a remedy is a valid and effective means of rectifying discrimination.

#### d) Conclusion

The obstacles to using the Charter to compel the provision of childcare seem to be overwhelming. The first hurdle is to make the Charter apply at all when, except for the very narrow possibility outlined above, no law is in place that can be attacked. Secondly, it is uncertain whether a court would accept the argument that failure to provide childcare is discrimination on the basis of sex, on the grounds that not all women have children, and having a child may be viewed by the court as a voluntary assumption of responsibility. Also, the phrase "equal benefit of the law" has never been interpreted in Canada and it is not certain that its interpretation will be sufficiently more broad than in Bill of Rights equality cases to allow success in a case of this nature. The valid government object test in one form or another will also have to be faced.

Finally, the courts, although they may be found to have the power to institute the remedy of a mandatory daycare program, may be very reluctant to use such a new and powerful tool.

Overall, it is to be expected that the courts will exercise some degree of caution in interpreting the new Charter, and there appear to be too many areas in the type of action contemplated above that involve legally tenuous or fairly radical arguments for such an action to be successful.

## 2. Affirmative Action through Human Rights Legislation<sup>114</sup>

In the discussion above the remedy contemplated, compelling the government to provide daycare, fell short of a full-fledged "affirmative action program". Affirmative action has been discussed by the Affirmative Action Division of Employment and Immigration Canada:

*...a comprehensive plan is an action strategy designed to ensure equality of opportunity at all employment levels and to provide for the implementation of those special measures necessary to ensure equality of results, given the specific conditions existing in the company. The measure of successful implementation of an affirmative action plan is the achievement of goals expressed as changes in the composition at all levels of the company's labour force.*

The term "systemic discrimination" refers to discrimination that is not intentional; it doesn't stem from ill-will on the part of the employer or a "pattern of unequal treatment" of potential employees. Rather, it results where "despite the equal application of an employment practice there is a disparate impact on certain groups of workers (such as women) and this impact cannot be related to job performance or the safe and efficient operation of the workplace".<sup>115</sup> Systemic discrimination was first recognized as a concept by the U.S. Supreme Court in *Griggs v. Duke Power Company*,<sup>116</sup> where it was held that practices that restrict opportunities of minorities are discriminatory unless they can be justified by business necessity, even if all employees or potential employees are treated in the same way.

Since the *Griggs* case, numerous decisions have been rendered in Canada that recognize that discrimination need not be intentional or the result of ill-will in order to contravene



human rights legislation.<sup>117</sup> The Federal Court of Appeal in *CNR v. Canadian Human Rights Commission and K.S. Bhinder*,<sup>118</sup> however, has recently held that section 10 of the *Canadian Human Rights Act* is not broad enough to cover the effects of systemic, or indirect, discrimination. Section 10 reads as follows:

*It is a discriminatory practice for an employer or an employee organization*

*(a) to establish or pursue a policy or practice, or*

*(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.*

Section 703(a)(2) of the 1964 *Civil Rights Act* of the U.S., upon which *Griggs*, *supra*, was decided, reads much the same as section 10, except that the words "or otherwise adversely affect" are added after "deprives or tends to deprive". The lack of these words in section 10, according to the Federal Court of Appeal, means that *Griggs* loses its persuasive value, and section 10 cannot, unlike its American counterpart, be interpreted to cover situations where discrimination has not been intentional. Le Dain, J., in a strong dissenting judgement in *Bhinder*, found that section 10 would cover systemic discrimination. This case is currently under appeal to the Supreme Court of Canada, where, in light of some fairly recent decisions by that court, it is believed to have a good chance of being overturned. In *Athabasca Tribal Council v. Amoco Canada*<sup>119</sup> the matter in question was an affirmative action program that the Tribal Council sought to have the Energy Resources Conservation Board impose as a condition of its approval of a tar sands project. Ritchie, J., speaking for Laskin, C.J., and Dickson and McIntyre, J.J., held *inter alia* that such an affirmative action program would not contravene Alberta's *Individual Rights Protection Act*<sup>120</sup> (which prior to this case contained no provision allowing affirmative action programs). The court held that if the preamble to the Act, which included the words "all persons are equal in dignity and rights", was to have meaning and significance, the statute should not be read in such a way as to have the opposite effect. The measures proposed in the affirmative action program did not discriminate against other inhabitants. By a pronouncement such as this, the Supreme Court of Canada can be interpreted as having some sympathy to the notion of systemic discrimination.

The following components of an affirmative action program as outlined by the Montreal Association of Women and the Law<sup>121</sup> are assumed in federal government policy to be necessary elements in an affirmative action program.<sup>122</sup>

1. **Equal Opportunity Measures** — These are permanent changes to a company's employment system that involve a commitment to refrain from any overt discriminatory practices such as wage differentials between men and women performing the same job.
2. **Remedial Measures** — These refer to any action designed to redress past discrimination by providing

specific benefits such as special training programs for women.

3. **Support Measures** — These permanent measures alleviate an employment problem specifically affecting the group whose situation the company wishes to improve. For example, in the case of women, it might mean setting up a childcare program at the company locale.
4. **Goals and Timetables** — Goals are program objectives expressed in numerical terms, providing a target toward which to aim. Timetables outline when and what results are expected.

Experience has shown that simply declaring a group that has traditionally been the object of systemic discrimination "equal" and going no further is not sufficient to rectify the situation. What is required seems to be a "systemic remedy", such as the implementation of affirmative action programs. Although all of the provinces except Newfoundland and Quebec have enacted human rights legislation that permits affirmative action programs (Bill 86, which would allow these programs, is before the Quebec legislature), there is little indication that employers have taken advantage of these provisions to implement voluntary programs.<sup>123</sup> What is required is some means of compelling employers to implement affirmative action programs.

The *Canadian Human Rights Act* 1977,<sup>124</sup> as outlined above, specifically allows affirmative action programs as a remedy. So do the human rights legislation of Saskatchewan<sup>125</sup> and Quebec<sup>126</sup> (assuming Bill 86 is approved). This remedy has never been applied. However, in *Action Travail des Femmes v. Canadian National Railway*, which was heard in May of 1982, the Action Travail des Femmes of Montreal applied to a Human Rights Tribunal for an order imposing an affirmative action program on the Canadian National Railway. This case will undoubtedly set a precedent in the use of this remedy. If the remedy is granted, it is suggested that in future this will be the most effective means of correcting systemic discrimination against women. Human rights legislation, unlike the Charter, is applicable to the private as well as to the public sector, and it is in the former that willingness to institute voluntary affirmative action programs is most lacking. In addition, human rights legislation does not require, as does the Charter, that a law be in effect that can be struck down. What is required is to show that a discriminatory situation exists which requires rectification.

It would not be necessary under human rights legislation to apply for a full "affirmative action" program as a remedy. The remedy sought might be the institution of a "special program, plan, or arrangement" in the form of daycare facilities alone (see *Canadian Human Rights Act* section 41(2)(a)).

### 3. Striking Down Existing Childcare Legislation

The albeit somewhat negative alternative also exists that the Charter could be used to strike down existing provincial childcare legislation in the hopes that it would be replaced with a scheme that would more fully meet the needs of working women. In Alberta, for example, a single working mother earning less than \$1,100 per month can receive an income subsidy for daycare. As a result of the subsidy, she would pay a maximum of \$45 per month for daycare for preschool-

aged children, regardless of the number of children in daycare. The subsidy works on a sliding scale and anyone earning over \$1,440 net per month would receive no income subsidy for daycare. The average cost to parents not receiving an income subsidy for daycare is in the area of \$200 to \$300 per month. However, the actual cost of daycare is closer to \$600 per child. The difference in cost is made up by an operating allowance granted to licensed daycares pursuant to the *Social Care Facilities Licensing Act*<sup>127</sup> of Alberta.

The effect to the legislation is that parents having good incomes who can afford to place their children in daycare receive a government subsidy for the difference between what they pay and the actual cost of daycare. However, for those who earn over \$1,440 per month, too much to qualify for the income subsidy yet not enough to afford to pay the difference between per capita subsidies and actual cost, this subsidy is not available. These people are often forced to make such arrangements as placing their children with neighbours, relatives, or other babysitters. Studies show these children more often than not receive a poorer quality of care than they would have in a licensed daycare.

The possibilities exist that the *Social Care Facilities Licensing Act* could be attacked as unconstitutional. It could be argued on behalf of the children that as the result of their parents' economic situation they are being discriminated against in not receiving the same subsidy from the government as children of families with higher incomes.

In this type of argument, the Charter appears clearly to be applicable, since a provincial law favouring one group unfairly would be attacked. Although it would not be possible to fit these children into a class enumerated by section 15(1), the classes enumerated are not exhaustive (see Section VI of this paper) and discrimination on any unacceptable grounds may still contravene the Charter. The class may only be subject to the equivalent of "minimal scrutiny test" but, even so, it would be possible to argue that the results of the legislation passed have no rational connection with the purpose of the legislation, if this purpose was presumed to be to keep the cost of daycare to the parent down in order that those who are in need will be able to benefit from it.

Also, in this scenario, no special remedy is being sought other than to strike down the law as contravening the Charter. This would have the effect of forcing the provincial government to address the issue of childcare, and the door would be open to lobbying for more equitable access or universal provision of daycare for all parents.

The disadvantage of this course of action is that it is a negative measure and may have the effect of undoing the good that stems from the legislation in question. In effect what is being said is that if a certain group cannot have subsidized childcare then no group should have it.

In conclusion, it is submitted that of the alternatives considered in this paper, the positive and comprehensive method of forcing governments to implement affirmative action programs, including the "support measure" of providing childcare through human rights legislation, is the one most likely to be effective in improving the situation of the working woman.

Finally, the value of lobbying for legislative change in the area of daycare should not be forgotten. It was through this means that paid maternity leave was finally implemented

through the *Unemployment Insurance Act*<sup>128</sup> in 1971. Although the means by which women are provided maternity leave could be improved, the government has been made, in a great part through the Royal Commission on the Status of Women and the Action Committee on the Status of Women, to recognize that such a system is necessary in our society. Women should not be treated unfairly because they bear the primary burden for child bearing and child raising. Ultimately, all of society benefits from mentally and physically healthy children. The next logical step from providing an income for a pregnant woman is to provide her with the means to care for her child once it is born, without unduly prejudicing her income and chances for career advancement in the process.

### VIII. CONCLUSION AND RECOMMENDATIONS

Daycare involves three very important functions, all of which must be considered when provision of the service, in any of its many forms, is contemplated. The three interlocking functions are social service, educational, and economic.<sup>129</sup> When one or more of these functions is ignored, the provision of the service is, very often, seriously deficient.

The social service aspect of daycare recognizes the public interest and requires that socially acceptable standards be observed in the care of children. Minimum standards for licensing group daycare centres are legislated across Canada and offer a basic level of protection for children. Where their needs have not been officially addressed, however, is in the private, informal care arrangements the majority of working parents in Canada choose for their children.

The educational function of daycare requires that the qualification and training of daycare workers be of a high standard and that the equipment and care have educational value. It also requires continuity in employment of care-givers. This function is often given a lesser priority than the social services function by commercial and informal care-givers. It results from an emphasis being placed on custodial care rather than on the developmental aspects of childcare.

The economic functions of daycare must address two sets of needs: those of the parents and those of the economy. Clearly, parents benefit from working. Even those whose income is small and who receive little economic benefit benefit in terms of self-respect. The benefit or contribution of working parents to the economy must also be considered.

It is apparent that lack of adequate daycare has not kept women from working. On the contrary, women are in the workforce in greater numbers than ever.

The question of whether or not working women (the prime nurturers of children) could contribute more to the economy if daycare better served their needs seems to be answered in the affirmative whenever the issue is examined. Lack of flexible, high-quality care for children is a barrier to advancement and opportunity in the workplace for the parent(s) without it because they cannot fully participate in activities that could allow them to advance or obtain better jobs.

Balanced against the contribution or potential contribution of working parents of children in daycare, the cost to society of providing the services must be considered. Cost-benefit studies of daycare in Canada are lacking, but even if they were available it is doubtful whether a study could reflect the personal, psychological, and political factors that have a bearing on the issue. Certainly in economic terms, the cost of

good daycare is high, but if these services did not exist, it is unlikely society would experience an economic gain. Without daycare, the economy would lose the contribution of the working parents and costs of social assistance would go up. Another benefit factor difficult to measure is the preventive social service and education function that good daycare provides, which can best be regarded as an investment in the future.

Universal, free, government-sponsored daycare is an attractive solution to the daycare problems in Canada. However, it is not a realistic alternative in the current economic climate in this writer's view. Consequently, the next best alternative must be pursued, which is the involvement of all the stakeholders in adequate daycare making a contribution towards its implementation and operation. Governments, employers, union representatives, and parents must collaborate to establish a framework of goals which reflect benefits and services of adequate daycare and remove barriers to equality for women and segregation by socio-economic groups for children.

This process should be entered into voluntarily, but the government should employ persuasive techniques such as greater tax incentives to employers to encourage participation in provision of daycare and equitable universal subsidies to allow more parents access to quality care at lower prices. Government should also make employer-assisted childcare a non-taxable benefit for employees, and at the same time adjust the tax credit system by increasing the tax credit for lower income parents. Money for this scheme could be obtained by abolishing the normal tax deduction for children as long as they are of daycare or after-school-care age. An

alternative to adjusting the tax credit system and abolishing normal deductions for children is to increase the value of deductions for children as income decreases. This would have the same effect of assisting those in the lower income brackets by giving them more disposable income.

Government should also take on the responsibility of disseminating accurate information about the availability, cost, and quality of daycare so that parents could make intelligent decisions when choosing daycare for their children.

The concept of shared responsibility for children's care between father and mother should be reflected in any new legislation. Commercial daycare and informal babysitting arrangements, although filling an important need, should not be encouraged through tax concessions or subsidies unless a higher standard can be guaranteed through either prerequisite controls or through contract compliance where applicable. Compliance with high standards could also be achieved through a program of government assurances on loans for start-up costs.

Employers should be encouraged to explore ideas such as part-time work and job-sharing, the four-day work week, flexible work hours, and extended parental leave to reduce demand for daycare services.

If a multi-faceted approach is adopted, a continual evaluation procedure must be established to ensure adaptiveness to changing needs of all concerned. By approaching the daycare issue this way, the diverse needs of working parents and organizations that employ them are recognized as well as the social, economic, and political uncertainties of the present time.



## NOTES

1. Employment and Immigration Canada, *Skills, The New National Training Act: Overview*, Ottawa, 1981, p. 4.
2. Canadian Advisory Council on the Status of Women, *As Things Stand: Ten Years of Recommendations*, Ottawa, CACSW, 1983.
3. For a discussion of this thesis see P. Bradshaw-Camball, "Current Treatment of Work and Family: Is There a Relationship?" Paper presented at the ASAC Conference, University of Ottawa, Ontario, 1982.
4. Reva Landau, "Parental Leave—A Comparative Study", *Women in the Workforce: Affirmative Action and Parental Benefits*, Sourcebook, 1983, p. 67.
5. Masaru Ibuka, *Kindergarten is Too Late*, Sphere Books Ltd., London, 1979.
6. See also Benjamin S. Bloom, *Stability and Change in Human Characteristics*, New York, John Wiley and Sons, Inc., 1968, p. 68, and W. Fowler, "A Developmental Learning Approach to Infant Care in a Group Setting," *Merrill-Palmer Quarterly*, Vol. 18, No. 2, 1972; p. 145-175.
7. Canadian Pediatric Society, *Standard for Child Development Programs Including Day Care Centre and Family Day Home*, 1974. Available through Dr. V. Marchessault, Executive Secretary, Canadian Pediatric Society, Université de Sherbrooke, Quebec.
8. Polly Hill, *An Overview of the Needs of Children and Youth in the Urban Community*, CMHC, NHA 5106, Ottawa, 1980, p. 1.
9. L.C. Johnson, *Who Cares? A Report of the Project Child Survey of Parents and Their Child Care Arrangements*, Community Day Care Coalition and the Social Planning Council of Metro Toronto, 1977.
10. *Supra*, note 4, p. 95.
11. *Ibid.*, p. 97. The Human Resources Network, a private consulting firm in Philadelphia, studied this question and found that only a small proportion of mothers' decisions to enter the workforce are based on the adequacy or inadequacy of organized daycare. They concluded that in the United States, lack of organized daycare has not proved to be the barrier to working women it was once thought to be. See *World of Work Report*, Vol. 2, Number 2, February 1977, p. 20. But see also a contrary view in *Working Mothers and Their Child Care Arrangements*, 1973, Canada Department of Labour.
12. Howard Clifford, *Status of Day Care in Canada, 1977: A Review of the Major Findings of the National Day Care Study 1977*, National Day Care Information Centre, Health and Welfare Canada, p. 1.
13. Stephen Chadima et al., *Children and Pre-school: Options for Federal Support*, Congressional Budget Office, Congress of the United States, September 1978, p. 43-51.
14. Board of Directors, University Day Care Society, *A Proposal for University Day Care Center Expansion*, 1982, unpublished.
15. Stanislaw Judek, *Women in the Public Service, Their Utilization and Employment*, Canada Department of Labour, December 1967, at p. 90.
16. See Henry Melvin Hart and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, tentative edition. Cambridge, Mass. 1958.
17. *Ibid.*, p. 876. The authors cite the example of post-World War II fliers wanting to use surplus government planes to carry air freight. Years of delay passed and eventually forced many of the applicants out of business while the Civil Aeronautics Board tried to decide whether or not the proposal was consistent with "public interest, convenience and necessity" required as a prerequisite.
18. These problems are discussed in more detail in Section VII, *infra*.
19. *Supra*, note 16, p. 881.
20. *The Day Care Kit*, Day Care Research Group, 1982, 48 Boustead St., Toronto.
21. David Millar, "Day Care Standards of Care and Accessibility", *Perception*, Sept./Oct. 1982, p. 14.
22. Costs are discussed in more detail in Section VI, *infra*.
23. These calculations are based on the difference in tax payable if no deduction for childcare expenses were permitted, and the tax payable where a \$2,000 deduction is permitted.
24. M. Krashinsky, *Day Care and Public Policy in Ontario*, Ontario Economic Council Research Studies, University of Toronto Press, 1977.
25. M. Lueck, A.C. Orr, and M. O'Connell, *Trends in Child Care Arrangement of Working Mothers*, Current Population Reports, Series P-23, No. 117, 1982.
26. Royal Commission on the Status of Women in Canada, *Report*, Department of Supply and Services, Ottawa, 1970, p. 302.
27. Women's Bureau, Labour Canada, *Maternity and Child Care Benefits in Canada*, Government of Canada Publication, 1983.
28. Directive Governing Leave for Family Responsibilities. Published October 22, 1981. Transmittal Letter 520-2, 525-2. Published in Personnel Management Manual Treasury Board, Government of Canada.
29. *Supra*, note 4, p. 61.
30. For example, see *Athabasca Tribal Council v. Amoco Canada*, [1981] S.C.R. 699 and discussion at Section VI, subsection 2, *infra*.
31. *Supra*, note 26.
32. The benefits and drawbacks of commercial daycare are discussed in Section V, *infra*.
33. See Section VI on costs, *infra*.
34. See Sections V and VI, *infra*.
35. For example, see Ontario Federation of Labour, *Day Care Deadline 1990*, a brief to the Government of Ontario on the Future of Daycare Service in Ontario by the Ontario Coalition for Better Day Care, 1981. The coalition is made up of 18 groups.
36. It has long been accepted that society has both the right and the responsibility to step in to assist a child if his/her parents are unable or unwilling to provide proper care and protection. This is reflected in criminal as well as child welfare legislation.
37. *Supra*, note 35, p. 3.
38. In Ontario, some half-day nursery schools receive a subsidy and the federal government, through Manpower and Immigration and other levels of government, has funded some parent-and-child drop-in centres.
39. Other advantages cited are: changing needs of growing children could be easily accommodated in a neighbourhood centre without relocating children; centres involving parental participation create a much healthier environment for children than those that don't; the centre would be cost efficient because it would coordinate and minimize many tasks currently replicated in different locations; the centre would upgrade and lend prestige to daycare service, thus generally raising daycare standards; opportunities for staff development would lower turnover rates; centres would facilitate monitoring of standards; recording problems of childhood problems would be facilitated, thus ensuring ongoing support services. These are listed by Jane Bertrand and Susan Colley in a Discussion Paper prepared for the NAC Social Services Committee at p. 12.
40. Bertrand and Colley, *ibid.*, p. 19.
41. "Day Care in the Worst of Times", *The Globe and Mail*, October 11, 1982.
42. Ontario Advisory Council on Day Care, *Final Report*, January, 1976, Ministry of Community and Social Services, p. 25.
43. The U.S. Department of Labor in Washington, D.C., did this.
44. Bureau of Municipal Research, *Work Related Day Care—Helping to Close the Gap*, Civic Affairs, 1981, September, p. 18.
45. For example, the KLI Child Development Center, Cambridge, Mass., The Broadcasters Child Development Center in Washington, D.C., and the Northside Child Development Center in Minneapolis.
46. However, the idea of workplace daycare is not. The earliest crèches and nurseries operated in Canada in the late 19th century in order to enable women to work in domestic and other menial jobs, and again were prevalent in wartime when a female labour force was required for war-time production. They disappeared, however, when the men returned from the war and women were once again relegated to the home.
47. The Workplace Day Care Resource Group, *Children at Work: An Inventory of Work-Related Day Care in Canada*, Social Planning Council of Metropolitan Toronto, 1982.
48. *Ibid.* Educational institutions were not included in the survey, but other studies show that on-site centres are very common.
49. These projects have been placed "on hold" with the downturn in the economy. However, all the plans have been quite extensively developed and are ready to go ahead when the employers perceive it is economically feasible for them to do so.
50. Social Planning Council, *100,000 Children: Alternatives for Service Delivery*, a Report of the Project Child Care Policy Task Force, November, 1979, p. 2.
51. *Supra*, note 44, p. 15.

52. For detailed examples of workplace daycare see *The Workplace Day Care Resource Group*, *supra*, note 47.
53. Results of a 1978 survey by the Women's Bureau, U.S. Department of Labor, *Child Care Centers Sponsored by Employers and Labour Unions in the United States*, 1980, pp. 2-8.
54. See Women's Bureau, Ontario Ministry of Labour, *Inventory of Workplace Day Care*, July, 1983.
55. *Supra*, note 53.
56. Substantially the same results can be found in "The Realities and Fantasies of Industry Related Child Care", proceedings of a Symposium, The University of Colorado Medical Center, Denver, Colorado, May 21, 1973.
57. AT&T: *Two Experimental Day Care Centers that Closed*, World of Work Report, Work in America Institute, Inc., New York, February, 1977.
58. "The Impact of Child Care on Employee Absenteeism, Turnover and Productivity", Proceedings of a Symposium, The University of Colorado Medical Center, Denver, Colorado, May 21, 1973.
59. *Ibid.*, p. 57.
60. Portions of this section were prepared with the assistance of Professor Catherine Brown, Faculty of Law, University of Calgary. For a more extensive discussion, see "Tax Planned Executive Compensation Packages for Women" in *Women, the Law and the Economy*, Pask, Mahoney, and Brown, eds., Butterworths, March, 1985.
61. There is an argument that daycare services could qualify as a non-taxable benefit. This is discussed later in this section.
62. All figures are approximate and based on 1983 deductions.
63. These figures are based on combined federal and provincial tax in Alberta.
64. The clause reads as follows:  
  
*The employer shall pay to each employee who has one or more children under the age of nine a total of \$30.00 each month to help defray the cost of child care. These sums shall be added to the employee's monthly pay.*  
  
*Nothing in the above provision shall give the employer the right to discriminate against job applicants because of the number of dependants they may have.*
65. [1969] Tax A.B.C. 1; 69 DTC 81; Also No. 713, 24 Tax A.B.C. 228; 60 DCT 333; [1971] Tax A.B.C. 74; 71 DTC 41.
66. See, "Company Day Care Can Pay Dividends", *The Financial Post*, July 25, 1981, p. 20.
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## A FEDERAL CONTRACT COMPLIANCE PROGRAM FOR EQUAL EMPLOYMENT OPPORTUNITIES

Marilyn Leitman

### Sommaire

L'étude décrit les conséquences constitutionnelles, législatives et administratives de l'adoption d'un programme fédéral d'obligation contractuelle visant à faire respecter l'égalité en matière d'emploi. On distingue entre l'obligation contractuelle à l'égard des droits de la personne et celle à l'égard de l'action positive, laquelle est décrite eu égard aux autres initiatives que le gouvernement fédéral pourrait adopter pour favoriser l'action positive. Le respect de l'obligation contractuelle est intéressant parce qu'il permet au gouvernement fédéral d'étendre son champ de compétence aux employeurs régis par les gouvernements provinciaux, d'adopter des solutions et d'imposer des sanctions particulières.

L'étude aborde les questions constitutionnelles que pose l'adoption d'un programme visant à faire respecter l'obligation contractuelle par les employeurs provinciaux, mais aucune conclusion n'est tirée. Bien que les difficultés constitutionnelles puissent être évitées en adoptant le programme sans avoir recours à la loi, il serait préférable, voire capital, que l'obligation contractuelle soit imposée par la législation.

Il y a une possibilité de chevauchement et d'incompatibilité entre les programmes fédéral et provinciaux, et entre un programme fédéral d'obligation contractuelle et les dispositions actuelles de la *Loi canadienne sur les droits de la personne*. Quoiqu'il y ait moyen de réduire ces problèmes, ils sont inévitables dans une certaine mesure.

L'étude traite également des solutions possibles, des modalités d'application et des secteurs qui seraient assujettis à l'obligation contractuelle. On prend en exemple ce qui se fait aux États-Unis afin de souligner les avantages et les inconvénients de chaque formule.

En conclusion, l'auteur analyse les problèmes qu'il faudrait résoudre si un programme fédéral d'obligation contractuelle était mis en œuvre. On ne peut toutefois répondre à la question de savoir si un tel programme doit être mis en œuvre, sans tout d'abord parler de sa teneur.

### Summary

This paper discusses the constitutional, procedural, and administrative ramifications of a federal contract compliance program for equal opportunity in employment. Human rights contract compliance is distinguished from affirmative action contract compliance, and the latter is described in the context of other initiatives that the federal government could take to foster affirmative action. The particular appeal of contract compliance is that it permits the federal government to extend its jurisdictional reach to provincially regulated employers, and that it allows for unique sanctions and remedies.

The constitutional questions raised by a federal contract compliance program covering provincially regulated employers are canvassed, although no firm conclusions are drawn. While the constitutional problems could be sidestepped by implementing the program without a legislative base, a legislative base is preferable, if not essential.

There is potential for overlap and inconsistency between federal and provincial schemes, and between a federal contract compliance program and the existing administration under the *Canadian Human Rights Act*. While efforts could be made to minimize these problems, it is suggested that they could not be completely avoided.

Remedies, enforcement, and coverage options are also considered. The American experience is drawn on in an effort to point out advantages and drawbacks of each option.

The paper ends with a brief discussion of the problems to be solved if a federal contract compliance program is to be implemented. The decision as to whether or not such a program should be implemented, however, cannot be answered without reference to the substantive content of the program.





# A FEDERAL CONTRACT COMPLIANCE PROGRAM FOR EQUAL EMPLOYMENT OPPORTUNITIES

Marilyn Leitman\*

## 1. INTRODUCTION

### A. The Two Options

Contract compliance is a tool to achieve objectives. It works by obliging contractors to comply with certain terms in their contracts. Breach of these terms could give rise either to negotiated settlement or to enforcement proceedings, remedies, and sanctions. In the context of equality in employment, the federal government could undertake one or both of two kinds of contract compliance:

1) Human Rights Contract Compliance. This would involve obliging employers who enter into contracts with the federal government to abide by the anti-discrimination, or human rights, provisions in the *Canadian Human Rights Act*.<sup>1</sup> Human rights contract compliance is contemplated by section 19 of that Act:

*19. The Governor in Council may make regulations respecting the terms and conditions to be included in or applicable to any contract, licence or grant made or granted by Her Majesty in right of Canada providing for*

*(a) the prohibition of discriminatory practices described in sections 5 to 13; and*

*(b) the resolution, by the procedure set out in Part III, of complaints of discriminatory practices contrary to such terms and conditions.*

No regulations have been passed pursuant to the above section. The result of regulations implementing section 19 would be that provincially regulated corporations doing business with the federal government, and not now subject to the *Canadian Human Rights Act*, would have to comply with sections 5 to 13 in addition to relevant provincial law. The application of the *Canadian Human Rights Act* would thereby be extended.

The human rights or anti-discrimination provisions in sections 5 to 13 of the Act, then, would be terms of contracts let by the federal government. Sections 5 and 6 deal with the provision of goods, services, facilities, or accommodation customarily available to the public and with the provision of commercial premises or residential accommodation; section 12 deals with the publication of discriminatory notices and signs; and section 13 deals with hate messages.

Sections 7 through 11 are related to employment. Section 7 prohibits discrimination in employment on a prohibited ground. Section 8 proscribes employment application forms, advertisements, and inquiries that imply a limitation, specification, or preference based on a prohibited ground. Section

9 prohibits discriminatory practices within employee organizations. Section 10 prohibits employer and employee organization behaviour "that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination." Section 11 provides for equal pay for work of equal value. The prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, marital status, conviction for which a pardon has been granted, and, in matters related to employment, physical handicap: section 3. As will be discussed, a federal human rights contract compliance program could include remedies and sanctions not contemplated by section 19. In that case, the program might also include employers already subject to the *Canadian Human Rights Act*.

2) Affirmative Action Contract Compliance. This would involve imposing an obligation to undertake affirmative action on employers doing business with the federal government. The program could cover contractors subject to exclusive federal legislative jurisdiction with respect to employment and discrimination (and therefore subject to the *Canadian Human Rights Act*), and contractors subject to exclusive provincial legislative jurisdiction with respect to employment and discrimination (and, accordingly, subject to the relevant provincial human rights legislation).

### B. A Framework for Discussion

The distinction between avoiding adverse impact or systemic discrimination and undertaking affirmative action is not a crisp one. The employer who seriously undertakes not to discriminate on a systemic basis is forced to a review and overhaul of employment systems not unlike the process of affirmative action. In theory, a human rights contract compliance program that concentrated on systemic discrimination would share a lot with an affirmative action contract compliance program, albeit the former would be prohibitive in tone and the latter prescriptive. In this sense, the two approaches overlap, and could be pursued together.

However, human rights contract compliance involves not only the prohibition of impact discrimination, but also the prohibition of intentional and individual discrimination. It incorporates the standards of human rights legislation, and with these an emphasis on complaint investigation and individual remedies. The next section of this paper raises issues specific to human rights contract compliance. The rest of the paper is directed to affirmative action contract compliance, though many of the issues, problems, and resolutions related to affirmative action contract compliance are also relevant to human rights contract compliance.

## 2. HUMAN RIGHTS CONTRACT COMPLIANCE

in considering federal human rights contract compliance applied to provincially regulated employers, it is obvious that

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the anti-discrimination provisions of the *Canadian Human Rights Act* would be to a great extent redundant to those found in provincial human rights legislation.

One possible advantage of proceeding under the federal legislation with respect to a matter covered by provincial legislation would be the power of a federal tribunal to impose affirmative action on a corporation found to have discriminated: paragraph 41(2)(a). However, to duplicate proceedings in the absence of additional substantive protection against discrimination would seem both wasteful and unfair.

The focus of a human rights contract compliance program, then, could be on kinds of protection provided by the *Canadian Human Rights Act* that are not consistently provided for in human rights legislation in other jurisdictions in Canada. For the purposes of discrimination in employment, these include age, offences for which a pardon has been granted, disability, and equal pay for work of equal value. For the purposes of the mandate of the Commission on Equality in Employment, the relevant areas are physical disability (covered by every jurisdiction except the Yukon) and equal pay for work of equal value (covered only by federal and Quebec legislation, though all jurisdictions prohibit wage discrimination to some degree).

Another way in which the *Canadian Human Rights Act* might go beyond most provincial legislation has to do with adverse impact or systemic discrimination. Section 10 of the Act was formerly thought to cover systemic discrimination. It prohibits the establishment or pursuit of a policy or practice "that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination". However, the majority of the Federal Court of Appeal, in *Canadian National Railway Co. v. K.S. Bhinder*,<sup>2</sup> recently held that intent to discriminate is a necessary element of a violation of section 10. This decision is now on appeal to the Supreme Court of Canada. One would hope that section 10 would be amended if the Federal Court of Appeal decision is upheld.

Assuming that the *Canadian Human Rights Act* will prohibit impact discrimination, whether as a result of judicial interpretation of section 10 or as a result of legislative amendment, a federal human rights contract compliance program would cover impact discrimination. If this were the case, the federal program might involve itself in complaints where the prohibited ground of discrimination (e.g., race, sex) was addressed by provincial legislation.

Even if a federal human rights contract compliance program was restricted with respect to impact discrimination to grounds not covered by the relevant provincial legislation, there could be some areas of overlap in federal and provincial proceedings. For example, a provincial proceeding for equal pay for similar work might not preclude a federal proceeding for equal pay for work of equal value. Overlap can arise in two ways: the factual investigation may cover the same area, and the remedies sought may be the same or similar. While human rights commissions and tribunals could exercise discretion to minimize duplication, it may be expected that some will in fact occur.<sup>3</sup>

The administration of the program would not have to be very different from the existing administration under the *Canadian Human Rights Act*. There would be additional administrative costs as a result of investigating the additional

complaints. As well, there would be some additional administrative costs to the various federal contracting authorities related to placement of the human rights terms in federal contracts. Contracting corporations might hike their bids somewhat, to reflect their costs of compliance, particularly with respect to equal pay for work of equal value. To the extent that the program included a monitoring function, appropriate resources would be required.

From the point of view of business, the costs of compliance with the higher standard would be a concern. Another concern would be the possibility of proceedings in both provincial and federal forums.

It is fair to assume that a federal human rights contract compliance program would be the subject of some significant provincial objections and would give rise to a constitutional challenge.<sup>4</sup> The program would deal with the very matters addressed by human rights legislation. Even though the program might avoid grounds covered by provincial legislation, the imposition of additional prohibited grounds on provincially regulated corporations would be perceived by some as unwarranted.

This discussion of federal human rights contract compliance has focused on its application to provincially regulated corporations, as a method of extending the reach of the *Canadian Human Rights Act*. It is also possible to include federally regulated corporations, which are already subject to the *Canadian Human Rights Act*, in the program. The purpose would be to supplement the remedies or sanctions available for breach of the human rights provisions in the Act.

With respect to federally regulated corporations, problems of constitutionality and federal-provincial relations do not arise. As well, the problem of overlapping programs would arise only if administration of the contract compliance program was not coordinated with, or consolidated with, the Canadian Human Rights Commission. In the context of human rights contract compliance, coordination should not prove difficult. As will be discussed in section 6, this issue is more complex in connection with affirmative action contract compliance.

### 3. CONTRACT COMPLIANCE AS AN OPTION TO PROMOTE AFFIRMATIVE ACTION

Affirmative action can be described as a series of positive measures, or a program, undertaken by employers to encourage the fuller participation of members of particular groups in employment. This description of affirmative action is intentionally general, and no attempt is made in this paper to discuss what the particulars of affirmative action plans pursuant to a federal contract compliance program might be. Affirmative action might operate differently in different industries and corporations. More significantly, affirmative action can mean very different kinds of measures and programs, depending on the strategy and policies favoured.

There are at least seven methods by which the federal government might foster corporate affirmative action:

- a) mandatory affirmative action for federally regulated employers;
- b) mandatory affirmative action for crown corporations, insofar as federal jurisdiction permits;
- c) affirmative action contract compliance for federally regulated employers;

- d) affirmative action contract compliance both for provincially and federally regulated employers;
- e) affirmative action contract incentives;
- f) affirmative action imposed following a finding of discrimination under human rights legislation; and
- g) voluntary affirmative action, assisted by federal government resources.

These methods may be used individually or in combination.

The power to impose affirmative action obligations following a finding of discrimination under the *Canadian Human Rights Act* is provided for in paragraph 41(2)(a) of the Act, though this provision has not yet been used. The Canada Employment and Immigration Commission administers a voluntary affirmative action program; it has met with remarkably little success. The other options have yet to be tried in any systematic way.

The option of universal mandatory affirmative action is not available to the federal government because of the division of constitutional powers. This division of powers dictates an important feature of affirmative action in Canada: any approach will necessarily be piecemeal. The second factor that limits, or shapes, the federal approach to affirmative action has to do with policy considerations.

The rationale for any government-sponsored affirmative action program is that government believes affirmative action to be *right*, in that it serves to remove unjust barriers to employment opportunities. The choice as among programs has to do with balancing the costs of the particular program against its looked-for benefits, and with the state of our knowledge about the feasibility and effectiveness of particular programs. Any affirmative action program will provide experience that may indicate the desirability of extending the program, or of taking a different approach altogether.

The federal government's options differ in degrees of intervention and in comprehensiveness. Employers covered by mandatory affirmative action could not do, or refrain from doing, anything that would sidestep the requirements of the relevant legislation. Contract incentives and voluntary affirmative action are the least interventionist of the options. Mandatory affirmative action under federal legislation would affect only federally regulated corporations, as would affirmative action imposed following a finding of discrimination. Since under this latter option affirmative action obligations would arise only if the corporation's employment practices were found to be discriminatory, it can be considered not wholly unilateral.

Contract compliance is voluntary in the sense that corporations would be free to choose not to contract with the federal government. However, the exercise of this freedom would be quite impractical for many federal contractors. Nonetheless, it is possible that an affirmative action contract compliance program would be politically more palatable than federal legislation of general application requiring affirmative action. It is easier to justify.

Some corporations would in fact choose not to contract with the federal government, in order to avoid affirmative action obligations. It would be left to the corporations to calculate whether the costs of compliance were worth incurring. Then, proponents of contract compliance can argue that, as a matter of policy, it is reasonable to demand a particularly

high standard from persons dealing with government property. While legislation of general application may demand that all subjects meet certain minimum requirements, government may insist on special efforts when parting with public funds.

Affirmative action contract compliance appears to fit the ideology of free enterprise more comfortably than does legislating a general requirement of affirmative action. Granted that federal government contractual power is extensive, contractual power is not unique to government. All parties are free to exercise whatever contractual powers they have, within the limits of law and public policy. Legislative intervention in the private sector tends to be presumed bad, unless shown to be warranted. The use of contractual power, on the other hand, tends to be presumed fine, unless shown to be unwarranted.

Contract incentives are a very light style of government intervention and can easily be incorporated into a contract compliance scheme. Incentives could be provided as an award for particularly good performance, or they could be worked into the negotiating process. Extra consideration might be given to bids that include an exceptionally good affirmative action plan,<sup>5</sup> or extra measures might be inserted into plans in exchange for favourable terms in other parts of the agreement.

If affirmative action contract compliance is implemented without other corporate affirmative action initiatives by the federal government, contractors might view this as unfair. The government might be seen as lacking the courage of its convictions, particularly if it refrains from requiring affirmative action of federally regulated crown corporations. In this context, it is relevant that the federal government has committed itself to affirmative action in the public sector.

Mandatory affirmative action for all federally regulated employers could also provide a framework for an affirmative action contract compliance program directed at provincially regulated employers. As well, the option of imposing affirmative action following a finding of discrimination could be complementary to contract compliance. It would be necessary to control for overlap between the contract compliance program and initiatives taken under human rights legislation. On the other hand, a contract compliance program could establish an atmosphere in which provisions for affirmative action under the *Canadian Human Rights Act* would be used. Paragraph 41(2)(a) of the Act provides:

*41(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated...it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:*

- (a) that such person cease such discriminatory practice and, in consultation with the Commission on the general purposes thereof, take measures, including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future;*

Section 15(1) is as follows:



15(1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status or physical handicap of members of that group, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

The threat of imposed affirmative action under paragraph 41(2)(a) of the *Canadian Human Rights Act* could be a powerful reason for employers covered by that Act to adopt affirmative action plans, provided the provision were used with some degree of vigour and the Act prohibited impact discrimination.

Contract compliance is not an option to be chosen as against the other options. Rather, it complements and is complemented by other affirmative action options open to the federal government. It may be more acceptable than legislation of general application imposing affirmative action, and is far more forceful than a purely voluntary approach. It is a mechanism whereby the federal government could extend its reach beyond employers over whom it has legislative jurisdiction with respect to employment and discrimination. In addition, the sanctions that contract compliance permits, debarment in particular, are likely to be very effective.

#### 4. CONSTITUTIONAL ISSUES

##### A. Legal Basis of a Contract Compliance Program

This section of the paper attempts to identify the constitutional issues relevant to a legislated federal contract compliance program. It should be noted that the division of powers in the *Constitution Act, 1867* relates to legislative powers only. Accordingly, if the federal government were to institute a contract compliance program without a legislative base, the constitutional problems discussed below would not arise. However, legislation is preferable in view of the complexity of the program and the extent to which it would affect rights. A program based on Cabinet directives and administrative policy would offer no assurance against frequent, or even arbitrary, rule changes, and no guarantee of due process. If a contract compliance program is to survive changes in government, or even in senior administrative personnel, it should have parliamentary sanction.

A contract compliance program would intervene in the conduct of business in a significant way. However meritorious that intervention might be, there should be a fair means of challenging it. This could not be done in the absence of public and relatively permanent rules. It is submitted that administrative directives would not be either as public or as permanent as legislation and regulations. Even if administrative policy were fairly public and stable, in the absence of a legislative base, challenge of governmental action by judicial review would be extremely difficult.

Another reason legislation is preferable has to do with the limits of contracts. While it may be possible to provide for dispute resolution mechanisms and procedures by contract, to do so raises a myriad of problems, including designation

of an arbitrator, powers of the arbitrator, and appeals and judicial review of the arbitration decision. Provision for remedies and sanctions by contract is also problematic. The common law rules of contract, including rules associated with specific performance, penalty clauses, and third-party benefits, would have to be closely examined, with a view to determining what legislative modification of these rules would be required, within the limits of federal legislative jurisdiction. Even if the necessary legislative modifications of contract law were effected, a contract compliance program without a clear and express legislative base would be cumbersome.

It is submitted that a contractual base should only be considered if future judicial rulings make a legislative base impossible. In that event, careful consideration would have to be given to the particular problems, just discussed, posed by implementation by contract.

##### B. Division of Powers and the Spending Power

By virtue of section 92(12) of the *Constitution Act, 1867*, the provinces have exclusive legislative jurisdiction with respect to "Property and Civil Rights", a head of legislative power that has been interpreted as including matters of employment and discrimination.<sup>5</sup> Any federal legislation touching on these matters must draw its constitutional validity from its relation to one of the enumerated heads of power in section 91 of the *Constitution Act, 1867* or from Parliament's legislative jurisdiction in relation to "peace, order and good government", from the opening paragraph of section 91.<sup>7</sup> Federal legislative jurisdiction over employment and discrimination with respect to employees of the Crown in right of Canada, employees of federal crown corporations, and employees who are employed "upon or in connection with the operation of any federal work, undertaking or business", is discussed by Tarnopolsky.<sup>8</sup>

However, a federally legislated contract compliance program meant to include within its scope corporations otherwise exclusively regulated by provincial law with respect to employment and discrimination raises a distinct set of questions. These have not yet been fully considered by the courts, and the discussion that follows accordingly does not draw firm conclusions. It should be emphasized that constitutional validity would likely depend on the terms of actual legislation.

Section 91(1A) gives Parliament exclusive legislative jurisdiction over "The Public Debt and Property", referred to as the "spending power". It is this power that must be looked to in support of a legislated federal contract compliance program:

*The Parliament of Canada has power under s.91(1A) to legislate in relation to its own debt and property. It can spend money which it has raised through a proper exercise of its taxing power. It can impose conditions on the disposition of such funds while they are still in its hands. It has used this power to make federal grants-in-aid, which are subject to compliance with conditions that the Parliament of Canada has prescribed.*

As Kerwin, J., said in *Reference re Employment and Social Insurance Act*, [1936] S.C.R. 427 at p.457, (1936), 3 D.L.R. 644 at p.669:

*"It is quite true that Parliament, by properly framed legislation may raise money by taxation*

and dispose of its public property in any manner that it sees fit. As to the latter point, it is evident that the Dominion may grant sums of money to individuals or organizations and that the gift may be accompanied by such restrictions and conditions as Parliament may see fit to enact. It would then be open to the proposed recipient to decline the gift or accept it subject to such conditions."<sup>9</sup>

As discussed in the Introduction to this paper, section 19 of the *Canadian Human Rights Act* authorizes regulations to implement human rights contract compliance. With respect to the constitutional validity of section 19, Tarnopolsky states:

*It is quite clear that section 19 is essentially a valid expression of the federal power over "Public Debt and Property".*<sup>10</sup>

He bases his opinion on *R. v. Baert Construction Ltd.*<sup>11</sup> and *Construction Montcalm Inc. v. Commission du Salaire Minimum*.<sup>12</sup> Both of these cases discussed the *Fair Wages and Hours of Labour Act*,<sup>13</sup> which prescribes certain minimum employment standards on contractors doing business with the federal government. The issue in these two cases was whether an otherwise provincially regulated federal contractor had to comply with provincial legislation relating to minimum wages, given that the contractor was governed by the *Fair Wages and Hours of Labour Act*. The courts held that the contractors were subject to provincial legislation regarding minimum wages, and that this did not conflict with their obligations arising from the federal statute.

It should be pointed out, however, that the constitutional validity of the *Fair Wages and Hours of Labour Act* was not specifically addressed in either the *Baert* or *Construction Montcalm* cases. Accordingly, while there is reason to suppose that federal legislation providing for contract compliance with respect to provincially regulated employers would be considered valid, the matter is not entirely free from doubt.

Assuming Parliament does have jurisdiction to pass legislation requiring contractors to abide by certain human rights or affirmative action conditions, a question arises as to whether Parliament can pass legislation to provide for special remedies and enforcement procedures. Tarnopolsky's statement, above, that section 19 of the *Canadian Human Rights Act* is "essentially a valid expression of the federal power over 'Public Debt and Property'",<sup>14</sup> implies that his answer is in the affirmative: section 19 contemplates the use of the enforcement procedures and remedies of Part III of the Act.

In support of this conclusion, *Rhine v. R.* suggests that Parliament could alter contractual rights as part of an otherwise valid statutory scheme:

*It should hardly be necessary to add that "contract" or other legal institutions, such as "tort" cannot be invariably attributed to sole provincial legislative regulation or be deemed to be, as common law, solely matters of provincial law.*<sup>15</sup>

A more specific question arises as to whether the federal government could pass legislation providing for relief to

employees who are injured by breach of their employers' federal contract compliance obligations. In this connection, *MacDonald et al. v. Vapour Canada*<sup>16</sup> and *Rcois Construction Inc. v. Quebec Ready Mix Inc.*<sup>17</sup> may be relevant. These cases involved attempts by the federal government to provide civil causes of action in respect of criminal acts. The attempts were declared *ultra vires*. These cases could be distinguished from the case at hand: they did not involve the spending power; and a civil remedy, it might be argued, would be to the purpose of a contract compliance program. Moreover, that remedy could be pursued in the context of an administrative proceeding, rather than in the courts.

The applicability of these two cases notwithstanding, however, legislation providing for employee relief would differ from enforcement procedures and remedies that run directly between the federal government and the contractor. It is possible that the courts would not see employee relief as being on a continuum with such mechanisms as termination of contracts or debarment of contractors. A remedy that is provided to a party other than the federal government might not be considered necessarily incidental to the government's exercise of the spending power.

A constitutional question also arises with respect to the granting of enforcement powers under a contract compliance program to an administrative tribunal. Any proposal by the federal government to assign to an administrative tribunal the jurisdiction to decide questions of a nature that courts ordinarily decide, such as entitlement of individual employees or the federal government to damages for breach of a contractual term, specific performance of a contract, and the like, could well give rise to a challenge based on section 96 of the *Constitution Act, 1867*. That section, which on its face provides only that the federal government (through the Governor General) appoint the judges of the superior, county, and district courts of the provinces of Canada, has been interpreted by the Supreme Court of Canada as a constitutional safeguard against attempts by governments to strip away the jurisdiction of those courts. In other words, to give a new authority (that is, not one of the courts mentioned in section 96) powers that have belonged to a federally appointed court since Confederation is to attempt to create a superior or county court without complying with section 96, and so the attempt is unconstitutional.<sup>18</sup>

Formerly it was thought that section 96 was an impediment only to the provinces and that it did not prevent the federal Parliament from assigning jurisdiction to decide questions to any tribunal it chose. Recently, however, the Supreme Court of Canada forcefully stated that section 96 is a constitutional roadblock to Parliament as well:

*Parliament can no more give away federal constitutional powers than a province can usurp them. Section 96 provides that "the Governor General shall appoint the judges of the superior, district, and county courts in each province". The proposal here is that Parliament transfer the present superior courts' jurisdiction to try indictable offences to a provincial court. The effect of this proposal would be to deprive the Governor General of his power under s.96 to appoint the judges who try indictable offences in New Brunswick. That is contrary to s.96.*

*Section 96 bars Parliament from altering the constitutional scheme envisaged by the judicature sections of the Constitution Act 1982 just as it does the provinces from doing so.*<sup>19</sup>

The conferral of adjudicative functions on a non-section 96 tribunal is nevertheless valid if the judicial powers of the tribunal form part of a larger context in which the tribunal is charged with policy and administrative responsibilities. The thinking behind this appears to be that the tribunal is not a court in the sense of section 96, even with its judicial powers, because of the overall picture within which those powers are exercised.<sup>20</sup> Accordingly, it is unlikely that section 96 would prove an obstacle, provided the policy and administrative context was clear.

### C. Potential Conflicts Between Provincial and Federal Legislation

The final constitutional issue to be addressed relates to the applicability of the doctrine of paramountcy in the event that valid federal legislation implementing contract compliance were to conflict with valid provincial legislation. As reflected in the *Construction Montcalm* case, the mere existence of federal and provincial legislation covering the same ground does not constitute a conflict: where possible, both will stand.<sup>21</sup> However, in the case of direct conflict, the rule is that "provincial enactments or orders will be inoperative to the extent that they conflict with federal enactments or orders".<sup>22</sup>

Tarnopolsky considers that the usual rule might apply to a federal contract compliance enactment in conflict with a provincial enactment:

*Even though the employment relationships of enterprises which are not "federal works, undertakings, services or businesses" are within the jurisdiction of the provinces, when they are engaged in fulfilling contracts with the federal government on federal Crown property, it would appear that provincial legislation will be applicable to them only to the extent that it does not conflict with applicable federal legislation. In other words, there may be some argument that where the federal legislation applies a higher standard and, presumably, where the provincial legislation is in direct conflict, then the federal will prevail.*<sup>23</sup>

However, it might conceivably be argued that conditions imposed on employers as a result of their decisions to contract with the federal government should not be viewed as sufficient to displace provincial enactments.

In any event, it is worth considering what would be involved in a conflict between a valid federal contract compliance statute and valid provincial legislation. Tarnopolsky addressed this issue and concluded that the potential for conflict would be minimal:

*Since all the anti-discrimination legislation in Canada is very similar, both as to protected classification of individuals and as to the type of activity or facility concerned, it is difficult to see where conflict could arise. It is true that some categories of people are covered by the federal Act and not by some provincial Acts, or vice versa, but that alone does not constitute a conflict. If the federal Act covers a group*

*which a provincial Act does not, that is not conflict, and again the reverse would be true. The only area where there might possibly be conflict would be between the adoption of a "special programme" which might be ordered by a Tribunal, pursuant to section 41(2)(a) of the Canadian Human Rights Act on the one hand and, on the other, those few provinces which do not yet have provision for such "special programmes".*<sup>24</sup>

The potential conflict between a special program (affirmative action) ordered by a federal human right tribunal and a provincial statute that does not provide for such programs was dealt with in *Athabasca Tribal Council and the Energy Resources Conservation Board v. A.G. Alberta*.<sup>25</sup> In that case, though it was not necessary to the determination of the appeal, four judges of the Supreme Court of Canada considered whether an affirmative action program would be in violation of Alberta's *The Individual's Rights Protection Act*.<sup>26</sup> At that time the Alberta statute did not specifically provide for approvals of affirmative action plans.<sup>27</sup> Ritchie J., with Laskin C.J. and Dickson and McIntyre J.J. concurring, concluded that an affirmative action program based on racial criteria would not be in breach of the Alberta Act.<sup>28</sup> Ritchie J. rejected the "reverse discrimination" theory, stating:

*The purpose of the plan as I understand it is not to displace non-Indians from their employment, but rather to advance the lot of the Indians so that they may be in a competitive position to obtain employment without regard to the handicaps which their race has inherited.*<sup>29</sup>

Mr. Justice Morrow, dissenting in the Court of Appeal, is quoted by Ritchie, J. with approval as follows:

*Of particular significance in my opinion is the use of the words "all persons are equal in dignity and rights without regard to race". If those high sounding words have any meaning and significance at all, surely one cannot read the statute in a way to result in or have the effect of reaching the very opposite effect to the declared purpose.*<sup>30</sup>

The other five judges on the Supreme Court of Canada bench did not deal with this issue, so that it cannot be regarded as settled law that affirmative action programs may be consistent with anti-discrimination legislation. As well, the validity of a particular program might well turn on its particular content, and on the wording of the relevant statute.

The only Canadian jurisdictions that still do not provide at all for special programs are the Yukon and Newfoundland.<sup>31</sup> A potentially more difficult problem is posed by the various provisions that allow for special programs, insofar as these may conflict with a federal program. Such conflict could occur in two ways: 1) provincial legislation or regulations may require approval of affirmative action plans, and that approval might not be given with respect to a plan within the federal program; and 2) provincial legislation or regulations may provide for certain conditions or priorities to be included in a plan, which conditions or priorities may be inconsistent with the federal program. Provincial and territorial provisions dealing with affirmative action plans are set out in the Appendix.

If the paramountcy rule applies to these conflicts, the federal legislation would override the provincial legislation. If, however, the paramountcy rule is not applicable, the federal



legislation could place federal contractors at risk of violating one or another legislative scheme. One solution would be for the federal government to defer in case of actual conflict: it should be noted that the above situations of conflict may never, or only rarely, actually arise. Another possible solution might lie in federal-provincial consultation. For example, provincial legislation might be enacted that would deem affirmative action plans that are in accordance with federal requirements to be in compliance with provincial requirements. Some reciprocity might be included in this sort of solution: federal contractors might be deemed in compliance with federal requirements if they are subject to certain provincially instituted affirmative action programs.

#### D. Conclusion

The constitutional issues that would be raised by a legislated federal human rights or affirmative action contract compliance program are not settled. However, there is a reasonable basis for arguing that the spending power would support legislation providing for the inclusion of human rights or affirmative action terms in federal contracts, and for the enactment of enforcement procedures and remedies to be exercised by the federal government in case of breach. Federal legislation providing for relief to employees for injury caused by breach of employers' obligations would be more vulnerable. Assuming a valid federal legislative scheme, it is likely that the doctrine of paramountcy would apply in cases of actual conflict. Finally, constitutionality might depend on how the legislation was framed.

The constitutional issues are sufficiently difficult that it might be advisable for the federal government to refer them to the Supreme Court of Canada before proceeding with a program covering provincially regulated employers. As indicated at the beginning of this section, the constitutional problems associated with a federal contract compliance program do not arise with respect to corporations otherwise subject to federal legislative jurisdiction over matters of employment and discrimination.

#### 5. POTENTIAL FOR OVERLAP BETWEEN FEDERAL AND PROVINCIAL SCHEMES

Quite apart from the constitutional problem of direct conflict between federal and provincial legislation, there may be overlap between federal and provincial schemes. This emerged in the preceding section, in relation to provincial legislation permitting affirmative action. It was suggested that deference or reciprocal recognition of plans might assist in unravelling some of the difficulties. However, smooth coordination and cooperation cannot be assumed. The prospect of affirmative action programs at the municipal, provincial, and federal levels amply illustrates the problem.

As stated in section 2, overlap can arise in two ways: the factual investigation may cover the same ground, and the remedies available may be the same or similar. For example, a provincially regulated Ontario corporation that does business with the federal government is investigated by the Ontario Human Rights Commission because of complaints of violation of section 10 of the *Ontario Human Rights Code*,<sup>32</sup> which prohibits impact discrimination on prohibited grounds. The complainants are seeking back pay. The suit goes to tribunal. At the same time, the federal contract compliance

agency institutes a compliance review. The facts to be investigated in the review are much the same as those to be established in making out a case of impact discrimination. The agency determines that there are grounds for debarment, and proceeds to tribunal. The proceedings at the two tribunals review much the same evidence. In addition, if the federal program is set up to provide back pay, that issue may be aired at both proceedings.

To some extent, the various agencies and tribunals involved might exercise discretion to minimize the duplication. The *Canadian Human Rights Act* specifically provides the Commission with discretion not to deal with a complaint which is "trivial, frivolous, vexatious or made in bad faith",<sup>33</sup> or if the alleged victim "ought to exhaust grievance or review procedures otherwise reasonably available".<sup>34</sup> In addition, the decision as to whether to appoint a tribunal is discretionary: subsection 39(1). While not all provincial human rights commissions have a discretion as to whether to investigate,<sup>35</sup> the decision to appoint a tribunal is in effect discretionary in every jurisdiction in Canada.<sup>36</sup>

The Ontario Divisional Court discussed the nature of this discretion in *Re Dagg and Ontario Human Rights Commission et al.*<sup>37</sup> Griffiths J., for the court, stated that the decision not to appoint a tribunal was an administrative one. Even assuming a duty to be fair, the duty would only require the Commission or Minister to receive the representations of the applicant and inform the applicant of the basis of the decision not to proceed.<sup>38</sup>

However, it is certain that some overlap in proceedings would occur as a result of a federal contract compliance program, partly because the discretion not to proceed will not always be appropriately exercised, and partly because the issues before the provincial and federal tribunals would not be identical.

The problem has arisen in the United States. While the federal government in the U.S. can rely on constitutional paramountcy to preempt state legislation, it has not done so with respect to Title VII of the Civil Rights Act, 1964. In fact, section 706(c) of Title VII defers to state or local law for a period of 60 days or more, in the event of a complaint regarding a practice prohibited by state or local law:

*In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the state or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law....*

However, after the expiration of the waiting period, the federal Equal Employment Opportunity Commission (EEOC) may launch proceedings.

With respect to contract compliance, section 60-2.31 of the Office of Federal Contract Compliance Program

(OFCCP) regulations, pursuant to Executive Order 11246, provides:

*To the extent that any state or local laws, regulations or ordinances, including those which grant special benefits to persons on account of sex, are in conflict with Executive Order 11246, as amended, or with the requirements of this part, we will regard them as preempted under the Executive Order.<sup>39</sup> (Executive Order 11246 has been amended by Executive Order 12086.)*

It should be noted that the above provision deals only with conflict, and does not attempt to coordinate federal, state, and local requirements.

It seems that until recently the coexistence of federal, state, and local affirmative action contract compliance requirements did not pose serious problems for contractors, since the state and local agencies were prepared to accept compliance with the federal program as meeting their requirements. This changed with the budget cuts of the Reagan administration. There is a growing perception that participation in the federal program is inadequate. In particular, municipal authorities in urban areas with large minority populations are now inclined to do their own audits.<sup>40</sup>

As to individuals seeking relief in two forums, it seems that this has occurred with some frequency. Increasingly, however, the federal courts seem willing to use procedural devices to avoid dealing with cases in which adequate state remedies have already been provided.<sup>41</sup>

It should be acknowledged that a federal contract compliance program in Canada would result in overlap with provincial and municipal schemes, and that administrative discretion may limit but would not solve the problem. There is no ideal solution. However, one major area of overlap could be minimized: the contract compliance program could emphasize contract-related remedies, such as termination and debarment, rather than individual relief.<sup>42</sup> Particularly in the context of affirmative action contract compliance, it may be that this emphasis would be more in keeping with the purpose of the program. This is discussed in greater detail in section 7.

#### **6. THE FEDERAL AGENCY FOR CONTRACT COMPLIANCE: SEPARATE FROM OR WITHIN THE CANADIAN HUMAN RIGHTS COMMISSION**

There are some strong arguments for maintaining a federal contract compliance agency separate from the Canadian Human Rights Commission. The Commission is perceived as, and to a great extent is, an adversary to business. Insofar as a contract compliance program should emphasize contractual consultation and negotiation, it is questionable whether the Canadian Human Rights Commission is at present appropriately positioned to administer the program. The expertise required to administer an affirmative action contract compliance program is different from that required to investigate and attempt to settle individual human rights complaints.<sup>43</sup> Agency staff should include experts in business administration and employment systems who can match the sophistication of business representatives in establishing and evaluating affirmative action plans. To the greatest degree possible, relations with business should be non-confrontational. The model of dispute resolution associated with the Canadian

Human Rights Commission, however apt in relation to individual complaints, would not be suitable to most of the functions of a contract compliance agency.

However, the overlap between contract compliance reviews and human rights investigations discussed in the previous section must be considered. The possibility of some overlap between provincial and federal schemes is inevitable. But overlap between two federal schemes is largely avoidable, and it would be difficult to justify a choice of a system that did not avoid it. It is suggested that the way to do this most effectively is to establish the contract compliance agency as a branch of the Canadian Human Rights Commission, adequately funded and staffed.

The Hatch Report describes problems in the United States due to lack of coordination between the OFCCP and the EEOC:

*The consequences of this duplication are, unfortunately, quite predictable. For example, the First Alabama Bank of Montgomery was sued by the EEOC in 1969. The litigation culminated in a court order pursuant to which the court monitored the EEO activities of the bank through quarterly compliance reports. The reports were filed for more than six years until the court determined in August of 1979 that they no longer were necessary. During the reporting period three E.O. 11246 compliance reviews were conducted, all of which resulted in determinations that the bank was in compliance. Three months following court termination of the reporting requirement, OFCCP commenced yet another compliance review which would have encompassed many of the same issues involved in the Title VII litigation and earlier compliance reviews.<sup>44</sup>*

Separate agencies could also result in inconsistent policies. This has happened in the United States: the Hatch Report discusses inconsistencies between the legal requirements under Title VII and Executive Order 11246.<sup>45</sup> While it may be expected that federal statutes and regulations would not be inconsistent, steps would have to be taken to ensure consistency in administrative policy.

A side benefit of locating a contract compliance agency within the Canadian Human Rights Commission might be a greater concentration in the Commission on systemic issues. As discussed above, in section 3, a more vigorous use of the power of federal human rights tribunals to order affirmative action following a finding of discrimination would complement a contract compliance program.

Where there is a substantial overlap in issues, proceedings under the *Canadian Human Rights Act* should be consolidated with proceedings under a contract compliance program. While this would be possible even if the contract compliance agency were separate from the Commission, it is suggested that integration of the two agencies would facilitate such consolidation.

If it is considered that the disadvantages of locating the contract compliance agency within the Human Rights Commission outweigh the advantages, every effort should be made to coordinate the operations of the two agencies. In any case, responsibility for administering and enforcing the program should not be divided among the various federal

contracting authorities, as was the case with the American program until 1978.<sup>46</sup> To do so would create uneven and divergent approaches to the program. As well, any given contractor could be subject to more than one contracting authority, resulting in confusion and duplication.

## 7. SANCTIONS, REMEDIES, AND ENFORCEMENT PROCEDURES

### A. Sanctions and Remedies

A distinction can be drawn between: 1) remedies for breach of contract that involve only the federal government and the contractor, albeit certain groups of employees are meant to be the ultimate beneficiaries of the program; and 2) remedies that involve a direct benefit passing to employees. In the first category are termination, debarment, and holdbacks. These might be viewed as sanctions rather than as remedies. Also to be considered in this category are a number of sanctions not usually associated with the contracting process, including publication of names of contractors in compliance and not in compliance and monetary penalties for breach. Damages, the most common contract remedy, would not be appropriate in that the federal government would be hard pressed to establish financial loss to itself consequent on breach of equal employment opportunity provisions.

In the second category are back pay, adjustments in employment benefits, such as pension benefits, seniority, sick pay and vacation pay, and reinstatement. Specific performance can also be seen as a remedy involving a direct benefit to groups of employees, insofar as performance of human rights or affirmative action terms and conditions protects or improves their position.

The potential usefulness of each of these remedies to a contract compliance program will be evaluated in turn. Particular reference will be had to the American experience, as the U.S. federal contract compliance program provides for most of these remedies, in some degree.

**Debarment.** This sanction is provided for in Executive Order 11246, which established the legal authority for the American federal contract compliance program. Section 209(a)(6) states that the Secretary of Labor may:

*Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any non-complying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.*

The power of debarment stems from the financial importance of federal government work to federal contractors, and it is fair to assume that this is considerable. While it would be expected that debarment would be resorted to only infrequently (between 1971 and 1981, only 26 compliance reviews in the U.S. resulted in debarment),<sup>47</sup> the threat of debarment could be very effective.

**Termination.** This sanction is also provided for in the Executive Order, section 209(a)(5). The Secretary of Labor may:

*After consulting with the contracting agency, direct the contracting agency to cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the equal opportunity provisions of the contract. Contracts may be cancelled, terminated or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.*

Termination is a less practical sanction than debarment because of the difficulties of terminating a contract in mid-performance: the government may not be in a position to forgo the benefits to it of completion of the contract, and calculations of amounts owing for work completed may be complex and litigious. Nonetheless, termination could be appropriate in limited circumstances.

**Holdbacks.** Not provided for under the Executive Order, a system of holdbacks could be introduced into a contract compliance program, either as a matter of routine, to provide insurance against breach, or as a result of a complaint or concern arising out of a compliance investigation.

A question arises whether it would be fair to withhold funds from employers before a determination is made that the relevant conditions had been breached. A related question has to do with the purpose to which such funds might be put: amounts that could feasibly be held back under a contract may bear no relationship to claims for relief by employees. The issue of employee relief in the context of a contract compliance program is pursued later in this section. Another possible use for holdbacks would be in connection with monetary penalties, also discussed later in this section.

**Publication.** The Executive Order, section 209(a)(1), allows the Secretary of Labor to:

*Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.*

It seems this provision has not been used to any significant extent in the U.S.<sup>48</sup> However, media coverage of equal employment opportunity proceedings in the U.S. is extensive, and it is likely that American corporations weigh the costs of bad public relations in this area when setting corporate policies in the equal employment area.<sup>49</sup>

**Monetary Penalties.** Monetary penalties might be particularly appropriate with respect to provision of false information and to refusal to supply required information. In this connection, the Executive Order, section 209(a)(4), provides that criminal proceedings may be brought by the Department of Justice "for the furnishing of false information to any contracting agency or to the Secretary of Labor". Under OFCCP regulations, refusal to supply required information may result in administrative enforcement proceedings and the imposition of sanctions, including debarment, termination, and "appropriate relief (which may include affected class and back pay relief)".<sup>50</sup>



**Direct Benefits to Affected Persons.** This might take the form of specific performance of, or compliance with, equal opportunity provisions, such as implementation of changes to recruiting systems or provision of training programs. It might also involve adjustments in employment benefits and wages. It is helpful, in discussing this sort of relief, to separate specific performance of equal employment opportunity provisions generally from wage and employment benefit remedies.

If court-ordered specific performance is to be relied on in enforcing a contract compliance program, legislation would be required: under existing law, the courts are very reluctant to order specific performance where to do so would involve ongoing supervision. However, and leaving wages and employment benefits to one side for the moment, it is questionable whether the specific performance order would be a useful mechanism in a contract compliance program. The ultimate sanctions behind a specific performance order are jail and fines for contempt of court. Assuming that no one should go to jail for breach of equal employment opportunity provisions, it would seem that the sanctions of termination and debarment would be more apt than would the possibility of fines for failure to comply with an order of specific performance. The spectre of termination and debarment put the contractor to an economic choice: comply or lose the business of the government. It should be added that the same analysis would apply to orders for compliance issued by an administrative tribunal.

The Executive Order, section 209(a)(2), provides that the Department of Justice may, in case of "substantial or material violation of the contractual provisions" or threat thereof, seek injunctions "within the limits of applicable law" against persons who prevent or seek to prevent, directly or indirectly, compliance with the Order.

Turning to relief in the form of wages and employment benefits, there are two advantages to providing for a wage and employment benefits remedy: first, it would afford direct relief to affected persons; and secondly, it would provide the contract compliance agency with a powerful enforcement tool, since the cost of this sort of relief can be enormous.

The problems associated with this relief, however, should be weighed. The constitutional question has been discussed.<sup>51</sup> As well, involvement of a contract compliance agency in complaints related to wages and employment benefits would increase overlap with human rights proceedings.<sup>52</sup> Finally, the provision of a wage and employment benefits remedy in a contract compliance context would foster a confrontational relationship between the contract compliance agency and business. To the extent that a contract compliance agency were forward-looking, rather than focused on past misconduct, the program might well be more successful.

In the United States, retrospective relief, and back pay in particular, are central to the federal contract compliance program. While the Executive Order does not explicitly address back pay, regulations passed pursuant to the Order provide that back pay may be part of a conciliation agreement,<sup>53</sup> may be imposed through an administrative enforcement proceeding,<sup>54</sup> and may be sought in a civil action by the Department of Justice.<sup>55</sup>

The legal status of these regulations is a matter of some debate. Nonetheless, the OFCCP continues to enforce them:

between 1969 and 1979, the OFCCP entered into hundreds of back pay agreements involving more than \$61-million.<sup>56</sup> In 1979, OFCCP settlements involved close to \$9.3-million. In the first few weeks of fiscal year 1980, an additional \$5.2-million in back pay, and substantial pension benefits, were obtained from Uniroyal, Inc.<sup>57</sup>

A decision not to provide for court or tribunal imposed retrospective relief to employees, by itself, would not have to mean that such relief would never be afforded through the contract compliance program. Assuming wage and employment benefits matters were included as part of an affirmative action plan (and it is hard to see how these matters could be left out), breach of those provisions would trigger sanctions. Rectification of the breach might be the price of avoiding debarment or termination, depending on the policy direction of the program.

## B. Hearings

It is suggested that as a general proposition hearings should be afforded, in accordance with the rules of natural justice, prior to the imposition of sanctions. Some sanctions, such as publication, may only require a relatively informal hearing. Other sanctions are sufficiently severe as to call for a full and formal hearing. Debarment is in this class.

The Executive Order requires that contractors be afforded an opportunity for a hearing prior to debarment. However, with respect to other sanctions, hearings are in the discretion of the Secretary of Labour.<sup>58</sup> The regulations are ambiguous on the question of hearings prior to the imposition of sanctions other than debarment.<sup>59</sup> Effective January 28, 1980, OFCCP regulations were amended to provide for expedited hearings.<sup>60</sup> Use of the expedited procedure is in the discretion of the government, and while it claims that the procedure will be used only for uncomplicated issues, there is concern that due process will be sacrificed.<sup>61</sup> The Hatch report describes the expedited procedure as "little more than 'trial by ambush' ".<sup>62</sup> While this may be somewhat extreme, it underlines the importance of procedures that are perceived to be fair.

As noted above, in section 6, provision should be made for consolidation of contract compliance hearings and investigations with possible related proceedings under the *Canadian Human Rights Act*. As well, depending on how the program is set up, matters might be referred where appropriate by the contract compliance agency to the Canadian Human Rights Commission, and vice versa. In this connection, subparagraph 33(b)(i) of the *Canadian Human Rights Act* provides that the Commission may refrain from dealing with a complaint where it appears that:

*the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act.*

Referrals might also be useful as between the federal contract compliance agency and provincial commissions.

## C. Settlement

The existence of significant sanctions and remedies would contribute to favourable settlements. If the emphasis of a

contract compliance program is to be on compliance rather than on the imposition of sanctions, the agency's staff should include people skilled in conciliation. As well, agency policy should place a high priority on settlement.

The Executive Order, section 209(b), provides that the Secretary of Labor "shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions...before proceedings shall be instituted...." Section 60-1.33 of the regulations provides that (1) "if the contractor...is willing to correct the violations and/or deficiencies, and (2) if OFCCP...determines that settlement (rather than referral for consideration of formal enforcement) is appropriate, a written agreement shall be required."<sup>63</sup>

## 8. REPORTING, RECORD-KEEPING, AND MONITORING

### A. Reporting and Record-Keeping

Reporting and record-keeping requirements would provide data necessary to an increased understanding and awareness of systemic discrimination. In addition, they would enable a contract compliance agency to plan a system of contractor reviews. Both purposes should be kept in mind when prescribing records to be kept and to be submitted by contractors. The issues involved in designing reporting and monitoring systems may be identified through a review of the American experience.

American reporting requirements under the OFCCP are extremely modest in the first instance. Corporations need only submit a one-page form annually, Form EEO-1.<sup>64</sup> The form requires employers to classify jobs according to nine very broad categories, and to indicate representation of minorities and women in each job category. The OFCCP recently proposed that, in addition, employers be required to submit a summary of their affirmative action plans on an annual basis.<sup>65</sup> The theory was that the summary affirmative action plan would permit the OFCCP to take a more informed approach to selecting contractors for review. Not surprisingly, the proposal has met with disapproval, and it is doubtful whether it will go forward. Objections included the belief that the OFCCP would not in fact get useful information from the summary affirmative action plan not already provided by Form EEO-1, and concerns that the summaries would not be protected from disclosure under freedom of information legislation.<sup>66</sup>

Notwithstanding the minimal reporting requirements of the OFCCP, the paperwork burden imposed on contractors is very substantial and rigid. Written affirmative action plans must be prepared and available for review, and must conform to lengthy and highly specific regulations.<sup>67</sup> In addition, the OFCCP may initiate administrative enforcement proceedings against a contractor who "refuses to supply records or other requested information, or refuses to allow the OFCCP access to its premises for an onsite review".<sup>68</sup>

The paperwork requirements of the OFCCP have been heavily criticized. In particular, there have been complaints of lack of flexibility and reasonableness on the part of OFCCP personnel. In one case cited by the Hatch report, the OFCCP is alleged to have requested data that would have involved more than 10,500 pages, notwithstanding that the OFCCP did not have sufficient resources to review and analyze the

data before it would need updating.<sup>69</sup> In another case cited by the Hatch Report, officers of the National Bank of Greenwood testified:

*We are amazed at the ever changing demands of that agency for statistical data, general format, job groups, language, recruitment areas, the eight-factor analysis. For 2-1/2 years it has been like a river, always moving, always shifting, always changing: it never stays the same.*<sup>70</sup>

OFCCP requirements are tolerated, if not defended, by observers convinced of the effectiveness of the program. A Conference Board Report of 1980 acknowledges that the paperwork burden is "voluminous", but comments:

*...increasingly, senior personnel executives are coming to view these paperwork requirements from a different perspective. Many admit that — for the first time — they have detailed information about the numbers of people in meaningful job groupings and about the movement or flow of members of various protected groups into, between and out of those meaningful job groupings....They also have developed a much clearer picture of external labor market sources and availabilities....[f]or the first time, they know enough to begin to monitor and to help the company to manage its overall human resource utilization as a flow system.*<sup>71</sup>

It might be possible to place limits on government demands for data, either by specifying types of data government can ask for or by invoking a general rule that demands for data may not outstrip government's ability to work effectively with it. The disadvantages of the specific approach are that it could become *pro forma* to make all permissible data demands, and that a high degree of specificity might restrict government's ability to investigate and learn.

### B. Monitoring

To require extensive reporting and comprehensive investigation would be unduly expensive. Monitoring would have to be by way of selective review, similar to income tax audits. The American experience indicates the importance of systematizing the process of selecting employers for review. The Hatch Report relates incidents of overkill with respect to particular corporations: it seems one corporation, with 113 facilities, underwent 135 compliance reviews in one year. Another major corporation, with an apparently particularly fine affirmative action record, underwent five reviews in a three-year period.<sup>72</sup> The OFCCP has committed itself to establishing and refining criteria for a review system, focusing on industries and contractors who appear to be failing to meet OFCCP obligations.<sup>73</sup>

It is essential that contractor reviews be performed by personnel who have the skills required to be flexible. If an inflexible checklist approach is to be avoided, personnel must be able to understand employment systems and personnel policies. Rigidity would work against innovation, frustrate business, and ultimately hike costs for the sake of dubious benefits. This is particularly true with respect to employment processes involving judgement, such as wage setting and promotion to management.

## 9. SCOPE OF A FEDERAL CONTRACT COMPLIANCE PROGRAM

### A. Introduction

Any federal program would be limited in coverage, simply because there is no way to reach provincially regulated corporations that do not do business with the federal government. One problem associated with limits in coverage is that the employers to be covered may be placed at a competitive disadvantage. Morley Gunderson makes this point:

*A uniform legislated standard prevents some firms from having a cost advantage....It is for this reason that some employers may welcome a uniformly and impartially applied standard that subjects both they and their competitors who discriminate more from having an 'unfair' cost advantage. Such employers may be reluctant to change their individual hiring practices but they may be willing to collectively do so as a group, through the acceptance of uniform legislated standards.<sup>74</sup>*

The costs to business of complying with an equal employment opportunity contract compliance program are impossible to estimate without reference to the particular requirements of a program. Even with those particulars, it would be difficult to distinguish costs of not discriminating on a systemic basis from costs of taking affirmative action initiatives. And it would be difficult to separate costs inherent in those initiatives from costs of demonstrating compliance with government requirements.

The usefulness of American estimates of costs to business of complying with OFCCP requirements is questionable. Not only do the difficulties just set out apply, but it should be borne in mind that the American program is mature. It would certainly cost less on an annual basis to maintain an affirmative action program than to initiate one, so that estimates that do not distinguish between start-up costs and maintenance costs should be viewed with caution. As well, questions should be asked about the corporate accounting systems from which estimates are drawn: do they distinguish costs of complying with Title VII from costs of contract compliance? Do they distinguish costs of contract compliance from other human resource management costs? It is with these cautions in mind that American estimates are included here.

The Hatch Report states that compliance with OFCCP requirements costs American businesses more than \$1 billion annually, exclusive of the costs of remedial relief or legal fees.<sup>75</sup> No explanation of how this figure was arrived at is provided in the Report. An unpublished paper distributed by the Equal Employment Advisory Council has estimated "the annual costs of complying with federal EEO requirements in general and OFCCP's regulations in particular" to "all 325,000 federal contractors" to be \$1.15 billion.<sup>76</sup>

Related to the issue of scope of the program is the point that it is not necessary to apply one uniform set of requirements to all covered employers. Distinctions may be drawn according to size of corporation, type of industry, and so on. That is, to some extent it is possible to match requirements to capacity to meet them, and value of meeting them.

What follows is a review of options with respect to the scope of a federal contract compliance program.

### B. Federally Regulated Employers vs. All Employers Doing Business with the Federal Government

Restricting a federal contract compliance program to federally regulated employers would sidestep problems of federal-provincial relations and much of the risk of overlap and duplication. The obvious result of this restriction in scope is that it would place the employment practices of provincially regulated employers beyond the reach of the federal government.

The option of contract compliance for federally regulated employers should be compared to the option of legislation applying to all federally regulated employers regardless of whether they do business with the federal government: contract compliance allows for unique sanctions and appears to conform to the principles of free enterprise more comfortably than does legislation of general application. It can be viewed as a moral exercise of bargaining power by government when spending taxpayers' money.

There are no good data available on the number of employees who would be affected by a federal contract compliance program, however restricted. However, Table 1 indicates that in 1977 there were approximately 550,000 private-sector employees under the jurisdiction of the Canadian Human Rights Commission, and hence employed by federally regulated employers. This number comprised approximately 5.6 per cent of the total workforce (9,754,000) in 1977. The numbers of employees of federally regulated private-sector employers doing business with the federal government would accordingly be something less than 550,000.

Gauges of the potential impact of a federal contract compliance program that included provincially regulated contractors are equally rough and elusive. The volume of government purchasing may serve as a crude indicator: it has been estimated by Treasury Board officials that total annual federal government spending is currently in the vicinity of \$10 billion, as compiled from the Main Estimates for fiscal year ending March 31, 1984. According to the Canadian Advisory Council on the Status of Women, the federal government annually enters contracts with between 25,000 and 30,000 corporations, worth \$6.5 billion to private business and a further \$5.5 billion to crown corporations.<sup>77</sup>

The government contracting process is not centralized. Each contracting authority is left to compile its own contracting data, and no effort appears to have been made to ensure the compilation of lists of contractors, or the estimation of numbers and sizes of contracts. The Department of Supply and Services is the largest government contracting authority, in terms of dollar volume of contracts let. Estimates from this department indicate that its spending has averaged between \$5 billion and \$6 billion annually over the last three years, with approximately 300,000 contracts being let annually. However, it is not clear how many contractors are involved in the total number of contracts.

### C. Definition of Contractor According to Size

Exemptions from the coverage of a contract compliance program would have to be established according to size of contractor, which may be measured by number of employees and by dollar volume of contracts with the federal government. The importance of a measurement in terms of



TABLE 1

**Estimated number of persons who come under the jurisdiction of the Canadian Human Rights Commission for employment matters, by province and type of agency, showing such persons as a percentage of the total employed labour force, Canada, 1977**

|                     | Canadian Human Rights Commission Employment Jurisdiction   |                                                              |                                             |                              |                   |                                                           |                                     | Canadian Human Rights Commission employment jurisdiction as % of total employed labour force |
|---------------------|------------------------------------------------------------|--------------------------------------------------------------|---------------------------------------------|------------------------------|-------------------|-----------------------------------------------------------|-------------------------------------|----------------------------------------------------------------------------------------------|
|                     | Private industries under federal jurisdiction <sup>A</sup> | Persons under the Public Service Employment Act <sup>B</sup> | Federal government enterprises <sup>C</sup> | Canadian Forces <sup>D</sup> | RCMP <sup>E</sup> | Military Reserves and Cadet instructors list <sup>F</sup> | Other federal agencies <sup>G</sup> | Total Employed Labour Force <sup>H</sup>                                                     |
|                     |                                                            |                                                              |                                             |                              |                   |                                                           |                                     | (thousands)                                                                                  |
| Newfoundland        | 10,430                                                     | 5,865                                                        | 5,915                                       | 867                          | 632               | 989                                                       | 1,079                               | 25,777                                                                                       |
| P.E.I.              | 2,201                                                      | 1,507                                                        | 1,092                                       | 1,011                        | 127               | 296                                                       | 281                                 | 6,515                                                                                        |
| Nova Scotia         | 17,829                                                     | 16,803                                                       | 5,291                                       | 12,267                       | 655               | 2,314                                                     | 6,992                               | 62,151                                                                                       |
| New Brunswick       | 16,163                                                     | 8,359                                                        | 7,213                                       | 4,400                        | 583               | 1,349                                                     | 1,078                               | 39,145                                                                                       |
| Quebec              | 141,071                                                    | 52,918                                                       | 38,523                                      | 10,978                       | 1,245             | 6,216                                                     | 4,869                               | 255,820                                                                                      |
| Ontario             | 202,947                                                    | 127,573                                                      | 42,872                                      | 22,953                       | 3,689             | 8,374                                                     | 29,350                              | 437,758                                                                                      |
| Manitoba            | 37,679                                                     | 12,484                                                       | 14,096                                      | 4,090                        | 1,023             | 1,309                                                     | 2,211                               | 72,892                                                                                       |
| Saskatchewan        | 13,760                                                     | 8,289                                                        | 4,666                                       | 1,638                        | 1,642             | 959                                                       | 1,701                               | 32,855                                                                                       |
| Alberta             | 39,101                                                     | 18,085                                                       | 9,551                                       | 7,450                        | 1,810             | 1,520                                                     | 2,773                               | 80,290                                                                                       |
| British Columbia    | 67,319                                                     | 26,636                                                       | 8,150                                       | 8,416                        | 3,728             | 3,680                                                     | 2,541                               | 120,470                                                                                      |
| Yukon & N.W.T.      | 1,500                                                      | 2,334                                                        | 1,216                                       | 318                          | 334               | 56                                                        | 1,461                               | 7,219                                                                                        |
| Outside Canada      | —                                                          | 1,934                                                        | 8,355                                       | 6,287                        | 72                | 6                                                         | 4,977                               | 21,631                                                                                       |
| Total:              | 550,000                                                    | 282,787                                                      | 146,940                                     | 80,675                       | 15,540            | 27,068                                                    | 59,313                              | 1,162,323                                                                                    |
| Men and Women       | 202,489                                                    | 95,922                                                       | 49,842                                      | 4,522                        | 879               | 4,957                                                     | 20,119                              | 378,730                                                                                      |
| Women <sup>I</sup>  | 347,511                                                    | 186,865                                                      | 97,098                                      | 76,153                       | 14,661            | 22,111                                                    | 39,194                              | 783,593                                                                                      |
| Men                 | 36.8%                                                      | 33.9%                                                        | 33.9%                                       | 5.6%                         | 5.7%              | 18.3%                                                     | 33.9%                               | 32.6%                                                                                        |
| Women as % of total |                                                            |                                                              |                                             |                              |                   |                                                           |                                     | 37.3%                                                                                        |

—Not available.

A Includes certain enterprises in the following industry categories: railway transport and services, air transport and services, road transport and services, water transport and services, services incidental to transportation, pipeline, gas and electric power, telephone communication, cable communication, radio and television, grain operation and milling, banking, uranium and other mining, and other. Source: Estimated (to account for non-response) from unpublished data for 1977 from Surveys Division, Labour Canada.

B Mainly persons working in government departments, including civilians working for the Department of National Defence and the RCMP who are not members of those forces. Source: Public Service Commission, *Annual Report 1977*, Public Service Commission of Canada, Table 2 (Minister of Supply and Services Canada, 1978).

C Mainly persons working in Crown corporations. Data on women are estimates. Source: Statistics Canada, Federal Government Section, *Federal Government Employment, July-September, 1977*, Cat. No. 72-004 (Statistics Canada, Ottawa, 1978).

D Regular Canadian Forces Personnel. Source: Unpublished data from Personnel Information Systems, Department of National Defence.

E Comprises Regular Members, Special Constables and Civilian Members of the RCMP. Source: Unpublished data from Organization and Personnel, Royal Canadian Mounted Police.

F Includes 22,122 Primary Reserves and 4,926 Cadet Instructors List personnel. These reserve personnel receive a stipend from the Department of National Defence conditional upon their attendance at regularly scheduled training sessions. Source: Unpublished data from Personnel Information Systems, Department of National Defence.

G Includes Atomic Energy of Canada, Atomic Energy Control Board, Bank of Canada, Economic Council of Canada, Cape Breton Development Corporation, National Research Council, Canada Council, National Arts Centre Corporation, National Film Board, Atlantic Pilotage Authority, Loto Canada, National Capital Commission and others. Data on Women are estimates. Source: Estimated from data published in the source mentioned in footnote C.

H Excludes the unemployed. Numbers do not add up to the total due to independent rounding. Source: Statistics Canada, Labour Force Survey Division, *The Labour Force, December, 1977*, Cat. No. 71-001 (Statistics Canada, Ottawa, 1978), p. 59.

I In calculating this percentage, persons in the Yukon and Northwest Territories and those outside Canada were excluded from the total. Source: W.S. Tarnopolsky, "Legislative Jurisdiction over Anti-Discrimination (Human Rights) Legislation in Canada," 12 Ott. L.R. 1, at 46-47, from Research Branch, Canadian Human Rights Commission.

dollar volume of contracts is that it tends to exclude from the program contractors whose connection to government is slight; the world of government contractors is a shifting one, and some means of excluding very marginal contractors becomes necessary. At the same time, any dollar volume exemption would have to take account of repeated small contracts with one contractor, for example by aggregating the dollar volume of contracts with a contractor in a year.

An exemption expressed in terms of duration of a contract might also serve the purpose of ensuring a significant relationship between government and the contractor. However, such an exemption would create anomalies: it would be possible for a supplier of goods whose business was almost entirely dependent on the federal government to remove itself from the ambit of the program. While a duration criterion might be useful with respect to contracts not involving the supply of goods, such an exemption would make it necessary to categorize all contracts.

Size-related exemptions are useful not only with respect to whether or not a contractor is covered by the program, but also with respect to the level of requirements that should be applied to each contractor. For example, a number of different kinds of affirmative action plans could be provided for, with level of complexity required depending on size of contractor.

OFCCP regulations provide exemptions based on number of employees and dollar volume of contracts with government. Contracts not exceeding \$10,000 do not trigger OFCCP requirements, provided that where a contractor has contracts with government in any 12-month period that have an aggregate value in excess of \$10,000, the exemption does not apply.<sup>78</sup> Open-ended contracts, or contracts for indefinite quantities, trigger the requirements unless there is reason to believe that the dollar volume in the year will not exceed \$10,000.<sup>79</sup> The regulations include another set of size exemptions related to the obligation to prepare a written affirmative action plan: contractors with fewer than 50 employees and less than \$50,000 in government contracts in a year are exempt.<sup>80</sup>

#### D. Definition of Contractor According to Industry

A contract compliance program could be restricted to industries with the worst problems, or with the greatest opportunities for rapid change. However, to do so may give rise to problems of unequal treatment. Nonetheless, particular affirmative action obligations might be tailored to particular industries. For example, there might be an emphasis on promotion of women in the banking and insurance industries, and an emphasis on recruitment of women in the mining and construction industries.

OFCCP regulations do not exempt any industries. Rather, the size exemptions referred to above do not apply to "depositories of Federal funds in any amount" or to "financial institutions which are issuing and paying agents for U.S. savings bonds and savings notes".<sup>81</sup> This sort of provision could be used in Canada to ensure that a federal contract compliance program covers banks and trust companies.

#### E. Subcontractors

The inclusion of subcontractors in a contract compliance program could enormously increase the impact of the program. OFCCP regulations apply to subcontractors. "Subcontract" is very broadly defined, as follows:

*"Subcontract" means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and employee):*

*(1) For the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, which, in whole or in part, is necessary to the performance of any one or more contracts; or*

*(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed.<sup>82</sup>*

In addition to expanding the coverage, this approach has the potential to magnify the force of agency sanctions: prime contractors may be prohibited from dealing with businesses that have been debarred.

A question arises as to how government would identify subcontractors. One possibility is to require that contractors regularly supply government with names of subcontractors involved in fulfilment of the contract. An alternative would be to rely on spot checks to determine whether subcontractors of a particular contractor are complying.

#### F. All Operations of a Contractor vs. Only Those Operations Involved in Carrying Out the Contract

The application of a contract compliance program to all operations of a contractor may be an economical way of expanding the scope of the program. Given an obligation to develop an affirmative action approach for facilities involved in carrying out a contract, the contractor will necessarily identify the expertise and procedures involved. Without implying that implementation of affirmative action in all facilities would not involve significant expense, it is suggested that the cost per facility should diminish after the initial stages. This would be particularly true where facilities are similar in function or are in the same geographic area.

OFCCP requirements apply to all facilities of the contractor, though there is provision for discretionary exemption by the director of "facilities which he finds to be in all respects separate and distinct from activities...related to the performance of the contract or subcontract, provided that he also finds that such an exemption will not interfere with or impede the effectiveness of the order".<sup>83</sup> Not surprisingly, the proviso has eclipsed the exemption.

#### G. Expanded Definition of Contract

The contract compliance model could be applied to employers who receive any kind of government benefit. Section 19 of the *Canadian Human Rights Act* contemplates a program applying to any "contract, licence or grant made or granted by Her Majesty in Right of Canada". In addition to employers with supply or service contracts with the federal government, employers receiving funds from government by way of loans, grants, or guarantees might be covered. For example, recipients of contributions under the Defence

Industry Program or the Shipbuilding Industry Assistance Program could be required to undertake affirmative action.

As well, employers holding resource leases might be subject to the program. Because of the geographic location of federal Crown lands, this might be of particular relevance to the employment opportunities of natives. Currently, special equality measures are being imposed on some offshore and northern resource developers under the *Canada Oil and Gas Act*.<sup>64</sup>

#### H. Discretionary Exemptions

Provision for discretionary exemptions might be useful, in relation both to individual contracts and to particular groups or types of contracts. However, unless the discretion is exercised according to well-developed and clear guidelines, there are risks of arbitrariness and of dilution of the program.

OFCCP regulations include limited discretionary exemption provisions. The broadest of these is couched in terms of the national interest:

*The Director may exempt an agency or any person...when he deems that special circumstances in the national interest so require. The Director may also exempt groups or categories of contracts...of the same type where he finds it impracticable to act upon each request individually or where group exemptions will contribute to convenience in the administration of the order.*<sup>65</sup>

In addition, as mentioned above, the director may exempt facilities that are entirely separate from activities related to the contract.<sup>66</sup> Finally, OFCCP requirements do not apply when the head of the agency determines that awarding a contract without imposing OFCCP requirements is necessary to national security.<sup>67</sup>

#### 10. IMPACT ON GOVERNMENT PURCHASING

Equal employment opportunity contract compliance would have two unpopular effects on government. Firstly, a new bureaucracy would be inevitable. Secondly, contract compliance could have the unintended consequence of increasing government's costs of procuring goods and services.

The Department of Supply and Services currently favours a voluntary approach, considering that affirmative action contract compliance

*would adversely affect the efficiency and effectiveness of the department's procurement activities by increasing contract throughput times, decreasing procurement function productivity, and curtailing the number of suppliers willing to bid on government contracts.*<sup>68</sup>

#### 11. COSTS AND BENEFITS OF AFFIRMATIVE ACTION CONTRACT COMPLIANCE

This paper has examined the problems that would have to be solved in order to implement a contract compliance program. Some of these involve making choices between various alternative approaches to a contract compliance program — choosing the approach that most closely meets the

various relevant policy goals. For example, the choice whether to include subcontractors in the program is of this kind. Others are problems that may not be fully soluble, as, for example, the prospect of some duplication of schemes. This poses a question: are the benefits of contract compliance worth the costs?

The costs of a contract compliance program have been discussed throughout this paper, but it might be useful to list them in one place:

- if the program covers provincially regulated employers, costs in terms of federal-provincial relations;
- costs to taxpayers of more government bureaucracy;
- increased costs to taxpayers of government procurements;
- costs to employers of implementing equal employment opportunity systems;
- costs to employers of complying with government requirements, beyond the costs of actual implementation;
- if the program covers provincially regulated employers, costs of possible duplication of functions at the provincial and federal levels.

As well, there may be social or financial costs having to do with the particular substantive requirements that would be placed on employers in any given program. The question of what the equal opportunity obligations of employers might be is one which I have not attempted to address in this paper.

Derivative benefits that have been associated with affirmative action contract compliance include more efficient human resource planning by employers, and the development of a skilled workforce to meet future skills shortages. On the first point, it is perhaps tendentious to suggest that employers must do something because it is good for them. Possible improvement in personnel management is not a strong selling point; it may be more of a consolation prize. On the second point, in view of the current recession, there is some question whether a significant skills shortage will actually occur in the near future.

The overriding projected benefit of a contract compliance program is the removal of barriers to employment opportunities in order to advance members of disadvantaged groups. The extent to which this would occur would depend on the nature of the employment opportunity obligations that the program imposed on contractors. Particularly with respect to affirmative action contract compliance, it must be said that the term "affirmative action" is capable of meaning very different things. Whether or not an equal opportunity contract compliance program should be recommended, then, cannot be answered without reference to the substantive content of the program.



## NOTES

1. S.C. 1976-77, c.33, as amended 1977-78, c.22, s.5; 1980-81, c.54, subs.56(1); 1980-81-82, c.111, s.5 (Sch.IV, ss.1-4), Sch.IV, s.2; 1980-81-82, c.143.
2. (1983), 48 N.R. 81; leave to appeal to S.C.C. granted, (1983), 51 N.R. 235.
3. The question of overlap, and how to deal with it, is discussed below, in section 5. Since the overlap issues relating to human rights contract compliance and to affirmative action contract compliance are similar, they are dealt with together.
4. The constitutional ramifications of federal contract compliance are discussed below, in section 4.
5. For a discussion of a bid adjustment system, see Merva Smith, "Government Purchasing as a Lever to Influence Private Sector Manpower Decisions", prepared for the Manitoba government, September, 1975, at 53-59.
6. A brief discussion of the case law on point is given in W.S. Tarnopolsky, "Legislative Jurisdiction over Anti-Discrimination (Human Rights) Legislation in Canada" (1980), 12 Ott. L.R. 1, at 3-4.
7. *Ibid.*, and *Reference re Validity of Industrial Relations and Dispute Investigation Act (Can.)*, [1955] S.C.R. 529.
8. Tarnopolsky, *supra*, note 6, at 5-41.
9. *Central Mortgage and Housing Corporation v. Co-operative College Residences Inc. et al.* (1975), 13 O.R. (2d) 394 at 410 (C.A.).
10. Tarnopolsky, *supra*, note 6, at 43.
11. [1975] 3 W.W.R. 347; (1974), 51 D.L.R. (3d) 265.
12. [1979] 1 S.C.R. 754; (1978), 93 D.L.R. (3d) 641.
13. R.S.C. 1970, c.L-3.
14. Tarnopolsky, *supra*, note 6, at 43.
15. [1980] 2 S.C.R. 444 at 447.
16. [1977] 2 S.C.R. 134.
17. (1980), 105 D.L.R. (3d) 15 (F.C.T.D.), on appeal to F.C.A.
18. For an example of section 96 in action, see *Re Residential Tenancies Act*, 1979, [1981] 1 S.C.R. 714 (Ontario Residential Tenancies Commission ruled unconstitutional as an attempt to usurp County Court jurisdiction).
19. *Re Court of Unified Criminal Jurisdiction; McEvoy v. A.G.N.B. and A.G. Can.* (1983), 48 N.R. 228 at 238 (S.C.C.).
20. See *Tomko v. Labour Relations Board (Nova Scotia) et al.*, [1977] 1 S.C.R. 112; *Re Residential Tenancies Act*, 1979, *supra*, note 18; *Re A.G. Qué. et al. and Grondin et al.* (1983), 4 D.L.R. (4th) 605 (S.C.C.).
21. [1979] 1 S.C.R. 754 at 780.
22. Eric Colvin, "Legal Theory and the Paramountcy Rule" (1979), 25 McGill L.J. 82 at 82.
23. Tarnopolsky, *supra*, note 6, at 43-44.
24. *Ibid.*, at 44.
25. [1981] 1 S.C.R. 699.
26. S.A. 1972, c.2.
27. It does now. See S.A. 1980, c.27, s.11.1, *The Individual's Rights Protection Amendment Act*.
28. *Supra*, note 25, at 712.
29. *Ibid.*, at 711.
30. *Ibid.*, at 712.
31. In view of the current interest in affirmative action, it would not be surprising if legislation providing for special programs were passed in these jurisdictions in the near future.
32. S.O. 1981, c.53.
33. s.33 (b) (iii).
34. s.33 (a).
35. The discretion to investigate is discussed by W.S. Tarnopolsky in *Discrimination and the Law in Canada*, Richard De Boo, 1982, at 446-447.
36. Alberta: *The Individual's Rights Protection Act*, R.S.A. 1980, c.I-2, subs. 27(1); British Columbia: *Human Rights Act*, 1984, S.B.C. 1984, c.22, ss.13 and 14; Manitoba: *The Human Rights Act*, C.C.S.M., c.H175, subs. 21(1); New Brunswick: *Human Rights Act*, 1971, c.8, subs. 20(1); Newfoundland: *The Newfoundland Human Rights Code*, R.S.N. 1970, c.262, amended 1978, c.35, s.16 and subs. 16A(1); Northwest Territories: *Fair Practices Ordinance*, R.O.N.W.T. 1974, c.F-2, subs. 7(2); Nova Scotia: *Human Rights Act*, C.S.N.S., c.H-24, subs. 25(1); Ontario: *Human Rights Code*, 1981, S.O. 1981, c.53, subs. 35(1); Prince Edward Island: *Human Rights Act*, S.P.E.I. 1975, c.72, subs. 24(1); Quebec: *Charter of Human Rights and Freedoms*, 1957, c.6, s.77; Saskatchewan: *Saskatchewan Human Rights Code*, 1979, c.5, subs. 29(1); Yukon Territory: *Fair Practices Ordinance*, 1963 (2nd), c.3, subs. 6(2).
37. (1979), 102 D.L.R. (3d) 155 at 158-159, leave to appeal to the Court of Appeal denied.
38. *Ibid.*, at 159.
39. F.R. 43.
40. Conversations with Peter Robertson, Consultant and former Director of the Office of Policy Implementation, EEOC, and Victoria Smith, Senior Consultant, Organization Resources Counselor, December 2, 1982.
41. Conversation with Peter Robertson, *ibid.*
42. As discussed in section 4, this would sidestep the constitutional question of a federally legislated civil cause of action for employees of provincially regulated corporations.
43. For Commission procedures in investigating or attempting to settle complaints, see *Canadian Human Rights Act*, *supra*, note 1, ss.32-38.
44. Committee Analysis of Executive Order 11246 (The Affirmative Action Program), prepared by the Committee on Labor and Human Resources, (the Hatch Report) United States Senate, April, 1982, at 14.
45. *Ibid.*, at 21.
46. President Carter consolidated all contract compliance functions in the OFCCP in 1978, by Executive Order 12086.
47. Jonathan S. Leonard, "The Impact of Affirmative Action", unpublished research report undertaken in co-ordination with the National Bureau of Economic Research, Cambridge, Mass., and the Institute of Industrial Relations and School of Business Administration, Univ. of California at Berkeley, 1983, Table 2.5.
48. Conversation with Peter Robertson, *supra*, note 40, December 7, 1983.
49. Victoria Smith considers this a major factor in OFCCP conciliations: conversation, *supra*, note 40, November 23, 1983.
50. F.R.43, s.60-1.26(a).
51. See section 4B, above.
52. See section 5, above.
53. F.R.44, s.60-1.33.
54. F.R.43, s.60-1.26(a)(2).
55. F.R.43, s.60-1.26(a)(2) and 60-1.26(e).
56. F.R.44, No. 250, December 28, 1979, Supplementary Information. See also the Hatch Report, *supra*, note 44, at 53-58.
57. Ruth Gilbert Shaeffer, *Nondiscrimination in Employment—and Beyond*, Conference Board, New York, 1980, at 42.
58. s.208(b).
59. See F.R.43, s.60-1.26(a)(2) and s.60-1.26(c).
60. F.R.44, ss.60-30.31 to 60-30.37.
61. F.R.44, Supplementary Information.
62. Hatch Report, *supra*, note 44, at 62.
63. F.R.44.
64. F.R.43, s.60-1.7.
65. F.R.44, s.60-2.14.
66. F.R.44, Supplementary Information.
67. F.R.43, s.1.40.
68. F.R.43, s.60-1.26(a)(2).
69. Hatch Report, *supra*, note 44, at 32.
70. *Ibid.*, at 33.
71. Ruth Gilbert Shaeffer, *supra*, note 57, at 43-44.
72. Hatch Report, *supra*, note 44, at 33-34.

73. F.R.44, Supplementary Information.
74. "Labour Market Aspects of Inequality in Employment and Their Application to Crown Corporations", chapter 8, section entitled "Attaining Target Efficiency", prepared for the Commission of Inquiry on Equality in Employment, October, 1983.
75. Hatch Report, *supra*, note 44, at 47.
76. "An Analysis of the Cost of OFCCP's Compliance Activities and Its Impact, as Measured by National EEO-1 Forms", undated, at 1.
77. Canadian Advisory Council on the Status of Women, *Critical Skill Shortages: New Opportunities for Women*, brief to the Parliamentary Task Force on Employment Opportunities for the '80s, 1981, at 25.
78. F.R.43, s.60-1.5(a)(1).
79. F.R.43, s.60-1.5(a)(2).
80. F.R.43, s.60-1.40(a).
81. F.R.43, ss.60-1.5(a)(1) and 60-1.40(a).
82. F.R.43, s.60-1.3.
83. F.R.43, s.60-1.5(b)(2).
84. S.C. 1980-81-82-83, c.81.
85. F.R.43, s.60-1.5(b)(1).
86. F.R.43, s.60-1.5(b)(2).
87. F.R.43, s.60-1.5(c).
88. Government of Canada, *Surmounting Obstacles*, 1983, at 21.

## APPENDIX

# Provincial and Territorial Statutory Provisions Allowing for Affirmative Action Programs

Statutory provisions are arranged alphabetically by province or territory. Beside the name of each jurisdiction appear one or more letters categorizing the legislation as follows:

- A — allows for approval of plans;
- B — requires approval of plans;
- C — provides for priorities and conditions determined by provincial authority to be incorporated into plans.

## Alberta — A, C

*Individual's Rights Protection Act*, R.S.A. 1980, c.I-2, s. 13.

13(1) The Lieutenant Governor in Council may make regulations

(a) exempting a person, class of persons or group of persons, or the Crown or any agent or servant of the Crown, from the operation of this Act or any of the provisions of it,

(b) authorizing the undertaking by a person, class of persons or group of persons, or by the Crown or any servant or agent of the Crown, of programs that, in the absence of the authorization, would contravene this Act, and

(c) respecting the procedure to be followed by the Commission in carrying out its functions under this Act.

(2) The Lieutenant Governor in Council may by regulation delegate to the Commission any of his powers under subsection (1).

(3) A regulation made under subsection (1)(a) or (b) may

(a) be specific or general in its application, and

(b) provide that the exemption or authorization that it grants is subject to any terms and conditions that the Lieutenant Governor in Council or the Commission, as the case may be, considers advisable.

## British Columbia — A

*Human Rights Act*, 1984, S.B.C. 1984, c.22, subs. 19(2).

19(2) The Council may approve any program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups, and any approved program or activity shall be deemed not to be in contravention of this Act.

## Manitoba — A, C

*Manitoba Human Rights Act*, S.M. 1974, c.65, s.9.

9 Notwithstanding the provisions of this Part, the Commission may, upon such conditions or limitations and subject to revocation or suspension, approve in writing any special plan or program by the Crown, any agency thereof, or any person to increase the employment of members of a group or class of persons on the basis of the race, nationality, religion, colour, sex, age, marital status, ethnic or national origin of the members of the group or class of persons.

## New Brunswick — A, C

*New Brunswick Human Rights Act*, R.S.N.B. 1973, c.H-11, s.13.

13(1) On the application of any person, or on its own initiative, the Commission may approve a programme to be undertaken by any person designed to promote the welfare of any class of persons.

13(2) At any time before or after approving a programme, the Commission may

(a) make inquiries concerning the programme,

(b) vary the programme,

(c) impose conditions on the programme, or

(d) withdraw approval of the programme,

as the Commission thinks fit.

13(3) Anything done in accordance with a programme approved pursuant to this section is not a violation of the provisions of this Act.

## Northwest Territories — A

*Fair Practices Ordinance*, R.O.N.W.T. 1974, c.F-2, added by 1981 (3rd) c. 12, s.27

14 The Commissioner may approve programs designed to promote the welfare of any class of individuals, and any such program shall be deemed not to be a violation of the provisions of this Ordinance.

## Nova Scotia — A

*Nova Scotia Human Rights Act*, S.N.S. 1969, c.11, s.19.

19 The Commission may approve programs of government, private organizations or persons designed to promote the welfare of any class of individuals, and any approved program shall be deemed not to be a violation of the prohibitions of this Act.

## Ontario — A, C

*Ontario Human Rights Code*, S.O. 1981, c.53, s.13.

13(1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

(2) The Commission may

(a) upon its own initiative;

(b) upon application by a person seeking to implement a special program under the protection of subsection (1); or

(c) upon a complaint in respect of which the protection of subsection (1) is claimed,

inquire into the special program and, in the discretion of the Commission, may by order declare,

(d) that the special program, as defined in the order, does not satisfy the requirements of subsection (1); or

(e) that the special program as defined in the order, with such modifications, if any, as the Commission considers advisable, satisfies the requirements of subsection (1).

(3) A person aggrieved by the making of an order under subsection (2) may request the Commission to reconsider



its order and section 36, with necessary modifications, applies.

(4) Subsection (1) does not apply to a special program where an order is made under clause (2)(d) or where an order is made under clause (2)(e) with modifications of the special program that are not implemented.

(5) Subsection (2) does not apply to a special program implemented by the Crown or an agency of the Crown.

#### **Prince Edward Island — A**

*Prince Edward Island Human Rights Act*, S.P.E.I. 1975, c.72, s.19.

19 The commission may approve programs of government, private organizations or persons designed to promote the welfare of any class of individuals, and any approved program shall be deemed not to be a violation of the prohibitions of this Act.

#### **Quebec — B,C**

*Charter of Human Rights and Freedoms*, R.S.Q. 1977, c.C-12, ss.86.1-86.7, added by S.Q. 1982, c.61.

#### **PART III**

##### **AFFIRMATIVE ACTION PROGRAMS**

86.1 The object of an affirmative action program is to remedy the situation of persons belonging to groups discriminated against in employment, or in the sector of education or of health services and other services generally available to the public.

An affirmative action program is deemed non-discriminatory if it is established in conformity with the Charter.

86.2 Every affirmative action program must be approved by the Commission, unless it is imposed by order of the court.

The Commission must, whenever required, lend assistance for the devising of an affirmative action program.

86.3 If, after investigation, the Commission confirms the existence of a situation involving discrimination referred to in section 86.1, it may recommend the implementation of an affirmative action program within such time as it may fix.

Where its recommendation has not been followed, the Commission may apply to the court and, on proof of the existence of a situation contemplated in section 86.1, obtain, within the time fixed by the court, an order to devise and implement a program. The program thus devised is filed with the court which may, in accordance with the Charter, make the modifications it considers appropriate.

86.4 The Commission shall supervise the administration of the affirmative action programs. It may make investigations and require reports.

86.5 Where the Commission becomes aware that an affirmative action program has not been implemented or is not being followed, it may, in the case of a program it has approved, withdraw its approval or, if it recommended implementation of the program, it may apply to the Court as in the second paragraph of section 86.3.

86.6 A program contemplated in section 86.3 may be modified, postponed or cancelled if new facts warrant it.

If the Commission and the person required to implement the affirmative action program agree on its modification, postponement or cancellation, the agreement shall be evidenced in writing.

Failing agreement, either party may request the court to decide whether the new facts warrant the modification, postponement or cancellation of the program.

All modifications must conform to the Charter.

86.7 The Government must require its departments and agencies to implement affirmative action programs within such time as it may fix.

Sections 86.2 to 86.6 do not apply to the programs contemplated in this section. The programs must, however, be the object of a consultation with the Commission before being implemented.

#### **Saskatchewan — A, C**

*Saskatchewan Human Rights Code*, S.S. 1979, c.S-24.1, s.47.

47(1) On the application of any person or on its own initiative, the commission may approve or order any program to be undertaken by any person if the program is designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin of members of that group, by improving opportunities respecting services, facilities, accommodation, employment or education in relation to that group.

(2) At any time before or after approval to a program is given by the commission, or a program is ordered by the commission or a board of inquiry, the commission may:

- (a) make inquiries concerning the program;
- (b) vary the program;
- (c) impose conditions on the program; or
- (d) withdraw approval of the program as the commission thinks fit.

(3) Nothing done in accordance with a program approved pursuant to this section is a violation of the provisions of this Act.

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## APPLYING EQUALITY TO EMPLOYMENT

Margrit Eichler

### Sommaire

Le document donne d'abord un aperçu du genre de discrimination en matière d'emploi exercée à l'égard des femmes et des hommes, puis aborde trois façons de concevoir l'égalité en matière d'emploi: 1) la représentation proportionnelle, 2) l'égalité des chances, et 3) la récompense égale. Ces trois modèles sont évalués selon ses critères de faisabilité, de l'utilité pour la formulation d'une politique et de la pertinence dans le contexte canadien. C'est le modèle de la récompense égale qui est jugé le plus utile pour favoriser l'égalité en matière d'emploi. L'auteure examine ensuite la façon d'appliquer le modèle de la récompense égale. Elle analyse les limites de ce modèle et propose des mesures pour favoriser l'égalité en matière d'emploi au Canada. Le document est suivi d'une annexe qui porte sur l'importance sociale des communications non sexistes.

### Summary

This paper takes, first, a brief look at the nature of inequality in employment for women and men and then discusses three ways of conceptualizing equality in employment: 1) the proportionate representation model of equality, 2) the equal opportunity model, and 3) the equal rewards model. The appropriateness of the three models is assessed against the criteria of theoretical soundness, utility for policy development, and embeddedness in the Canadian context; the equal rewards model is identified as the most useful approach to equality in employment. The paper then focuses on operationalizing the equal rewards model, discussing its limitations and suggesting some policy initiatives for moving Canada towards equality in employment. An appendix discusses the social importance of non-sexist communications.





## APPLYING EQUALITY TO EMPLOYMENT

Margrit Eichler\*

### INTRODUCTION

The concept of equality in employment is an elusive one, since it is difficult to visualize the state that would be described with such a concept. Most often, its meaning is taken as self-evident and therefore left undefined. (See, for instance, the papers submitted to the Subcommittee on Economic Growth and Stabilization of the Joint Economic Committee of the Congress of the United States, 1977.) Difficulties in attempting to define equality in employment arise from at least four distinct sources. One set of problems stems from the fact that it is hard to envision equality in employment in the overall context of a society that is based on inequality. Utopian thinkers have therefore traditionally handled the problem of inequality in employment for any given group by equalizing *all* work in its evaluation and, to some degree, in its allocation. (For a modern version that is extremely well thought through see Le Guin, 1974.) I will assume that for the purpose of this paper a complete restructuring of society along the lines of overall equality is outside the realm of the possible, given the current context, and will therefore not pursue this thought here further.

A second set of problems derives from the inherent contradiction between the meaning of equality at the aggregate and at the individual level. This is a very thorny theoretical issue. Within the most privileged group in Canada—namely prime age, white, Anglo Saxon males—there is a large amount of inequality, such that particular individuals from this group can be found at all rungs of the occupational ladder (although they are, to be sure, proportionately overrepresented at the upper rungs). There are some individual women who have a better position than some of the men in the generally privileged group. Given this fact, what does it mean for women to be equal?

A third set of problems derives from the focus on social policy that is here taken. While a particular definition of equality may make theoretical sense, it may or may not be useful for social policy development.

Finally, the last set of problems derives from the fact that equality is not a value that is meaningful outside of a societal context. George Orwell in *Nineteen Eighty-Four* (Orwell, 1962) and Zamyatin in *We* (Zamyatin, 1983) have both constructed dystopias that have as one of their ingredients equality for women and men in employment. It is unlikely that anybody would see equality as desirable under the conditions as depicted in these two books. Equality therefore needs to be embedded within an overall desirable context, rather than seen as the only important goal.

This paper will approach the subject by first (1) looking cursorily at the nature of inequality in employment for women

and men, and then (2) briefly consider different ways of conceptualizing equality in employment, with three constraints deriving from the problems identified above in mind: any definition needs to be theoretically sound, useful for social policy development, and embedded within the current Canadian context. Following this discussion, the paper will (3) briefly locate the notion of inequality within an institutional context and subsequently (4) suggest some policy mechanisms for achieving equality in employment for women. Finally (5), some difficulties attached to the policy suggestions made will be briefly touched upon.

### 1. INEQUALITY IN EMPLOYMENT

We can at present note distinct patterns in employment that can be identified as male and female patterns, respectively. For one, women as a group have significantly lower earnings than men as a group. Women are, further, represented to a significantly lower degree in what Podoluk calls "elite occupations"—she notes that there were 329,000 men in such positions as compared to 49,000 women, and that the latter had substantially lower earnings than the men. (Podoluk, 1984:21) Next, women are less likely to be unionized than men, they are more likely to be unemployed, and they are clustered in a few traditionally female-dominated occupations, namely clerical, sales, and service occupations, while men exhibit a diversified pattern of employment. Between 1971 and 1981 the concentration of women in these occupations increased rather than decreased. Women are also more likely to have part-time rather than full-time jobs. The Commission of Inquiry into Part-time Work found that in 1981 "women comprise 72 percent of all part-time workers but only 35 percent of all full-time workers; men comprise only 28 percent of all part-time workers, but 65 percent of all full-time workers." (Wallace, 1983:46)

Inequality of male and female workers shows itself at the individual as well as at the aggregate level. A woman with a given education is likely to earn much less than a comparably educated man; indeed, she is likely to earn less than a less well-educated man. In 1980, the average hourly earnings of a woman with a postgraduate university degree were \$12.56 while those of a comparably educated man were \$15.81 and for a man with a BA or equivalent they were \$13.72. By contrast, the hourly income of a woman with a BA or equivalent was \$10.28 while that of a man with a non-university degree was \$10.50. Finally, women with a non-university degree earned \$7.67 per hour on average, while men with secondary school or less earned \$9.33 and women in that educational category earned \$6.57. (Economic Council of Canada, 1983:118, t. A-13)

At the individual level, therefore, women are likely to find themselves in a less advantageous position than men of comparable education. At the aggregate level, women as a group are in lower level positions, receive less pay, occupy

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fewer decision-making positions, are in a smaller range of occupations than men, and are more likely to engage in part-time work. With respect to part-time work, the Commission of Inquiry into Part-time Work lists 10 disadvantages for the individual associated with part-time work (although it also recognizes, of course, some advantages):

**a. Economic**

- i. *Part-time work, in most cases, provides less income than a full-time job, while job-related expenses remain almost the same.*
- ii. *it is usually found in low skilled and low paying jobs.*
- iii. *Fringe benefits and pension plans are less available to part-time workers than to full-time workers.*
- iv. *Part-time workers have less job security because they are often the first to be laid off.*

**b. No Career Paths**

- i. *Part-time work provides little opportunity for training or promotion.*
- ii. *Long-range career planning is difficult, if not impossible because of the stereotype that part-timers are not serious about their careers.*
- iii. *Part-time work, as it exists today, is a job ghetto for women and students.*

**c. On-the-Job Difficulties**

- i. *Communications difficulties with supervisors and other workers may develop because part-time workers are not always available.*
- ii. *Conflict may occur with full-time workers, who often treat part-timers as second class citizens.*
- iii. *Scheduling, particularly for on-call workers, may conflict with other commitments. (Wallace, 1983:34)*

Overall, about one quarter of the female labour force works part-time rather than full-time. (Labour Canada, 1983:45)

One somewhat polemical attempt to sum up the situation at a worldwide level suggests that women perform at least 66 per cent of all the labour in the world while receiving only 10 per cent of the total of all salaries and owning only 1 per cent of all property. (As, 1982:105) With this picture of inequality as a backdrop, what are possible definitions of equality in employment?

## 2. EQUALITY IN EMPLOYMENT

There are at least three different models of what equality in employment might mean, which can be identified as (a) the proportional model, (b) the equal opportunity model, and (c) the equal rewards model. In the following I shall briefly consider all three in the light of the three criteria elaborated above, namely theoretical soundness, policy development utility, and embeddedness in the Canadian context.

### a) The Proportionate Representation Model of Equality

One way in which to identify equality would be to assume that equality would have been reached if there were proportionate representation of women in all occupational categories, within occupational categories at all levels, with equal pay, equal working conditions, etc. Theoretically, this is a very attractive model, since it is simple and clearcut. It is

valuable in offering us a guide to describing existing *inequalities*, and indeed the above description is partly based on this model as are most other descriptions of inequality in employment. It serves to measure the distance that yet separates us from the ideal of equality.

However, with respect to its utility for social policy development, this model is considerably less impressive. If we try to translate the goal of proportionate representation into concrete measures to get there, the logical means would be the establishment of quotas for different occupations. For instance, if women constitute 42 per cent of the labour force, 42 per cent of all plumbers, electricians, garbage collectors, university professors, lawyers, judges, medical doctors, babysitters, secretaries, and nurses, to name just a few occupations, would have to be female. Conversely, 58 per cent of all the occupants of these jobs would have to be male. As the overall proportion of women in the labour force increases (as is to be expected, since the influx of women into the labour force is significantly higher than that of men) these proportions would have to change accordingly, so that five years later a hypothetical 45 per cent of all incumbents would have to be female and 55 per cent male, to take one possible example.

Problems with such an approach would be manifold. The major one is that the degree of regulation required to achieve proportionate representation would be quite extreme. For instance, some of the occupations named are likely to have incumbents who work independently rather than as employees, as for instance in the case of plumbers or electricians. Policies would therefore have to be devised that would license according to sex quotas those occupations where licensing is currently required. Other occupations currently not requiring licensing (e.g., secretaries) would need to become licensed, so that the influx of people into these jobs could be controlled by sex. What would happen in jobs in which there are currently few openings and in which no expansion is likely? Secretaries, garbage collectors, and university professors might fall into this category. Would current incumbents be removed to make place for the currently underrepresented sex? What would happen if there are not enough interested applicants of the right sex with the relevant training? Would people be given permission to attend certain types of training programs only if they have the right sex?

One might argue that in spite of these difficulties the end results would be worth the social cost incurred. However, there is another problem. When dealing with large employers, such as multinational corporations, such a policy could be translated into meaning that a large employer must achieve the specified quotas within its own body of employees. However, a large number of workers work with small employers. If the concern is with proportionate representation at the aggregate level, would certain small employers be forbidden to hire employees of their choice because some *other* employers had already filled the quota for that sex? What constitutes 42 per cent (or 45 per cent) of three employees in a small retail store? Even with larger employers, there may be only one person in a particular occupational category, such as a personnel officer, a chief financial officer, etc. Who would determine which employer gets to hire a female and which a male?



For purposes of social policy development within the Canadian context, then, the proportionate model would seem to generate as many difficulties as it might solve, although for purposes of analysis it is a useful model.

#### **b) The Equal Opportunity Model**

The equal opportunity model would see equality in employment as having been achieved when women and men had equal opportunities to gain the same types of employment provided they had the same attributes. Clearly, this is an important aspect of a model of equality in employment, but as a comprehensive model it has some significant drawbacks. In a formalistic sense, equal opportunity exists in Canada at the present time for the vast majority of types of employment, since human rights legislation by and large prohibits discrimination on the grounds of sex, including in job advertisements. However, this legislation has been markedly unsuccessful in generating *equality of success* as compared to *equality of opportunity*. While it is, then, a necessary aspect of equality, it is not a sufficient condition.

One of the major problems with this model is, of course, that often the attributes of women and men are not identical when they seek employment. For instance, post-doctoral fellowships are an important stepping stone towards an academic job, especially in times of a shortage of academic jobs. If such fellowships are available only to young scholars, defined as scholars under the age of 35 (as used to be the case), this discriminates against women, who are more likely to finish their PhD at a later age than men because they are less likely to have moved from their BA to a PhD in an uninterrupted progression. Using, in a formalistic sense, a criterion of equal opportunity, therefore, turns out to serve, in this instance, a systemic discrimination. This can be avoided by specifying a number of years since the last degree, if the intent is to reserve the post-doctoral fellowships for young scholars, irrespective of their chronological age.

In general, however, the sheer fact of belonging to a minority group when seeking a position in an occupation is itself a factor that must be acknowledged. For instance, if a woman wants to enter a traditionally male occupation, such as a job in the construction business, the fact that she is a woman will mean that her treatment will be different from that which a comparable male would receive. (See Kanter, 1977)

Overall, then, equality of opportunity must be seen as a necessary aspect of equality in employment, but not as a comprehensive formulation of the goal of equality.

#### **c) The Equal Rewards Model**

As yet another way of conceptualizing equality in employment would be to argue that equality has been achieved when equivalent efforts are rewarded equally. As a broad definition, this seems to serve as a satisfactory statement, although it is rather vague and needs to be specified to become useful for social policy development. It is similar to the notion of equal pay for work of equal value, but broader in that rewards is a much broader concept than pay and equivalent effort encompasses more than just work of equal value. The task is, therefore, to try to develop this concept into a model that is useful. In order to do so, we need to specify both what is meant by equivalent efforts as well as what is meant by equal rewards.

Equivalent efforts is here meant to encompass work of equal value as well as socially useful aspects of currently unpaid labour. If we ignore the work that is socially useful but unpaid, the difficulty is "that equality for the most part is still defined in terms of women becoming equal to men in a labor market which has been organized by and for men". (Cook, 1977:275) In other words, we must socially recognize and reward the socially useful (and therefore by definition necessary) aspects of unpaid work. Since this point has been elaborated elsewhere (see Eichler, 1984), it will be taken as given here.

Turning to a specification of the meaning of equal rewards, one obvious interpretation is that there be equality of pay for work of equal value. However, rewards is a larger concept than pay. Sometimes it is a *position itself* that must be seen as a reward for previous efforts. All appointments of a public nature which are due to the judgement of some body or person would fall into this category, such as appointments to the Senate, to directorships of crown corporations, to judgeships, all political appointments, etc.

Another reward that is attached to work are fringe benefits. Full-time workers generally receive a package of fringe benefits along with their pay. Where such fringe benefits are *not* available to part-time workers on a prorated basis, these workers are obviously not receiving equal rewards for equivalent efforts.

Yet another reward of a non-monetary kind is equal access to decision-making positions beyond those which are due to appointment by a public body or figure. Decision-making affects the nature of employment in important ways, and access to a decision-making position is itself often a step in a career ladder.

Underlying all of these specifications are two other criteria: equal access to all jobs and equivalent working conditions. Equal access to all jobs involves a slight reformulation of the principle of equality of opportunity, which is clearly an aspect of equality in employment but which tends to focus on individual non-discrimination. Equality of access implies, by contrast, equality at the aggregate level, and thus addresses the notion of existing systemic discrimination. In other words, if a typically male pattern of employment is seen as necessary in order to gain access to certain types of positions, and if significant proportions of women do not exhibit this pattern because they are women, we are dealing with a situation in which there is no equality of access.

As far as equivalent working conditions are concerned, working conditions must be seen as an aspect of work as well as a reward for preceding and ongoing efforts. If, for instance, women are exposed to sexual and other forms of harassment as part of their working environment, they receive a penalty that men do not receive for equivalent efforts and therefore no equality obtains.

To summarize, at a rather high level of abstraction we can define equality in employment as the principle of equal rewards for equivalent efforts, operationalized into the following six sub-principles:

1. equal pay for work of equal value;
2. equal representation of both sexes in all appointments made in the public sector;
3. equal access to decision-making positions;

4. equalization of the rewards attached to full-time and part-time labour, by prorating of all benefits;
5. equal access to all jobs;
6. equivalent working conditions.

The latter two sub-principles can be further specified. At the individual level, equal access implies non-discrimination in the hiring (or promotion) of any individual who applies. At the aggregate level, sub-principles 5 and 6 can perhaps best be described as the creation of a woman-friendly environment to the same degree to which an environment is geared toward men. This is a complicated and little explored area, and the following list is meant to be suggestive rather than exhaustive. Creation of a woman-friendly environment would certainly include (but not necessarily be restricted to) the following components:

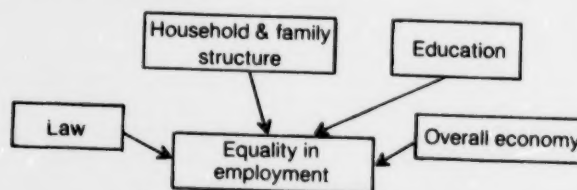
- a. all entry requirements must be non-sexist, by being absolutely relevant to the job, specific rather than general, and by recognizing work performed in the home or in the voluntary sector as work that generates certain types of experiences;
- b. women need to be moved in cohorts rather than as individuals into positions formerly occupied only by men;
- c. all communications (verbal, written, pictorial, or otherwise) must be non-sexist (see appendix for an elaboration of the importance of this component);
- d. sexual harassment must be eliminated if and where it has occurred;
- e. all equipment must be equally suitable for female and male employees;
- f. all facilities must be equally available and suitable for female and male employees;
- g. protective measures for reproductive organs must be extended to both sexes rather than to women only;
- h. family responsibilities of both male and female employees must be acknowledged and accommodated; and lastly
- i. flexible work hours need to be instituted wherever feasible.

The above constitutes a possible definition and operationalization of the concept of equality in employment for women. Before discussing some possible policy initiatives that might flow out of such a definition, I will briefly consider some of the limitations in trying to work towards equality in one aspect of society, given that there is inequality in all others.

### 3. IN/EQUALITY WITHIN AN INSTITUTIONAL CONTEXT

Overall, Canada is still a sexist society. Sexism expresses itself in a variety of ways in different institutions, and sexism in employment is just one of these expressions. Other forms include sexism in the household and family structures most of us live in, in research, science, and scholarship in general, in education, in the overall economy (beyond the employment sector), in law, in sports, in literature, in philosophy, in the media, in religion, in the justice system, etc. In fact, I have so far been unable to come up with a single example of a major institution in our society that is free of sexism. This overall sexist environment must be recognized as a constraint when trying to establish a non-sexist environment in any particular sector of society. Of those which are most important for

abolishing sexism in employment I would include law, household and family structure, education, and the overall economic structure.



All four of these institutions will have a constraining or facilitating effect on attempts to create equality in employment. As far as law is concerned, most progress has probably been made in the enactment and amendment (but possibly not in the administration) of laws. The household and family structure is inextricably linked to the achievement of equality in employment, and, indeed, unless we recognize the manner in which paid and unpaid work are mutually linked and dependent on each other we cannot hope to achieve equality in employment. This is the theme of a separate paper (see Eichler, 1984) and will therefore simply be taken as given rather than argued. Equality in education is one of the preconditions for achieving equality in employment, although it will not necessarily lead to the latter. Relevant questions in this context include the valuation of different types of educational background, whether all types of training and education are considered, and whether educational requirements are truly relevant.

Finally, equality in employment is not likely ever to be achieved unless Canada, as a country, adopts a full-employment policy. This argument has also been made elsewhere (see Bellemare with Eichler, 1983). For as long as people are desperate to find any job, irrespective of working conditions and pay, it will be difficult to effectively institute policies geared towards eliminating sexism in employment.

### 4. POSSIBLE POLICY INITIATIVES FOR ACHIEVING EQUALITY IN EMPLOYMENT

Certain *a priori* assumptions underlie the following suggestions which should be stated explicitly rather than be left implicit. In principle, I consider an incentive structure as more desirable than an approach premised on the use of penalties. It is cheaper, needs less administration, is likely to generate less resentment and therefore more compliance, discourages evasive tactics, and does not further increase the policing functions of the state, all of which I see as desirable ends. Further, one must make a difference between employment in the public and in the private sector. Finally, one would assume that whatever policies are being adopted would be phased in over a considerable period of time, and that the concrete details would be worked out together with employers, rather than simply be imposed on them, under the assumption that investments in terms of time and skills and significant input into the final product would increase the likelihood of any means adopted to be more effective.

With these presuppositions in mind, the first task is to invent a means whereby it becomes profitable for employers to be equal opportunity employers for women, and whereby it becomes less profitable for them to treat male and female employees differently. This could be achieved by providing a tax bonus, up to a certain maximum, perhaps five per cent of

the total, for any particular employer who demonstrates that equal rewards for equivalent efforts are, indeed, provided by this particular employer to female and male employees. The bonus would be reduced (up to 0) for partial or no implementation of equal rewards. This approach would have the added advantage of rewarding those employers who have been concerned about equal opportunity in the past, since presumably they would pay less tax than other members of their peer group.

Whether or not (or to what degree) equality has been achieved (or has failed to be achieved) could be determined by examining three indicators: wages, access to jobs, and working conditions. As far as wages are concerned, equality would have been achieved if the average wage of female and male employees were identical. This could be achieved in three ways: either an employer hires more women into higher paying positions (assuming that there is a considerable wage differential to begin with), or he raises the wages of the women in their current positions, or he utilizes a combination of both.

As far as access to jobs are concerned, this criterion overlaps considerably with the criterion of equivalent working conditions, but nevertheless one can assign the following elements to equal access:

#### **Equal Access**

1. A thorough examination, evaluation, plan for action, and implementation concerning the removal of all individual and systemic discriminatory elements in entry requirements. (E.g., are requirements stated directly—ability to lift 50 pounds—rather than indirectly—of the male sex?) Are typical non-traditional work experiences of women, e.g., in the voluntary sector or at home, recognized as equivalent to paid work experience, where applicable?
2. Ditto concerning the recruitment process (e.g., is word-of-mouth recruitment used rather than advertising? Are all appropriate media used? etc.).
3. Development and implementation of a plan to move women in cohorts rather than as individuals only (although that should happen, as well).

As far as equivalent working conditions are concerned, arguably some of the elements could be seen as falling into the preceding criterion. Elements of equivalent working conditions might include:

#### **Equivalent Working Conditions**

1. Development and implementation of a good policy concerning sexual and other forms of harassment.
2. An analysis of all communications for sexist content and implementation of a policy that all communications be non-sexist in nature.
3. An examination of all new and existent equipment with respect to its suitability for both sexes. (E.g., are protective garments suitable for both sexes? Are machines equally suited to be operated by both sexes?) Where equipment is found to be less suited or unsuited for one sex, a plan for its replacement or modification would need to be developed and implemented.
4. Ditto with all facilities. (E.g., are there sufficient numbers of bathrooms for both sexes? Are they equally conveniently located? Should they be integrated?)
5. Extension of all protective measures to both sexes.

6. Acknowledgement of family responsibilities for both male and female employees.
7. Introduction of flexible work hours, wherever feasible.

These (or similar) criteria could be developed into a standardized measuring instrument to assess the degree to which an employer has managed to create a "woman-friendly" environment. Their concrete elaboration, however, would have to be done in close cooperation with employers and unions, since otherwise one might assume that many would be unwilling to cooperate.

In addition, the following other measures could be taken immediately:

#### **Legislative Changes**

1. Equal pay for work of equal value legislation should be extended to such jurisdictions where it does not, at present, apply.
2. The federal government (as well as the provincial governments, of course) should adopt a policy of appointing women to 50 per cent of all public positions filled by appointment.
3. All large corporations should be required by law to fill half of their positions on boards and other supervisory bodies with women (irrespective of the sex composition of their workforce).
4. Legislation should be passed to equalize benefits attached to full-time and part-time work by making all benefits without exception available to part-time workers on a prorated basis.

Together, the various measures should move us somewhat closer to equality for women in employment.

#### **5. SOME POTENTIAL PROBLEMS CONCERNING THE POLICY INITIATIVES SUGGESTED**

The changes suggested are quite large and therefore by necessity quite a large number of problems can be expected to emerge if they were to be implemented. Here, I will mention only three which seem to be particularly important. For one, some of the proposed policy initiatives are more readily realizable by large employers than by small employers. E.g., equality of pay on average may not be feasible for employers with under 10 employees. This problem would have to be addressed in some form.

Another problem centres on the employer who hires people within a job ghetto. What does sex equality mean if all or almost all of the workers are either male or female? This problem, too, would have to be addressed.

Finally, it is always possible that well-intentioned policies have undesirable effects that go in quite a different direction from that which was intended. One of the possible negative consequences of some of the policy initiatives suggested is that men might move into female job ghettos without at the same time women moving into male job ghettos. Given high unemployment rates, this is not unthinkable. To prevent this from happening, some of the initiatives suggested may have to be specified as being meant to improve the situation of women, rather than to create sex equality.

#### **CONCLUSION**

Equality for women in employment is certainly a very desirable goal not just for women, but ultimately for the entire society. The policy initiatives suggested would probably go



some distance in moving us closer to this goal. However, assuming that we were, as a society, totally successful in achieving equality in the sense that at the aggregate level women and men were rewarded equally for equivalent efforts, and that at the individual level a woman with certain qualifications would be likely to end up with the same position as a man with comparable qualifications, in an absolute sense we would nevertheless not have diminished inequality in employment in society. We would have simply moved it around, such that the less desirable positions would now be

equally shared by women and men, rather than disproportionately held by women. To be sure, this would be an advance. A greater advance, however, would be an absolute reduction in inequalities between top and bottom jobs. This could be achieved by raising minimum wages, improving working conditions in the least favoured jobs, and instituting 100 per cent tax on income beyond a certain cut-off point. While this may not be politically feasible at present, ultimately it is extreme inequality itself that is the villain.

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## APPENDIX

## On the Social Importance of Non-Sexist Communications

Every communication works at different levels at once. There is the overt and intended meaning, and there are always other messages as well, often covert and unintended. One of the recent realizations in social science research has been that communications are not gender neutral. This is not particularly astonishing, since we are not living in a gender-neutral world, and since speech patterns and other forms of communication reflect (as well as shape), to some degree, the world within which we live.

A lot of research has recently been focused on sexist language. Sexist language tends to be identified by the use of male terms (man, he, mankind, policeman, postman, chairman, man years) for generic purposes instead of the use of truly generic terms (human, he/she, humanity, police officer, mailcarrier, chairperson, person years).<sup>1</sup>

Research has shown that sexism in language does indeed exist and does in fact affect our way of thinking. Broad philosophical treatments of this issue can be found in Moulton, Robinson and Elias, 1978; Spender, 1980, Vetterling-Braggin, 1981; Yaguello, 1979; also Eichler, 1983a. A very specific review of 14 empirical studies examining the issue of the supposedly generic male found that

*In all 14 studies the GM [generic male] terms caused more male-biased responses than did the more neutral wording. Thus, pictures illustrating generic man contained more males than pictures illustrating people. Characters referred to as generic-man, he or his were given a male identity*

*more often than characters referred to as person, their, they, he or she or his or her. (Silveira, 1980:170)*

While it seems conclusive that male terms do indeed evoke disproportionately male rather than generic associations, resistance to changing language remains strong in some quarters. Blaubeergs (1980) has identified and rebutted eight common themes typically encountered by advocates of non-sexist language usage, of which perhaps the most important one is that language is a trivial concern. On this she comments, "Overall, for a 'trivial concern' sexist language has received an inexplicable amount of attention in both academia and the media, and an inordinate degree of resistance to change." (Blaubeergs, 1980:139)

By now, a number of guidelines for non-sexist language have been developed and some of them have been in use for more than a decade. American examples of such guidelines include McGraw-Hill, n.d.; NCTE, 1976; Scotts, Foresman and Company, 1972; American Psychological Association, 1975; and Miller and Swift, 1980. Canadian guidelines for non-sexist language include Katz, 1981, and Treasury Board, 1982.

Overall, the evidence seems clear: sexist language is, indeed, sexist. Adopting new speech patterns will not abolish sexism in other areas, but it will help stimulate new thought patterns.

When it comes to communication of a non-verbal type, research efforts have usually focused on demonstrating the lopsided depiction of male and female subjects (for instance in books) and on analysing the stereotypical depiction of females and males (e.g., in TV; see, for example, Spears, Torrance, and Seydegart, 1982). That such lopsided and stereotypical depictions are a form of sexism is taken for granted rather than argued. And, indeed, this seems a sensible assumption to make.

1. A one-sided definition of sexist language has been used here because research has focused on this definition. A broader definition can be found in Eichler, 1983b: 15, where it is argued that "...language is non-sexist if it uses sex specific terms to describe sex specific situations, and by the same token never uses sex specific terms to describe generic situations, or, to say it positively, uses generic terms to describe generic situations. Sexist language commits either one or both of the above identified errors: it may use sex specific terms to describe generic situations and/or may use generic terms to describe sex specific situations. Either usage must be seen as unacceptable..."

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# DISCRIMINATION AND RELATED CONCEPTS: DEFINITIONS AND ISSUES

Patricia Hughes

## Sommaire

L'auteure analyse les définitions des expressions «déficience», «discrimination», «qualification professionnelle nécessaire» et «accommodement raisonnable» qui se trouvent dans les lois et la jurisprudence canadiennes et américaines. En outre, elle analyse brièvement les questions découlant de ces notions. Il y a conflit d'opinions dans la documentation de référence sur les questions à l'étude; toutefois, le document exprime le point de vue canadien lorsque c'est possible.

### A. Déficience

1. Définitions types
  - a) «Toute déficience physique ou mentale, qu'elle soit présente ou passée, y compris le défigurement ainsi que la dépendance, présente ou passée, envers l'alcool ou la drogue» (*Loi canadienne sur les droits de la personne* (modifiée)).
  - b) «Un handicap physique ou mental qui limite sensiblement les activités principales d'une personne» (comprend un handicap actuel ou antérieur) (*U.S. Rehabilitation Act de 1973*).
2. Questions
  - a) *L'expression englobe-t-elle les déficiences mentales, antérieures et apparentes?* Au Canada, on croit généralement que si.
  - b) *L'expression comprend-elle les déficiences «volontaires»* (la toxicomanie, l'alcoolisme, l'obésité, entre autres)? La question n'est pas claire; toutefois, ceux qui souffrent de toxicomanie ou d'alcoolisme sont protégés en vertu de la *Loi canadienne sur les droits de la personne*.
  - c) *La déficience doit-elle être grave et permanente?* Probablement pas au Canada.
  - d) *Test au travail.* Pour évaluer la capacité de l'intéressé à faire le travail. Il faut donner à l'intéressé la chance d'exécuter les fonctions et tâches du poste. La décision de l'employeur ne doit pas être fondée sur des hypothèses non établies quant à la capacité de l'intéressé à faire le travail.
  - e) *Questions posées sur la déficience, avant l'embauchage.* Ces questions sont interdites aux États-Unis, mais la situation est moins claire au Canada (elles sont interdites en Ontario, par exemple).

### B. Discrimination

1. Définitions types
  - a) Il y a discrimination lorsqu'on crée des distinctions, prononce des exclusions ou témoigne une

## Summary

The paper assesses definitions of the terms "disability", "discrimination", "bona fide occupational qualification", and "reasonable accommodation" as found in Canadian and American case law and legislation. It also briefly discusses issues arising out of the use of these concepts. There is disagreement in the source material about the matters discussed; however, the paper sets out the prevailing Canadian view where possible.

### A. Disability

1. Representative Definitions
  - a) "Any previous or existing mental or physical disability... including disfigurement and previous or existing dependence on alcohol or a drug" (*Canadian Human Rights Act* (am.)).
  - b) "A physical or mental impairment which substantially limits one or more such person's major life activities" (includes record of and perceived impairment) (*U.S. Rehabilitation Act of 1973*).
2. Issues
  - a) *Whether mental disability, past disability, and perceived disability are caught by the term:* the prevailing position in Canada is that they are.
  - b) *Whether "voluntary" disability is included* (refers to drug addiction, alcoholism, obesity, *inter alia*): position not clear but drug addiction and alcoholism protected by C.H.R.A. and elsewhere.
  - c) *Whether disability must be serious and permanent:* probably not in Canada.
  - d) *Test in employment sector:* whether the individual can perform the job; individual to be given the opportunity to perform required tasks and functions; decision of employer not to be based on unsubstantiated assumptions about individual's capacity.
  - e) *Pre-employment questions relating to disability:* cannot be asked in U.S.; position not as clear in Canada (cannot in Ontario, for example).

### B. Discrimination

1. Representative Definitions
  - a) Discrimination exists where there is a distinction, exclusion, or preference based on one of the enumerated grounds with the effect of nullifying or impairing the person's rights or freedoms (*Quebec Charter of Human Rights and Freedoms*).
  - b) Action of intentionally or unintentionally doing an act that offends the dignity of a person or has adverse consequences (*Rasheed v. Bramhill* (1980), 2 C.H.R.R. D/249 (N.S.)).

préférence en se fondant sur l'une des raisons énumérées et qui ont pour effet de priver l'intéressé de ses droits ou libertés (*Charte des droits et des libertés du Québec*).

b) Action préméditée ou involontaire qui offense une personne ou lui nuit d'une façon ou d'une autre (*Rasheed v. Bramhill* (1980), 2 C.H.R.R. D/249 (N.-É.).

## 2. Questions

a) *La discrimination doit-elle être préméditée?* L'étude analyse cette question et montre que la discrimination indirecte ou involontaire est également visée. Cette idée faisait école jusqu'à ce que la Cour d'appel de l'Ontario, dans l'affaire *O'Malley c. Simpson-Sears* (1982), 3 C.H.R.R. d/1071 et la Cour fédérale d'appel, dans l'affaire *Bhinder vs. Canadian National Railways* (1983), 4 C.H.R.R. D/404, rev'g (1981), 2 C.H.R.R. D/546, jugent que pour être efficace l'interdiction de discrimination indirecte doit être affirmée explicitement. (Un appel a été interjeté dans les deux cas précités auprès de la Cour suprême du Canada). L'étude explique brièvement l'attitude de certains conseils et tribunaux pour montrer à quel point on semble hésiter à s'en tenir à ces décisions.

b) *Charge de la preuve incombant au plaignant:* la nature des faits doit être présentée par le demandeur/plaignant et l'utilisation des statistiques à l'appui. En général, le plaignant qui est protégé en vertu de la Loi doit prouver qu'il a la qualification nécessaire, mais que l'emploi lui a été refusé. Dans les cas de discrimination systémique, la preuve que l'intéressé a subi de graves conséquences pourrait suffire à constituer une présomption légale.

## C. Qualification professionnelle normale

### 1. Définitions types

a) La nécessité de posséder les qualités essentielles pour remplir les fonctions du poste (définition généralement retenue dans le droit jurisprudentiel).

b) La nécessité de posséder les qualités essentielles pour remplir les fonctions du poste, déterminées après l'introduction, lorsque c'est possible, d'un accommodement raisonnable (selon les lignes directrices de la Loi canadienne sur les droits de la personne; il ne s'agit pas nécessairement de l'opinion générale).

### 2. Questions

a) *Test:* expliqué dans *Hall and Gray c. The Borough of Etobicoke* (1982), 3 C.H.R.R. D/781 (S.C.C.). Cette exigence doit être imposée honnêtement et doit avoir un rapport réel avec l'exécution du travail.

b) *Sécurité qui entre en jeu:* Les normes imposées à l'employeur peuvent être moins sévères quand il y a risque de compromettre la sécurité du public ou des employés.

c) *Genre de preuve nécessaire:* des statistiques irréfutables et des preuves médicales, et non seulement des impressions (*Etobicoke*). S'il n'y a pas d'autres moyens d'évaluer les aptitudes de

## 2. Issues

a) *Whether discrimination requires intention:* paper traces the development of concept to show it includes indirect or unintentional discrimination. This was prevailing view until Ontario Court of Appeal in *O'Malley v. Simpson-Sears* (1982), 3 C.H.R.R. D/1071 and Federal Court of Appeal in *Bhinder vs. Canadian National Railways* (1983), 4 C.H.R.R. D/404, rev'g (1981), 2 C.H.R.R. D/546 held that an effective prohibition of indirect discrimination requires explicit wording. (Both cases are under appeal to the Supreme Court of Canada.) The paper briefly sets out the response of some boards and tribunals to indicate an apparently widespread reluctance to follow these decisions.

b) *The onus on the complainant:* nature of the case to be made by the plaintiff/complainant and use of statistics considered. Generally, complainant with protected characteristic must show she was qualified for the job but was denied it; in systemic discrimination cases evidence of disproportionate impact might be sufficient to make a *prima facie* case.

## C. Bona Fide Occupational Qualification

### 1. Representative Definitions

a) A requirement relating to the essential features of the job necessary to the performance of the job (definition generally applied in caselaw).

b) A requirement relating to the essential features of the job necessary to the performance of the job, determined after reasonable accommodation has been made where possible (based on *Canadian Human Rights Act* guidelines; not necessarily general view).

### 2. Issues

a) *Test:* set out in *Hall and Gray v. The Borough of Etobicoke* (1982), 3 C.H.R.R. D/781 (S.C.C.); requirement must be imposed honestly and must be objectively related to the performance of the job.

b) *When safety is a factor:* standard to be met by the employer may be lower when the public safety or risk of fellow employees is involved.

c) *Nature of the evidence required:* must be concrete statistical and medical evidence, not impressionistic (*Etobicoke*); if no way to measure individual's ability to perform the job, an arbitrary classification may be permitted.

d) *Defences allowed:* business necessity test (business convenience probably not enough); preference of customers, co-workers, or employer probably not permitted (but may be allowed as a *reasonable occupational qualification*: *Canada Safeway Limited v. Steel and Manitoba Human Rights Commission*, 1984 4 W.W.R. 390 (Man. Q.B.)); perceived risk to employee may not be permitted, especially if based on stereotypical assumptions about the group to which employee belongs; (potential) conflict of interest allowed.

e) *Special provisions re disability:* appear in several human rights codes and generally permit employer

l'intéressé, une classification arbitraire peut être établie.

d) *Arguments admis*: le test des nécessités du service (les raisons de commodité ne suffisent probablement pas); les préférences des clients, des collègues ou de l'employeur ne sont probablement pas admises (mais peuvent être reconnues comme une qualification professionnelle raisonnable: *Canada Safeway Limited c. Steel and Manitoba Human Rights Commission*, 1984 4 W.W.R. 390 (Man. Q.B.); le risque apparent pour les employés ne sera peut-être pas admis, surtout s'il est fondé sur des hypothèses stéréotypées concernant le groupe auquel l'employé appartient. Les conflits d'intérêt (éventuels) sont admis.

e) *Dispositions spéciales concernant la déficience*: se trouvent dans plusieurs codes des droits de la personne et donnent plus de latitude à l'employeur (il reste à savoir si ces dispositions violent la Charte des droits).

#### D. Accommodement raisonnable

##### 1. Définition type

a) Les autres façons d'exécuter le travail et qui sont aussi satisfaisantes que la méthode exigée par l'employeur, ou la modification des locaux ou des concessions, notamment l'aménagement des horaires, la fourniture d'un lecteur, etc. (d'après le droit jurisprudentiel).

##### 2. Questions

a) *Ce qui est raisonnable*: comprend la notion de contrainte pour l'employeur par suite des difficultés engendrées par les accommodements, le coût de ceux-ci par rapport aux avantages; dans certains cas, les coûts doivent être si élevés que la survie de l'entreprise est mise en jeu.

b) *Situation au Canada*: ne figure pas encore dans la doctrine générale en matière de discrimination au Canada; ce critère est exigé dans certaines circonstances en vertu de la *Loi canadienne sur les droits de la personne* et il pourrait l'être également aux termes d'autres lois et règlements.

greater leeway (*quaere*: whether this constitutes a Charter violation).

#### D. Reasonable Accommodation

##### 1. Representative Definition

a) Alternative methods of performing the job that are as satisfactory as the method required by the employer or architectural renovations or accommodations such as re-scheduling, providing a reader, etc. (based on caselaw).

##### 2. Issues

a) *What is reasonable*: includes concept of undue hardship to employer because of difficulty of adjustment, high cost of the accommodation, relative cost of the accommodation and benefits; in some cases, cost may have to be so high as to endanger the business.

b) *Status in Canada*: not yet generally accepted part of discrimination doctrine in Canada; *Canadian Human Rights Act* requires it in some circumstances and it may be required in other jurisdictions.





## DISCRIMINATION AND RELATED CONCEPTS: DEFINITIONS AND ISSUES

Patricia Hughes\*

### I. INTRODUCTION

This paper considers definitions of the terms "disability", "discrimination", "bona fide occupational qualification", and "reasonable accommodation", as well as certain issues arising from these definitions. The definitions are culled from legislation, case law, and academic writings, primarily from Canadian and American jurisdictions, and their inclusion here is intended to indicate the range of meaning accorded these terms. It will be seen that while definitions and applications abound, general patterns have emerged.

The primary source of definitions of these terms in Canada is provincial and federal human rights legislation. The equality rights provision of the Charter (section 15), which guarantees equality rights without discrimination on the basis of a non-exhaustive list of specified grounds, may be an important vehicle for challenging apparently discriminatory practices in crown corporations but there has been, of course, no judicial consideration of section 15 since it does not take effect until April 17, 1985.

The first step in a case involving a "disabled" complainant is to determine whether or not the characteristic at issue is a disability within the meaning of the particular legislation under which the action is brought. Although most legislation is specific and detailed in defining the term "disability" (or "handicap"), some conditions have been the subject of judicial scrutiny (for example, alcohol and drug addiction and obesity have received such consideration). With some exceptions, the term has been interpreted broadly and few conditions short of perfect health would appear not to fall within the category of "disability".

In many cases, the employer does not intend to discriminate against the applicant and this is especially, but not exclusively, so with disabled persons. Employers often underestimate the capability of a disabled person and believe that the applicant simply cannot do the job at the required standard. The meaning of "discrimination" has evolved to take into account the effect of an employer's policy not only on disabled persons but on all persons who fall within protected categories such as religion, sex, and race.

In the United States, not only intentional but unintentional or indirect discrimination has been prohibited; the latter has had legal impact for more than a decade, and until very recently it was accepted in Canada, too, that employers could be held liable under human rights legislation for indirect or systemic discrimination. Two cases (*Bhinder* and *O'Malley* to be discussed *infra*) have now placed the validity of that acceptance in doubt and the issue awaits determination by the Supreme Court of Canada.<sup>1</sup> The outcome of these appeals will not be determinative of the status of indirect discrimination under section 15 of the Charter. There are strong

arguments supporting its prohibition under section 15 but the issue remains for judicial determination since the wording of section 15 is ambiguous.

Once a complainant has established a *prima facie* case of discrimination, the employer can rebut that case by showing that there is some other explanation for the apparently discriminatory act. One defence available to the employer is that known as "bona fide occupational qualification" (or BFOQ), under which the employer leads evidence to show that the particular qualification on the basis of which the applicant was refused the position (in the hiring stage) is necessary to the performance of the job. A great deal of judicial effort has been expended on the BFOQ concept but the term remains somewhat ambiguous and at least one commentator has argued that it has no meaningful application in the United States because of various restrictions placed on employers. The term was addressed by the Supreme Court of Canada in 1982 with the result that the concept has been somewhat sharpened in this country.

The American jurisprudence has made it fairly clear that before raising the BFOQ defence, an employer must have considered whether the applicant could have performed the job if reasonable accommodation to his or her disability or other characteristic underlying the BFOQ had been possible and attempted. But it is not clear if reasonable accommodation is required in Canada, although some cases hold that it is an integral element of BFOQ.

This paper will approach each term separately but will indicate where and how they interrelate. Disability will be dealt with first, because it will, of course, be referred to in the discussions of each of the other terms. Furthermore, the other three terms are closely interrelated, especially within the framework of actual cases.

### II. THE TERMS OF REFERENCE

#### A. Disability

##### 1. Introduction

It is of some interest that at least one dictionary defines "disability" as "thing, want, that prevents one's doing something, esp. legal disqualification" (emphasis added). Synonyms for "disability" include "disqualification", "impotency", "inability", "unfitness", "incapacity", "incompetence", and "incapability". Yet one of the major tasks facing those concerned with human rights legislation has been to employ the law to minimize the extent to which "disabled" is held to mean "disqualified". In doing so, the law becomes a tool for transforming societal attitudes. This is, of course, true of much work in relation to discrimination, but in the case of the disabled or the handicapped the term for the condition and for the effect of society's negative response to it are the same, thereby heightening the difficulty of the undertaking.

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Indeed, it has been suggested that the terms "disability" and "handicap" be used to refer to different phenomena: "disability" would mean a "condition of impairment, physical and mental, having an objective aspect that can usually be described by a physician" while "handicap" would mean "the cumulative result of the obstacles which disability interposes between the individual and his maximum functional level" (tenBroek, 814; the definition of "handicap" is quoted by tenBroek from Von Hentig, *The Criminal and his Victim* (1943) 16 n.35). Thus disability would have an objective connotation, i.e., physical and mental, while handicap would be a social term. Nevertheless, generally speaking, the two terms have been used interchangeably and will be used interchangeably in this paper.

Statutory definitions of the terms "disabled" or "handicapped" will vary with the purpose of the legislation but there is a trend towards expansion so that both physical and mental disabilities are included. Moreover, some definitions are sufficiently thorough that few conditions would be excluded.

## 2. Definitions

### a) Canadian Sources

The Ontario Human Rights Code, 1981 provides a detailed definition of handicap under section 9:

- (i) Any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impairment, deafness or hearing impediment, or physical reliance on a guide dog or any on a wheelchair or other remedial appliance or device,
- (ii) a condition of mental retardation or impairment,
- (iii) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language or,
- (iv) a mental disorder.

Several other pieces of human rights legislation in Canada employ much the same definition as that which appears in the Ontario Code. The *Alberta Individual's Rights Protection Act* uses the term "physical characteristics", which is defined in section 38(i) in a way that is similar to the definition in the Ontario Code of physical disability. The *Saskatchewan Human Rights Code*, the *New Brunswick Human Rights Act*, the *Nova Scotia Human Rights Act*, and the *Prince Edward Island Human Rights Act* all refer to physical disability or handicap and define it in a way that is similar to or the same as the Ontario definition. The *Manitoba Human Rights Act* protects both physically and mentally handicapped persons; it should be pointed out that the Manitoba Act specifically defines "blind person" as someone who is registered with the Canadian National Institute for the Blind, as someone who is in receipt of an allowance under specified legislation, or as someone who has received an allowance in the past and is not still blind under the *Old Age Security Act*. The Acts that do not include protection for mentally handicapped persons will no doubt have to amend their legislation to conform to section 15 of the *Charter of Human Rights and Freedoms*

which prohibits discrimination on the basis of mental or physical disability.

The definition under the *Canadian Human Rights Act*, as amended in 1983, is more concise:

"disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

In a later section, "physical disability" is defined in much the same way as in section 9(i) of the Ontario Code for the purposes of that particular section which limits the scope of a Tribunal's orders in cases of non-physical disability until April 17, 1985.

### b) American Sources

One of the most comprehensive definitions can be found in the American federal legislation, in particular the *Rehabilitation Act of 1973*. That Act has been the focus of much legal action by the disabled, although there was, prior to the passing of the Act, and continues to be, state legislation in the area. Section 503 of that Act states that any contract over \$2,500 entered into with a federal department or agency shall contain a provision that the contracting party shall take affirmative action to employ and promote the qualified handicapped. There is a clear duty to accommodate under this section.

Section 504 of the Act states:

No otherwise handicapped individual in the United States, as defined in Section 706(7) of this title, shall, solely, by reason of his handicap, be excluded from the participation, be denied the benefit of, or be subject to discrimination under any program or activity receiving federal assistance or under any program or activity conducted by any Executive Agency or by the United States Postal Service.

Section 504 is patterned after Title VII of the *Civil Rights Act, 1964* which guarantees equal opportunity without discrimination on the basis of race, national origin, or religion. While the Health, Education and Welfare Regulations (HEW regulations) "construe Section 504 to mandate ... accommodate for handicapped persons", the courts have not yet determined whether this is in fact so. (Section 501 of the *Rehabilitation Act* governs the employment of handicapped individuals by the federal government but the only important case law has been decided under sections 503 and 504.)

Under section 504 of the Act, a handicapped person is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment". A pre-1974 definition referred to a disability that substantially affected one's employment or employability rather than a major life activity.

"Major life activities" include caring for one's self, performing manual tasks, walking, sitting, hearing, speaking, breathing, learning, and working.

The impact of the *Rehabilitation Act* has been greatly influenced by the HEW Regulations, which are specific in defining physical or mental impairment:

- a) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one



or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs, cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

- b) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Also included are diseases and conditions such as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, disabilities, mental retardation, emotional illness, drug addiction and alcoholism, *inter alia*.

Interpretation by state courts in the United States has shown that the definitions can be variously broad and narrow. One commentator has compared the broad definition given the term "disability" by the Wisconsin Supreme Court in relation to the *Fair Employment Act* of that state with the narrow definition accorded the term by the Rhode Island Supreme Court. The Wisconsin Court applied the following definition: "a disadvantage that makes achievement unusually difficult", especially "a physical disability that limits the capacity to work" (*Chicago, Milwaukee, St. Paul and Pacific R.R. v. Department of Industry, Labor and Human Relations* 215 N.W. 2d 443 (1974) (S.C. Wisconsin)). Asthma was held to be a handicap; also included would be diabetes, hypertension, and past histories of illnesses such as cancer, and possibly high blood pressure, stuttering, and temporary mental illness. On the other hand, the Rhode Island Supreme Court defined physical handicap as including disabilities, infirmities, and malformations; but the handicap had to be "a serious injury or impairment of more than a temporary nature" (*Providence Journal Co. v. Mason* 359 A.2d 682 (1976) (S.C. Rhode Island)); this did not include whiplash but would include blindness, paraplegia, and deafness (*McClung*, 1172).

The detailed definitions do eliminate ambiguities. One commentator has said that the definition in section 504 of the *Rehabilitation Act* "removes the need to seek a conclusive diagnosis, or to choose a psychological, sociological, or medical definition. Whether a person is characterized as a current addict, a partially or totally rehabilitated addict, or a suspected addict, Section 504 will define that individual as 'handicapped person'" (Bertman, 522).

### 3. Issues

#### a) Whether Mental Disability, Past Disability, and Perceived Disability are Caught by the Term

A failure to include mental impairment as a form of disability will likely contravene section 15 of the Charter once it comes into effect on April 17, 1985, and this would settle the matter even if there were not other reasons for such inclusion. In any case, human rights legislation is being amended to include it.

It must also be decided whether past handicaps are to be included and whether a perceived handicap will come within the scope of the definition. The *Ontario Human Rights Code* states that "because of handicap" means for the reason that the person has or has had, or is believed to have or have had, any of the conditions included in the definition.

The U.S. *Rehabilitation Act* also specifically includes prior disability and perception of disability. The *Canadian Human Rights Act* appears to include prior history but not perception; however, perceived disability has been recognized as a handicap under the *Canadian Human Rights Act* (*Valerie Bri-deau v. Air Canada* (1983), C.H.R.R. D/1314 (Fed. Tri.)) (the diagnosis of air bubbles in Brideau's lung was an error). It seems clear that the perception referred to is that of the employer and not the complainant/applicant (*Foucault v. Canadian National Railways* (1981), 2 C.H.R.R. D/475 (Fed. Trib.); *American Motors Corp. v. Labor and Industry Review Commission* 29 E.P.D. No. 32,880 (1982)).

One significant American case is *Duran v. The City of Tampa* 430 F.Supp. 75 (1977), which involved past history and the safety of the public. When safety is an issue, the employer is usually given greater leeway (see discussion under "bona fide occupational qualification", *infra*). Duran had applied for a position as a policeman with the City of Tampa. He had passed all the tests and the medical at which he revealed that he had had epilepsy in the past. He had had no seizures since 1959 and had discontinued medication in 1966. Expert testimony on a motion for a preliminary injunction (which was refused) indicated he was no longer considered an epileptic; nor did his past history mean that there was a greater chance of his having a seizure than of anyone in the general population having one. In the hearing on the merits, the District Court held that the City was to provide the medical examination and was not to consider the prior history of epilepsy as a disqualifying condition (451 F.Supp. 954 (1978)). This is important because of the safety factor involved that, as will be shown under the BFOQ section, does allow a more lenient standard to be applied to the employer. On the other hand, this case is also important in that there was a decided assessment of Duran on the basis of stereotype, rather than on an assessment of him as an individual, since mere knowledge of past epilepsy was the ground for denying him employment when in fact he no more had epilepsy at the time of his application than did someone who had never had epilepsy at all.

#### b) Whether "Voluntary" Disability is Included

Certain conditions have been the subject of much debate about whether or not they should be considered handicaps. One reason for the ambivalence is that some conditions such as drug addiction, alcoholism, and obesity have been and still are considered to be voluntary conditions, resulting from the individual's lack of willpower or from deliberate action by the individual. Medical research suggests that these conditions may not in fact be voluntary but linked to hereditary factors or to certain biological conditions (such as a chemical imbalance). The inclusion of addiction to drugs and alcohol under the *Rehabilitation Act* was met with an agitated response, and employers have been assured that the provision does not include persons whose current addiction or alcoholism prevents their performing the job or who would pose a threat to the safety of others or to property. In fact, any person whose handicap prevented his or her doing the job or posed a risk to the safety of others would not be considered "qualified". However, it may be that the effects of drugs or alcohol are less easy to determine and are more unpredictable and sporadic than certain other conditions, but it also may be that there is a special kind of reaction to drug

and alcohol addiction simply because these are perceived to be voluntary. It should be noted that while provincial human rights legislation in Canada does not refer to alcoholism or drug addiction, the *Canadian Human Rights Act* includes not only prior but existing alcoholism or drug dependency.

The issue of a prior history of drug addiction was considered in *Davis v. Bucher* 451 F.Supp. 791 (1978) (E.D.Pa.). Davis applied for a job as a fireman with the City of Philadelphia but was rejected when it was discovered that he had been a drug user, although he no longer used drugs at all. Prior drug use falls within HEW's guidelines as having "a record of....impairment". There had been no consideration of individual factors such as Davis's recent employment history, maintenance on a methadone program, or evidence of freedom from drug use. There was no rational relationship between the past drug use and the requirements of the job. Because the policy was so facially arbitrary and conclusive, the court held that Davis should have had at least the opportunity to show that the policy was inappropriate in his case (under the American constitution, this argument relates to due process, normally applicable only when the applicant is already employed, not at the hiring stage).

Obesity is another condition that does not clearly qualify as a disability. There has been some reluctance to consider it a handicap because it is seen as voluntary, the same reservation that has been expressed about drug and alcohol addiction. One case under the *Pennsylvania Human Relations Act* held that morbid obesity (that is, double one's ideal weight) was a handicap. The *Michigan Civil Rights Act* includes overweight among the protected classes in relation to employment discrimination (Baker, 1969).

In *La Commission des droits de la Personne du Quebec c. La Cite de Cote St. Luc* (1983), C.H.R.R. D/1287 (Que. Sup. Ct.), overweight was recognized as a handicap, but weighing less than a specified maximum weight was accepted as a *bona fide* occupational qualification for firefighters. In an earlier case, obesity was not considered a handicap according to the *Loi assurant l'exercice des droits des personnes handicapées* because it does not interfere with ordinary activities (*La Commission c. Roger Heroux* (1981), 2 C.H.R.R. D/388 (Que. Prov. Ct.); issue to be decided by the Court of Appeal (1981), 2 C.H.R.R. D/340) (there appears to have been no further reported decision on this case).

#### c) Whether Disability must be Serious and Permanent

It will be necessary to consider as well whether disabilities must be serious and permanent, as some definitions require; clearly the population receiving protection will vary accordingly. One consideration here is whether "affirmative action" purposes are different than human rights legislation purposes and whether definitions should differ accordingly. The wide variety of disabilities may make it more difficult to establish programs for the disabled than for members of other groups. In this section of the paper, I have referred to epilepsy, alcoholism, hearing impairment, obesity, air bubbles in the lung, and heart attack; in other sections, I refer to visual acuity, lack of digits on one hand, back injury, and leukemia. To speak of the "disabled" is to speak of a wide range of conditions, almost an open-ended category.

As indicated, in some American jurisdictions, such as Rhode Island, the handicap must be serious and permanent

before the handicapped person will receive the protection of anti-discrimination legislation.

In Canada, there has not been a general acceptance of a narrow definition of handicap, requiring it to be serious and permanent. Wearing glasses constituted a handicap for a Wardair stewardess who was required to "book-off" when her contact lens was torn and she had to wear glasses temporarily. A Federal Tribunal held that this constituted discrimination (in fact, by the time the dispute reached the Tribunal stage, Wardair had changed its policy on the wearing of glasses and only the amount of compensation was in issue) (*Angie Schaepsmeyer v. Wardair Canada* (1975) *Limited*, (1983), 4 C.H.R.R. D/1346).

#### d) The Test in the Employment Sector is Individual Assessment

The disparate nature of disability has meant that it is difficult to establish general guidelines about treatment of the disabled. Furthermore, a wide variety of factors influence the way in which any given person will be affected by a disability. Brian Linn gives the example of blindness: the age at which the individual becomes blind, age, other disabilities, if any, development of the other senses, method of adapting to the blindness (some blind persons use braille, others tapes, for example) are among factors that influence the extent to which or the manner in which the blindness can be accommodated. Thus the courts have established a doctrine of individual assessment. Although it has particular relevance to disabled persons, it also applies to members of other groups protected under anti-discrimination legislation.

This emphasis on individual ability appears in *Anderson v. Atlantic Pilotage Authority* (1982), 3 C.H.R.R. D/966 (Fed. Tri.), where Anderson's employment as a launchmaster was terminated because of the heart attack he had suffered seven years earlier. A heart attack was recognized as a physical handicap. On the basis of medical evidence relating to stress on the job and danger to others, the Tribunal, on the *Etoibicoke* test (considered under "*bona fide* occupational qualification"), ruled that a heart attack could form the basis of a *bona fide* occupational requirement. The Tribunal stated:

*The intent behind including discrimination against the physically handicapped as prohibited behaviour under the Human Rights Act is to bring handicapped employees into the workplace, to as great an extent as possible, as fully functioning employees. There may be jobs that certain handicapped people cannot do, although the law intends that employers not make generalized decisions as to what an employee with a certain handicap can and cannot do, without ensuring not only that the function in question is necessary to the job, but that the particular handicapped employee or applicant can do the particular job or function. (Emphasis added.)*

(Since the *Anderson* decision, the *Canadian Human Rights Act* has been amended to include as a protected category mentally as well as physically handicapped persons, and to extend the full protection of the Act to disability, rather than limiting protection to employment.)

The importance of individual assessment is also illustrated by *Ward v. Canadian National Express* (1982), 3 C.H.R.R. D/689 (Fed. Tri.), in which a man lacking all digits on one hand had clearly overcome his "handicap" to the extent that

he did not really perceive it as a "handicap". This case is discussed *infra* in relation to *bona fide* occupational qualification.

For these reasons and because conditions may require different skills, the same handicap will be treated differently under different conditions. Two American cases can be noted on this point as an example of what is required of employers in assessing disabled applicants, both of them in relation to blind persons in teaching. *Gurmankin v. Costanzo* 411 F.Supp. 982 (1976) (E.D. Pa.) concerned a blind person who sought a position teaching sighted children. *Upshur v. Love* 474 F.Supp. 332 (1979) (N.D. Ca.) involved a blind teacher who sought an administrative position.

Until 1974, the policy of the Philadelphia School District had been to exclude blind teachers from teaching sighted students in public schools. *Gurmankin* had been prevented from taking the teacher's examination. Expert testimony indicated that blind teachers maintained at least average discipline and that the great majority were at least average teachers. They were not assigned playground or lunch supervision and in various ways were able to perform all other functions of a teacher, sometimes with the assistance of students or other teachers. The Court found that there was "no rational basis" for the exclusion. Furthermore, *Gurmankin* had been interviewed for the position by persons having no special knowledge of the blind who, although critical of the applicant's answers to questions regarding discipline and immediate classroom correction of work, had not asked her how those problems could be overcome. In *dictum*, the Court found that the "grading of the oral examination was based, at least in part, on assumptions that the blind simply cannot perform, while the facts indicate that blind persons can be successful teachers". The Court's finding that *Gurmankin* had been discriminated against was affirmed on appeal without any discussion of the relevant points (556 F.2d 184 (1977)).

*Upshur* was less successful. He had been rejected because he did not seem to have the necessary qualifications for the job, in particular, leadership ability, and because he seemed in his oral interview to be expecting to rely on an aide to perform a wide range of administrative duties. The Court confirmed that the standard of determining whether the discrimination was justified was rational basis, and not strict scrutiny, because a disability may have a relation to job's requirements whereas race does not.<sup>2</sup> It was not necessary to consider reasonable accommodation since *Upshur* was not qualified, although in fact the respondent had considered the effect an aide and other adjustments might have.

The Canadian Human Rights Commission decided not to pursue the case of a cafeteria attendant on a CP ferry who was fired after having an epileptic seizure during a crossing. The attendant had not informed CP that he had epilepsy; CP also submitted that there were emergency situations in which all crew were required and the attendant might not be available. But the real reason his case was not taken up seems to have been that his epilepsy was not "controlled" (he did not take his medication consistently), and this distinguished it from a case in which a waitress on a ferry was given her job back after losing it because of her epilepsy: her epilepsy was controlled (*CHRC Decisions*, March-April 1982, 5).

#### e) Pre-Employment Questions Relating to Disability

Employers in the United States are not to ask questions about disabilities prior to employment; in Canada, this doctrine does not appear to have been developed to the extent it has in the United States. In a case under the *Saskatchewan Human Rights Code* in which an exemption was sought by the Occupational Health and Safety Branch (Saskatchewan Labour) and the Saskatchewan Mining Association from a prohibition against any pre-employment inquiry about disabilities, the Commission attempted to balance rights given the applicant and the employer under the Code ((1980), 2 C.H.R.R. D/261). The Code prohibits pre-employment inquiries; it also permits an employer to refuse a job to a person who could not perform it because of disability. The Commission ordered in part that a medical examination might be given but only after a job offer is made. It also ordered in respect to pre-employment inquiries that:

*Job applicants may be asked whether they have a physical disability which will interfere with their ability to perform the job for which they have applied. Employers or persons may also make pre-employment inquiry with respect to any applicant's ability to perform specific job-related functions. However, at no time on an application form or during pre-employment inquiry may an employer inquire into the nature or severity of a physical disability.<sup>3</sup>*

Under section 22 of the Ontario Code, pre-employment questions relating to any prohibited ground of discrimination are not allowed unless the Act allows discrimination. Presumably, this would include questions related to a defence under the Code, including that "the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of [a right under the Code] because of handicap" (section 16(1)), and also if the question relates to a *bona fide* occupational requirement (which applies under section 23(b) to age, sex, record of offences, and marital status, and under section 10 to all grounds).

Obviously, there is a problem for an employer who may not ask about disabilities; but such an employer can ask other questions related to skills or qualifications. For example, an employer may not ask if an applicant is visually impaired or how seriously — but can require a valid driver's licence. The more difficult cases occur when the condition is not evident and there is not a material requirement, such as a licence, that is job-related. For example, an employer may inadvertently hire an alcoholic for a job that requires careful concentration or attention to the safety of others. The balancing of employers' and minority applicants' rights is particularly evident in cases on BFOQ to be discussed below. Prohibitions on pre-employment inquiry appear in most human rights legislation in Canada (for example, the prohibition is found in section 9A(4) of the *Newfoundland Human Rights Act*; and the *Manitoba Human Rights Act* in section 6(4) specifically prohibits requiring the applicant to furnish any particulars about any prohibited ground of discrimination).

#### 4. Conclusion

Any definition of disability must consider elements that especially characterize the condition — the wide variety of disabilities, that some are manifest and some latent, that they may be job-related, and so on. However, a definition



also will have to be assessed within a general framework which includes other forms of discrimination and which attempts to protect and extend access of minorities to employment while at the same time recognizing that employers also must retain some degree of control over the job process.

## B. Discrimination

### 1. Introduction

The concept of "discrimination" has been developed over the last 50 years or so. During that period societal notions about the kinds of practices and attitudes that constitute discrimination have gradually become more sophisticated. There has been a move away from the view that the discriminatory practice must be based on hostility toward the victim. In an era in which an understanding of discrimination has become more widespread, it is expected that employers will have a greater awareness of the effect of their actions. Furthermore, it is acknowledged that persons who may not be the object of a particular, direct, malicious discriminatory act may nevertheless have their opportunities limited and their dignity offended by more subtle discrimination and by a failure to recognize special needs. Thus while discrimination was initially considered undesirable because it involved treating people differently on the basis of certain characteristics (particularly during the early years on the basis of race and colour), we now believe that "discrimination" — treating people differently in order to respond to different needs — may be necessary if they are to realize enhanced opportunities.

Responses to discrimination require acknowledgement that discrimination takes different forms. Four different classes of exclusionary barriers have been discussed by the commentators: social bias and the so-called neutral-standard barriers (such as facially neutral tests, height requirements, and architectural barriers) affect all discriminated groups; surmountable impairment barriers (such as the failure to provide an interpreter for the deaf) can be dealt with through accommodation; and insurmountable impairment barriers for which no accommodation is possible. The last two classes affect only the handicapped, according to one commentator (Martin, 883-84).

Further consideration suggests that the matter is not as clear cut as presented by Martin: women are faced by surmountable barriers, particularly the reluctance to establish separate washroom facilities, but not to the extent the handicapped are, admittedly. Insurmountable impairment barriers are strict barriers but they are the natural result of the impairment, at least at this stage of technology. Thus a blind person cannot be a bus driver not because the blind are discriminated against but because of the blindness itself. The other three barriers are related to discrimination in the way the fourth one is not. There would be no basis for an action of discrimination in relation to insurmountable impairment barriers but it might well be possible to bring an action in relation to surmountable barriers as long as the requirement of reasonable accommodation is recognized. Certainly there are actions for discrimination in relation to the facially neutral test, as discussed above. Social barriers, of course, can be a reason for discrimination and it becomes relevant if the discrimination occurs in relation to some prohibited activity.

Indeed, we have almost reached the point at which a failure to provide special treatment in order to enhance a person's opportunities is in itself discrimination.\* The Honourable Mark MacGuigan quoted the late president of the Philippines in setting out his own position on discrimination: "I believe that he who has less in life should have more in law" (MacGuigan, 234). Of course this clearly requires more than simple equal treatment since equal treatment without more may well have unequal consequences.

This position is an advance on prior treatment of disadvantaged groups such as the handicapped, as Cook points out. In ancient Greece, physically and mentally disabled children were left to die since it was believed they could not contribute to society and, indeed, added to its burdens; during the Middle Ages, disabled persons were imprisoned or left alone in the woods by themselves, but they were also the only legal mendicants or beggars; and in the United States, during the rise of capitalism, a doctrine of "survival of the fittest" counted the disabled as not the least among its victims. In addition, there have been restrictions on the right to marry or compulsory sterilization, particularly of the mentally disabled. Today, for the most part, more subtle forms of discrimination require attention and these have been recognized in the way discrimination has been defined.

### 2. Definitions

#### a) Canadian Sources

Peter Cumming has stated that "fundamental to the concept of discrimination is the existence of a preference or distinction based on an individual's characteristics but not related to an individual's merits" (*Bhinder v. CNR* (1981) 2 C.H.R.R. D/546). In that case, which was reversed on appeal (but not on this point particularly), he cites the following definition from an American case which is perhaps more accurate:

*"Discriminate" means to make a distinction in favour of or against the person or thing on the basis of the group, class or category to which the person belongs. (Courtner v. The National Cash Registry Co. 262 M.E. 2d. 586 (1970)).*

This definition is slightly more accurate than Cumming's own because the essence of discrimination is that it occurs precisely because the other person is *not* treated on the basis of his or her individual characteristics but rather on the stereotypes and expectations attached to a characteristic shared with others — that is, on the basis of membership in a class or category to which stereotyped assumptions are attached.

The *Quebec Charter of Human Rights and Freedoms* states that discrimination exists where there is a distinction, exclusion, or preference based on one of the enumerated grounds with the effect of nullifying or impairing the person's human rights and freedoms (section 10). This definition explicitly requires an adverse impact. The requirement of adversity is not present in all definitions of discrimination and, indeed, there may be explicit reference to positive discrimination. For example, the following two definitions cited in *Gadowsky v. The School Committee of the County of Two Hills, No. 21* (1980), 1 C.H.R.R. D/184, both include negative and positive discrimination:

Webster's New World: *To make distinction and [sic] treatment, show partiality and favour of or prejudice against.*

Webster's Third International: *To make a difference in treatment or favour on a class or categorical basis in disregard of individual merit.*

A third definition, also referred to in Gadowsky, does not specify whether the discrimination must be adverse:

Oxford: *To make or constitute a difference in or between; to differentiate; ...to perceive or note the difference in or between; to distinguish...to make a distinction.*

In general definitions not linked to a specific context, it might make sense to treat the word "discriminate" as a neutral synonym for "distinguish", "differentiate", or "classify". However, in the human rights context, the purpose is to eliminate distinctions that have negative consequences for people, not those that have positive effects (unless there is thereby a negative effect on others: we do not want to encourage privileged treatment of some workers at the expense of other workers, when the privilege is distributed on the basis of a protected ground). Indeed, if we define discrimination in part as a failure to recognize and respond to different needs, we cannot prohibit positive discrimination: on the contrary, we want to encourage it.

One criticism of prohibiting only adverse discrimination is that so-called "protectionist" legislation (for example, a more restrictive limit on working hours for women than for men) might not be caught by it. However, such legislation can be cast in an adverse light if it can be shown that it results in employers' unwillingness to hire female employees or if it is seen as an affront to women's dignity. An affront to dignity has been held to be an adverse consequence, whether it was intended or not (*Rasheed v. Bramhill* (1980), 2 C.H.R.R. D/249, citing *Payne v. Calgary Sheraton Hotel* (Alta, 1975)).

The proposed new *Manitoba Human Rights Act* would define the term as differential treatment on the basis of an individual's actual or presumed membership in a protected class or on the basis of the specific grounds listed. Unintentional discrimination would be expressly proscribed, although the employer would have to be "aware, or ought reasonably to be aware, of the discriminatory effect". There appears to be no explicit requirement that the discrimination be adverse.

The *Canadian Human Rights Act* prohibits discriminatory practices (for example, it is a discriminatory practice to refuse to employ or continue to employ any individual on a specified ground). This approach is generally followed in the provincial human rights legislation. The *Canadian Act* also defines discrimination as differentiating adversely in relation to a person on a specified ground.

In some instances, an individual's inability to do the job is built into the definition of discrimination, rather than making inability a defence to be advanced by the employer. To some extent, this is inherent in a requirement that the discrimination be adverse: if the complainant cannot do the job, being denied it can hardly be considered adverse; however, being denied the opportunity to show whether he or she could do the job, especially with reasonable accommodation, would be considered adverse. In the *Ontario Human Rights Code*,

this concept of incapacity or inability is explicitly deemed not to be discrimination as far as the disabled are concerned: section 16(1)(b) states that there has been no infringement of a right under the Code "for the reason only that the person...is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap".

Contemporary interpretations of discrimination find the traditional sense of discrimination as unfair treatment based on social bias to be incomplete. John I. Laskin, in writing of the *Ontario Human Rights Code*, points out that unequal treatment may be necessary to ensure equal effect:

*If the same treatment is suddenly imposed on persons who cannot effectively utilize it due to previous patterns and prejudice or exclusionary practices then discrimination within the meaning of Human Rights legislation may result.*

Both affirmative action and a prohibition of indirect discrimination entail recognition of this principle. If the same qualification is imposed on all workers, it may have a disproportionate impact on some workers because of their religion or other characteristic. Although the requirement is neutral, the effect of it is not. The *Ontario Human Rights Code*, 1981 expressly prohibits indirect (or "constructive") discrimination under section 10:

*A right of a person under Part 1 [of the Code] is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where*

(a) *the requirement, qualification or consideration is a reasonable and bona fide one in the circumstances; or*

(b) *it is declared in this Act that to discriminate because of such ground is not an infringement of a right [emphasis added].*

An example of the situation addressed by section 10 is the effect of a requirement of Saturday work on persons whose sabbath is on a Saturday: all employees are subject to the same requirement and in that sense, it is neutral, but not all employees can comply with it with equal ease.

The issue may be complicated because of the need to define clearly which groups are to be compared. Professor Cumming dealt with this problem in two cases involving Police Commissions (*Adler v. Metropolitan Board of Commissioners of Police and Police Chief Adamson* and *Colfer v. Ottawa Board of Commissioners of Police and Police Chief Sequin* (Ontario, 1979)).

Colfer was a female applicant who could not meet the height and weight requirements of the Ottawa Board and Professor Cumming found that there had been indirect discrimination against Colfer because the requirements had a disproportionate impact on women and there was no rational connection between the requirements and the job as a police officer. Adler could meet the height and weight requirements set by the Toronto Board for female applicants but not for male applicants.

Professor Cumming found no discrimination against him because male and female applicants were treated equally: "no matter what the gender of the applicant, she or he is measured by reference to the statistical 'average' height and weight of the applicant's gender. Neither gender is put at a disadvantage vis-a-vis the other gender" (see Tarnopolsky, 1982, 118 ff.). Professor Cumming points out that the situation might be different if Adler were a member of a racial group whose average height is shorter than that of the general population, and there is almost no doubt that this would be discrimination on grounds of race or ancestry or national origin; police forces have, in fact, lowered requirements to take this into account.

A prohibition of indirect discrimination was first recognized in Canada in *Re Attorney General for Alberta and Gares* (1976), 67 D.L.R. (3d) 635 (Alta. S.C.T.D.) in the context of the *Individual's Rights Act*, 1972, which provided for equal pay for equal work. Male and female employees belonged to different bargaining units; the female bargaining unit had negotiated lower wages than the male bargaining unit. The contravention of the Act was not intended but was a consequence of collective bargaining by separate units.

Since then, the general view had been that a prohibition against discrimination encompasses a prohibition against indirect discrimination. The board in *Gurman v. Greenleaf* (1982), 3 C.H.R.R. D/808 was of the view that a failure by the Manitoba Act to refer to motivation meant that "discrimination is a question of fact and that motivation is irrelevant". Indirect discrimination was found in *MacGillivray v. Hume's Transport Limited* (1982), 3 C.H.R.R. D/732 (Ont.) (refusal to pay OHIP premiums of married women); *Ward v. Canadian National Express* (1982), 3 C.H.R.R. D/689 (Can.) (requirement of a "functional" hand for position as warehouse worker); *Parent v. Department of National Defence* (1980), 1 C.H.R.R. D/121 (Can.) (classification of drivers had disproportionate impact on applicant with epilepsy). Other cases have accepted that the legislation prohibited indirect discrimination but did not find it in the particular case: *Malik v. Ministry of Government Services* (1980), 2 C.H.R.R. D/376 (Ont.) (complaint that job interview process discriminated against persons from countries with different cultural norms); *Offierski v. Peterborough Board of Education* (1980), 1 C.H.R.R. D/33 (Ont.) (female teacher denied promotion); *Jorgensen v. B.C. Ice and Cold Storage* (1980), 2 C.H.R.R. D/289 (B.C.) (female employee refused opportunity to perform certain work).

Currently the Ontario Code is the only human rights legislation in Canada that expressly prohibits indirect or constructive discrimination. The proposed *Manitoba Human Rights Act* would also expressly prohibit unintentional discrimination. The question of whether the term "discrimination" alone can be interpreted to include indirect as well as direct discrimination is addressed below (see Issue a): The Status of Indirect Discrimination in Canada).

All human rights legislation in Canada provides for affirmative action, thereby permitting different treatment that otherwise might be considered discriminatory. Section 15(2) of the Charter states that the prohibition against discrimination in section 15(1) does not preclude affirmative action. This issue is discussed elsewhere in this volume as one of the "Issues Under the Charter".

## b) Other Jurisdictions

Canadian cases often cite definitions of discrimination from other jurisdictions, including the United States (see the *Bhinder Tribunal* decision cited below, for example). Definitions of discrimination limited to direct discrimination do not vary from one jurisdiction to another; more significant is whether the term discrimination is considered to include indirect discrimination and a recognition that different needs might require different treatment in order to obtain an equal result.

The evolutionary development of the concept of discrimination in the American context is discussed by Tarnopolsky (Tarnopolsky, 1982). Until the end of the 1940s, an evil motive was considered necessary to impugn a discriminatory act. For the next 20 years or so, the "equal protection" concept applied and it was necessary to find that members of a specific group had actually been treated differently. This notion was followed by the "consequences or effects" approach (judicially recognized in *Griggs v. Duke Power Co.* 401 US 424 (1971)), which does not require hostile motives nor does it require unequal treatment since facially neutral requirements might have discriminatory impact (in *Griggs*, written tests required by the company for employment or promotion tended to rule out blacks disproportionately, and in other cases height and weight requirements that have tended to operate disproportionately against female applicants have been struck down. Neither the tests nor the height requirements were necessary for the job at issue). This last approach is not in fact new; it goes back at least as far as the striking down of literacy tests for voting during the Reconstruction in the United States, tests that most whites but few blacks could meet successfully.

In *Lau v. Nichols* 414 U.S. 563 (1974), the Supreme Court of the United States held that "uniform treatment does not satisfy an antidiscrimination directive when particular circumstances deny a protected individual a meaningful opportunity to participate" (the case involved the use of the English language in schools).

It should be noted that the United States Supreme Court has been unwilling to hold that the constitutional guarantee of equal protection under the Fourteenth Amendment extends to indirect discrimination unless it can be shown that there was a hidden intention to discriminate. In other words, it is necessary that the only plausible reason for the discriminatory effect was an intention by the legislative or administrator to discriminate. In *Yick Wo v. Hopkins* 118 U.S. 356 (1886), a municipal ordinance requiring a person wishing to open a laundry to obtain a licence was applied in such a way that nearly all non-Chinese applicants were granted licences but none of the Chinese applicants had been. An intention to discriminate by the administration of the ordinance could be inferred from the pattern of granting licences. But unless such intent is an unavoidable inference, indirect discrimination will not result in a striking down of legislation as offending the Fourteenth Amendment (*Washington v. Davis* 426 U.S. 229 (1976), involving the validity of qualifying tests for police officers that had a disproportionate impact on black candidates; *Personnel Administrator of Mass. v. Feeney* 442 U.S. 256 (1979), involving veteran's preference legislation for civil service positions that had a disproportionate impact on women). Accordingly, the indirect discrimination



cases arise under the *Civil Rights Act*, 1964 or other legislation.

Systemic discrimination is often manifested in ostensibly neutral testing or criteria that in reality has a disproportionate impact on certain groups. Employers are, of course, allowed to give applicants tests to measure their ability to perform the jobs for which they are applying, but there are guidelines that must be followed to ensure that the tests are not discriminatory. Such guidelines are outlined in the United States Department of Health, Education and Welfare Regulations to the *Rehabilitation Act* of 1973 in regard to the disabled, but they can be more generally applied, as well.

If an employment test or selective criterion tends to exclude handicapped individuals (this would also be true of race or sex), the test or criterion must be job-related; it can be used only if no alternative test (having less adverse effects) is available. Furthermore, even if a test is job-related, it cannot involve use of the impaired faculty unless that faculty is also job-related; for example, if the applicant is blind, a written test cannot be used unless the need to write is an essential part of the job or, in other words, is job-related (Olenick, 178).

In reversing the Court of Appeal, which had rejected the position that the tests required by Duke Power disproportionately affected blacks' chances of employment, promotion, or transfer and were therefore illegal, the Supreme Court of the United States held in *Griggs* that if an employment practice that has the effect of excluding blacks is not related to job preference, it is prohibited and that intent to discriminate is not necessary. The evidence showed that employees who had not completed high school or taken the test had progressed in departments where the tests were now used (*Griggs v. Duke Power Co.*). The Supreme Court held that consequences, not motivation, was the operative factor. In *McDonnell Douglas Corporation v. Green* 93 S.Ct. 1817 (1973), the Supreme Court stated that "*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives".

Decision No. 71-1418 (March 17, 1971 (EEOC Decisions 1968-1973)) of the Equal Employment Opportunity Commission found that a height requirement that had a disproportionate effect on females constituted sex discrimination, since it could not be justified on the basis of business need when a reasonable alternative to the requirement consisted of using platforms at some machines. There was also a disproportionate impact on persons with Spanish surnames, which was not rebutted by the number of persons hired; the Commission "assumed" that a large number of persons with Spanish surnames had been rejected and that "the existence of such a standard is likely to have a 'chilling effect' upon the potential Spanish surnamed American work force".

Another employer had a policy that restricted females from lifting weights over 40 pounds and also gave back X-rays to male employees but not to women (Decision No. 71-1332, March 2, 1971). Both were directly discriminatory. But the employer also engaged in indirect discrimination when it changed the duties of a position to include heavy lifting after women had bid for the position and rotated the lifting among all Raw Material Inspectors (RMI) instead of assigning the

task to one RMI. These changes were either direct or indirect discrimination, the first because they were *intended* to frustrate women's attempts at promotion to RMIs and the second because "for both biological and cultural reasons significantly fewer females than males are capable of handling objects weighing 80 pounds". The employer was not able to discharge the burden of showing it had "a substantial justification for not adopting a non-discriminatory alternative" (in this case assignment of the lifting responsibility to one RMI rather than the rotation system); the change was not shown to be necessary to the safe and efficient operation of the employer's business.

In *Dothard v. Rawlinson* 433 U.S. 405 (1977), the Supreme Court struck down height and weight requirements for prison guards since there was "gross disparity between the female and male exclusions" as a result of the requirements.

The consequences or impact definition of systemic discrimination is recognized in the English *Sex Discrimination Act* 1975, the relevant portion of which is as follows:

1. (1) a person discriminates against a woman in any circumstances relevant for the purpose of any provision of this Act if
  - (a) ...
    - (b) he applies to her a requirement or condition which he applies or would apply equally to a man but
      - i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and
      - ii) which he cannot show to be justifiable irrespective of the sex of a person to whom it is applied, and
      - iii) which is to her detriment because she cannot comply with it.

The English 1976 *Racial Relations Act* contains a similar provision. Legislation in other jurisdictions, such as Luxembourg, The Netherlands, Norway, and South Australia, also prohibits indirect discrimination.

The Convention on the Elimination of All Forms of Racial Discrimination, which was adopted by the United Nations in 1965 and ratified by Canada in 1976, defines discrimination as

*Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origins which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economical, social, cultural, or any other field of public life.*

We would have to add sex and disability to that list to conform to the Commission's Terms of Reference, and in any case these are now recognized in almost all lists of prohibited grounds of discrimination. Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women contains analogous wording (Canada actively participated in drafting this Convention).

### 3. Issues

#### a) The Status of Indirect Discrimination in Canada

Until the Ontario Court of Appeal decision in *O'Malley* and the Federal Court of Appeal decision in *Bhinder*, it had been accepted by most human rights boards that intention was not necessary and that indirect or unintentional discrimination could constitute the basis for a complaint of discrimination.

In *O'Malley v. Simpsons-Sears* (1982), 38 O.R. (2d) 423, the Ontario Court of Appeal found that under the *Ontario Human Rights Code*, 1980 there had to be an intention to discriminate in order to find a contravention of the Code. (Unlike the 1981 Code, its predecessor contained no express prohibition against constructive discrimination.) *O'Malley* was a Seventh Day Adventist whose religious convictions would not allow her to work on Saturdays. Lacourcière J.A., for the Court, held that the phrase "because of" in the Code imputed motivation and therefore intention.

The Federal Court of Appeal found that the *Canadian Human Rights Act* did not encompass indirect discrimination in *Bhinder v. Canadian National Railways* (1983), 4 C.H.R.R. D/404, reversing (1981), 2 C.H.R.R. D/546 (Fed. Trib.). *Bhinder's* employment was terminated when, because of his religion, he could not wear a hard hat as required by CN.

LeDain J., in his dissent, said that section 10 of the Act did in fact provide a basis for a finding of discrimination, but the majority believed otherwise, holding that specific wording such as that found in section 10 of the Ontario Code, 1981 was required. Heald J. was not persuaded by *Griggs v. Duke Power* because it was based on section 703(a)(2) of the *Civil Rights Act*, which included the words "or otherwise adversely affect"; this phrase does not appear in section 10 of the *Canadian Human Rights Act*.

Several boards and tribunals have shown a reluctance to accept the implications of *O'Malley* and *Bhinder*. At least one federal review tribunal has explicitly rejected *Bhinder*. In *Marcotte v. Rio Algom Limited* (1983), 5 C.H.R.R. D/2010, Rio Algom had provided subsidized housing to employees in certain categories. In the excluded categories, 73 per cent of the employees were women. The Review Tribunal stated it could not see how the words "deprives or tends to deprive" in section 10 of the *Canadian Human Rights Act* connote intent (but it dismissed *Marcotte's* appeal because it thought the policy was reasonable). (The dissent considered herself bound by *Bhinder* but would have rejected the employer's justification because she believed it to be based on stereotyped assumptions about women in the workforce.)

Peter Cumming, the Ontario Board of Inquiry in *Rand v. Sealy Eastern Limited* (1982), 3 C.H.R.R. D/938, strenuously disagreed with *O'Malley* but felt bound by it. *Rand* was an Orthodox Jew required by his employer to take a training course on Saturdays. The Board found that the employer's knowledge of *Rand's* religion coupled with the requirement to take the course constituted intent.

Boards and courts deciding cases under legislation other than the Ontario Code and the Canadian Act are able to distinguish the legislation involved to avoid the impact of *O'Malley* and *Bhinder*. Two Manitoba cases illustrate this approach (*Manitoba Food and Commercial Workers Union v. Canada Safeway Ltd.* (1983), 4 C.H.R.R. D/1495, upheld on this point [1984] 4 W.W.R. 390 (Man. Q.B.) and *Osborne v. Inco*

*Limited* (1984), 5 C.H.R.R. D/2219 (Man. Q.B.)). The Manitoba legislation contains a "saving provision" in s.6(6) (the lack of a saving provision in the Ontario Code was a major consideration in *O'Malley*) and employs the words "discrimination or intention to discriminate" in section 2(1)(d), suggesting that unintentional discrimination would be included (*Canada Safeway*) and the Manitoba Act is "general and result oriented" compared to the Ontario Code and Canadian Act, which are "narrow and regulatory" (*Osborne v. Inco*).

A brief word should be said about whether section 15 of the Charter prohibits indirect discrimination. The arguments in favour of such a prohibition revolve around the fact that despite *O'Malley* and *Bhinder*, a contemporary understanding of discrimination would recognize the importance of protecting people from the effects of discrimination, regardless of whether they were intentional. Nor, in any case, is the kind of statutory construction that was carried out in both *O'Malley* and *Bhinder* appropriate in the constitutional context, where a liberal and purposeful interpretation is the order of the day.<sup>5</sup> Opponents of this view have expressed concern that permitting plaintiffs to base their actions on indirect discrimination will involve the court in what is more appropriately a legislative function: telling the legislatures how to write the detailed provisions of statutes.<sup>6</sup> But if this is a problem, it is a remedies problem; it does not provide a convincing argument against extending the full protection of section 15 to members of protected classes. The safest course — and most appropriate one in respect of a commitment to equality — for government to take is to assume that indirect discrimination (or disparate impact) is encompassed by section 15.<sup>7</sup>

#### b) The Onus on the Complainant and Respondent

*McDonnell Douglas Corporation v. Green* sets out the order and allocation of proof in a discrimination action in the United States. The complainant must establish a *prima facie* case of discrimination that can be shown, in the case of race, by evidence that the complainant belongs to a racial minority, that he or she applied for a job made available by the employer and was qualified for it, but that he or she was rejected, that the job remained open, and that the employer continued to seek applicants with the complainant's qualifications. The employer then assumes the burden of showing a legitimate, non-discriminatory reason for the complainant's rejection (in *McDonnell Douglas* the complainant had engaged in unlawful protest conduct against the Company and this reason was held to be sufficient to discharge the burden on the employer). But this does not end the matter, for the complainant may then show that this reason was in fact a pretext (for example, that the employer had not rejected white persons who had also engaged in the unlawful conduct against it; also relevant, *inter alia*, would be the general practices of the employer in regard to minorities). "In short...respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover-up for a racially discriminatory decision". As was pointed out in *Texas Department of Community Affairs v. Burdine* 25 E.P.D. No. 315444 (U.S.S.C.), the employer does not have to show by a preponderance of evidence the existence of non-discriminatory reasons or that the person hired had superior qualifications in order to rebut the *prima facie* case and to shift the burden back to the claimant.

*Prewitt v. U.S.P.C.* 27 FEP cases 1043 (5th Cir., 1981) applies this process to cases involving disability. As outlined by Linn in his unpublished paper, the *prima facie* case may be established by the complainant's showing that he was qualified to cope with the position except for his physical handicap, that his handicap prevents him from meeting physical criteria for the position, and that the standards set by the employer have a disproportionate impact on persons with his handicap. The employer then has the burden of showing that the physical standards or criteria for that job are job-related and that people with that particular disability cannot safely and efficiently perform the essentials of the position. In considering whether or not persons with that disability can perform the essential tasks of the job, the employer must take into account whether reasonable accommodation could allow the individual to do so.

*McDonnell Douglas* and *Burdine* were considered in *Base-Fort Patrol Ltd. v. Alberta Human Rights Commission* (1982), 4 C.H.R.R. D/1200 (Alta. Q.B.), a sex discrimination case. The Court was of the *Burdine* persuasion, that the burden on the respondent is an *evidentiary* burden rather than a *legal* burden and it can be satisfied by a showing of *some* evidence.<sup>8</sup>

Professor Cumming set out requirements in *Offierski* that are similar to those prescribed in *McDonnell Douglas*:

*For the Complainant to be successful, the first requirement is that the Complainant establish a prima facie case of discrimination on the basis of her sex. To do this she must show (1) that she was qualified for the position for which she applied; (2) that despite such qualifications she was rejected and that (3) subsequent to her rejection the position remained open, or alternatively that an applicant of the opposite sex of apparently lesser qualifications was chosen for the position.*

(One would think that showing the successful candidate had equal qualifications would suffice to establish a *prima facie* case since the same qualifications had apparently been treated as inadequate when possessed by the complainant.) Once the *prima facie* case is made out, the onus then shifts to the respondent to provide a reasonable explanation for the discrimination.

The complainant may lead evidence in relation to his or her specific experience and about general patterns of treatment and statistical evidence. In *De Medina v. Reinhardt* 30 E.P.D. No. 33,014 (1982) (U.S. Court of Appeals), the percentage of women in various positions in a federal agency and the percentage of women holding similar jobs outside the agency were compared. Such a comparison can establish an inference of bias. It should be noted that this test is premised on the assumption that the percentage of jobs of women holding jobs in the private sector is an acceptable basis of comparison, and the test is not useful, of course, when there is also a bias in the private sector that has prevented a suitable employment pattern there.

Similarly, a comparison between the minority component of the local population and the proportionate minority members hired can be made, as in EEOC Decision No. 71-345 (1970), in which 40 per cent of the local workforce was black, yet no black women had been hired for a specified position.

The most common way to establish a *prima facie* case of discrimination is through the use of statistics. Statistics are particularly useful in cases of disproportionate impact, but they are not necessary: the Supreme Court of the United States stated in *Dothard v. Rawlinson* (*supra*) that

*...to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern.<sup>9</sup>*

In fact, the plaintiff in that case showed that the minimum height requirements excluded 33.29 per cent of women between 18 and 79 and 1.28 per cent of men in that age group. Similar statistics were introduced in relation to the weight requirements.

Offierski led statistical evidence showing the proportion of men and women in administrative positions in the education systems of Peterborough and Ontario in her complaint against the Peterborough Board (*supra*).

In another case (#YNO N-451, 1979 decision 70-422, EEOC Practice Decisions 1968-1973), evidence of discrimination included the proportion of blacks hired according to the employer's records. In that case, word-of-mouth recruitment conducted by a substantially all-white workforce without supplementary and simultaneous recruitment in the minority community "constitutes a *prima facie* violation" of the Civil Rights Act of 1964. This reminds one of "old boy" network hiring or employment practices and of internal promotional transfer practices that do not include advertising widely outside the agency or corporation.

Statistics may establish a *prima facie* case even when there is only a single act of discrimination, especially where the job is at an upper level and subjective factors, such as collegiality, are involved; then the overall hiring pattern is relevant (*Anderson v. City of Albuquerque* 30 EPD No. 33098 (1982) (U.S. Court of Appeals, 6th Cir.)).

Professor Eberts stated in *Malik* (*supra*) that when there is a requirement that the complainant clearly cannot meet (as in the hard hat requirement conflicting with Bhinder's religious tenets), there is a "presumption" of discrimination. In such cases, it is irrelevant how many other people cannot satisfy the requirement, at least for the purpose of establishing a *prima facie* case, because it is obvious that the plaintiff cannot.

#### 4. Conclusion

The major considerations in determining the most appropriate meaning of discrimination are whether or not indirect (or consequences/impact) discrimination should be explicitly recognized and whether efforts to make reasonable accommodation should form an integral part of the definition (so that to avoid liability for discrimination, an employer must make reasonable accommodation where appropriate). Reasonable accommodation is discussed below.

### C. Bona Fide Occupational Qualification Requirement

#### 1. Introduction

It should be stated at the outset that nothing appears to turn on the difference in phrasing between "*bona fide occupational qualification*", "*bona fide occupational requirement*", and "*bona fide occupational qualification and requirement*", although these terms vary from legislation to



legislation. However, there may be a difference between a "bona fide qualification" and a "reasonable qualification".

Once a *prima facie* case of discrimination has been made out by the complainant, the respondent then has the opportunity to show that the reason for the discrimination was in fact based on a *bona fide* occupational qualification (BFOQ); there was either, therefore, no discrimination at all or there was permissible discrimination. For example, a certain level of visual acuity is likely a *bona fide* occupational requirement for driving trucks.

## 2. Definitions

### a) Canadian Sources

The *Canadian Human Rights Act* says under section 14 that it is not a discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement.

Age is also covered separately: it is not discrimination if employment is terminated because the complainant has reached "a normal age of retirement for employees working in positions similar to the position of that individual".

The *Ontario Human Rights Code*, 1981 refers to BFOQ as follows: section 10 states that a right is infringed where a qualification, requirement, or consideration is imposed which is not in itself discrimination but would exclude a group protected by the Code except where "(a) the requirement, qualification or consideration is a reasonable and *bona fide* one in the circumstances". And section 23 states that the right to equal treatment in relation to employment is not infringed where "(b) the discrimination in employment for reasons of age, sex, record of offences or marital status of the applicant is a reasonable and *bona fide* qualification because of the nature of the employment". Handicap is dealt with under section 16(1): There is no infringement of right where "the person is incapable of fulfilling the essential duties or requirements attending the exercise of the right because of handicap" as long as that is the only reason. In a sense, this last provision goes some way to defining BFOQ (even though the BFOQ applies to all groups protected by the Code) since BFOQ refers to a characteristic necessary for the satisfactory performance of the essential functions of the job.

Section 8(1) of the *British Columbia Human Rights Code*<sup>10</sup> guarantees the right of equality of opportunity in relation to employment based on *bona fide* qualifications. The Act provides that there is to be no refusal to employ, continue to employ or promote, and no discrimination "unless reasonable cause exists for the refusal or discrimination". Sex can be a reasonable cause only with regard to the maintenance of public decency.

The *Alberta Individual's Rights Protection Act* provides for a BFOQ under section 7(3) and the *Saskatchewan Human Rights Act* allows for an exemption based on reasonable occupational qualification and requirement in relation to sex, physical disability, or age. Newfoundland and Prince Edward Island allow the standard BFOQ exemption.

Other legislation approaches the defence slightly differently. Section 20 of the *Quebec Charter of Human Rights and*

*Freedoms* provides that "[a] distinction, exclusion or preference based on the aptitudes or qualifications required in good faith for an employment...is deemed non-discriminatory".

The New Brunswick Act provides for a *bona fide* occupational qualification in section 3(5) with the added twist that it be "as determined by the Commission"; it also contains a specific provision (Section 3(7)(a)) in relation to physical disability: employment rights do not apply in the case of a disability "to the termination of employment or refusal to employ because of a *bona fide* qualification based on the nature of the work or the circumstance of the place of work in relation to the physical disability, as determined by the Commission". Nova Scotia has also given its Commission the responsibility of determining when "the nature and extent of the physical handicap reasonably precludes performance of a particular employment or activity" (section 11 B(1) sets out the prohibition against discrimination in relation to the handicapped with the same qualification), and when an ostensible discrimination is based upon a *bona fide* qualification: where these situations occur, the provisions prohibiting discrimination do not apply (section 11C(2)).

Manitoba has apparently attempted to cover all the territory: it gives protection, provides an exemption, and qualifies the exemption. The protection offered by the Act does not apply where "(a) sex, age, marital status, family status, or political belief, is a reasonable occupational qualification; or (b) physical or mental handicap is a reasonable disqualification" (section 6(6)). Just to be sure, section 6(10) provides that the protection does not apply "where the nature and extent of the handicap reasonably precludes or renders the person incapable of satisfactorily discharging the duties of the position". And then, as if afraid that defence will be abused, section 6(11) confirms that

*Notwithstanding subsection (10), no person shall refuse to employ a person who is physically or mentally handicapped, if the person has adequate training and experience and is qualified and capable to carry out the duties and functions of the position.*

This subsection appears to place a heavier burden on the handicapped applicant than on the non-disabled applicant; presumably the latter does not have to show he or she "has adequate training and experience and is qualified and capable" of carrying out the duties in order to receive the protection of the Act.

Note that nearly all the statutes use some variant of *bona fide* occupational qualification except Quebec's and Manitoba's; the former employs "in good faith" but refers to "aptitudes or qualifications required", while the latter uses the term "reasonable occupational qualification". There seems to be no reason why this terminology cannot be treated in the same way as *bona fide* occupational qualification since they all incorporate, it could be argued, both the subjective and objective components of the *Etoibcoke* test discussed below.<sup>11</sup> However, it may be that a *reasonable* requirement does not contain a subjective element.<sup>12</sup>

Professor Cumming has stated that "at the root of the concept, then, is a determination as to the ability of an employee to perform his or her duties" (*Bhinder*, Tribunal decision, reversed on appeal) and one aspect of BFOQ is

that the individual is to be assessed as such and not on the basis of membership in a stereotyped group.

In its January, 1982, *Newsletter* at page 7, the Canadian Human Rights Commission published guidelines relating to *bona fide* occupational qualification. These are:

1. the requirement must relate to "essential functions" of the job;
2. the requirement must be job-related;
3. the employer must be prepared to make reasonable accommodation;
4. "reasonable" accommodation takes into account undue hardship (financial or convenience) to the employer;
5. each applicant must be assessed on an individual basis; and
6. danger to co-workers and public can be considered a BFOQ but it must be an actual, and not speculative, risk.

The *Canadian Human Rights Guidelines* specifically indicate that it is not a *bona fide* requirement to make an assessment of an individual's ability that is based on membership in a particular class rather than on the individual's own merit ability. That guideline applies to all groups protected by the *Canadian Human Rights Act*.

The principle that the individual's ability to do the job and not assumptions based on stereotypes should be considered was illustrated by *Ward v. Canadian National Express* (1982), 3 C.H.R.R. D/689. Ward applied for a job as warehouseman with CN Express; he had no digits on one hand and was refused the position because of a policy that the warehouseman required at least two digits on one hand (the "functional" hand) as well as the other hand's being intact because of the constant loading and unloading related to the job. The respondent claimed its policy was job-related because there would be increased risk to the individual and to others without it.

The Tribunal heard medical evidence, evidence from Ward's former employers expressing satisfaction with his work for them, a comparison made by an employee from de Havilland explaining that Ward would likely satisfy their criteria, and statistics relating to hand injuries. At least as far as Ward was concerned, CN's medical requirements were not a BFOQ. The Tribunal stated that "minimum physical standards may be a good guideline for employers. However, persons who do not reach the minimum should not be excluded absolutely". CN's policy did not take into account "the exceptional individual", such as Ward. The Tribunal also pointed out that "even though the burden of proof is lighter where safety is a factor or where the job is a hazardous one, the *bona fide* occupational requirement must still be strictly construed". It should be noted that in this case the onus seemed to be on Ward to show that he could do the job rather than on the employer to show that he could not, apparently a reversal of the usual onus. In the American cases, the onus is on the employer.

#### b) American Sources

The major American case law is discussed below under the specific issue. The prevailing definition of *bona fide* occupational qualification is a requirement that is necessary to the satisfactory performance of the job.

### 3. Issues

#### a) The Test in Normal Circumstances

The test has clearly been set out by the Supreme Court of Canada in *Ontario Human Rights Commission and Dunlop, et al v. The Borough of Etobicoke* [1982] 1 S.C.R. 202. The Court adopted the two-prong test set out by Professor MacKay in *Cosgrove v. City of North Bay* (Ontario, 1976), which had been approved by the Ontario Court of Appeal (*Re Ontario Human Rights Commission and City of North Bay* (1977), 92 D.L.R. (3d) 544).

Cosgrove had been forced to retire at age 60 from his position as chief fire prevention officer with the City of North Bay. Professor MacKay found that this apparent breach of the *Ontario Human Rights Code* was saved by the defence of *bona fide* occupational qualification because of the physical and mental stress involved and the general deterioration occurring with age. MacKay's definition consisted of two elements: the subjective, meaning that the decision (that is, the choice of 60 as a mandatory retirement age) must have been made in good faith, honestly, and without ulterior purpose; and objective, meaning that there must be a rational basis for the decision: "In other words, although it is essential that a limitation be enacted or imposed honestly or with sincere intentions it must in addition be supported in fact and reason 'based on the practical reality of the work-a-day world and of life'".

Professor MacKay continued that he was not saying that retirement today at 60 was "the only alternative, nor even the best alternative available, but it was reasonable, supported by the evidence, [and] honestly motivated". Some American cases have required a consideration of whether there was a less discriminatory way to achieve what has been recognized as a legitimate end, but the MacKay definition has been cited in many decisions dealing with the issue of BFOQ and it does not include that requirement.

In *Etobicoke*, the Supreme Court of Canada held that mandatory retirement for firefighters at age 60 was a violation of the *Ontario Human Rights Code*, the employer not having discharged the onus of proof required to show that early retirement was justified by BFOQ. The Board of Inquiry had found that the Borough of Etobicoke had breached the Code and had not accepted a defence based on *bona fide* occupational qualification and requirement. On appeal, the Divisional Court reversed the Board and adopted the test for BFOQ & R, which had been enunciated by Professor MacKay in *Cosgrove*. McIntyre J. for the Supreme Court of Canada paraphrased the MacKay test as follows:

*To be a bona fide qualification and requirement the limitation complained of must be imposed honestly, that is in good faith, and not based on any extraneous or ulterior motive, and it must bear reasonable relationship to the circumstances of employment.*

Professor Dunlop, the Board of Inquiry in the *Hall and Gray* case, had stated the test slightly differently but expressed the view that his and the MacKay test were essentially the same: he said that *bona fide* in this context means

*"Real" or "genuine" i.e., that there is a sound reason for imposing an age limitation and the onus of establishing justification for discrimination is on the person alleging it to be justified.*

It should be noted that Professor Dunlop seemed to define the subjective element in terms of the objective or, put another way, he proposed a one element test and that test is an objective test. Professor MacKay said the limitation must be honest and based on good reasons — he did not say what would happen if it were not honest but was based on good reasons but he made it clear that honesty without good reasons is not sufficient. It seems that the objective strand has to prevail. The Divisional Court in *Hall and Gray* seemed to distinguish the Dunlop and MacKay tests.

The Supreme Court, however, found that "there is no significant difference" between the MacKay and Dunlop tests and there was no "serious objection to their characterization to the subjective element of the test". McIntyre J. formulated the test as follows:

*To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.*

*Carson v. Air Canada* (1983), 3 C.H.R.R. D/818 was concerned with Air Canada's policy of requiring higher qualifications for pilots over the age of 27. The Tribunal said that the essential functioning of the business must be at stake, not merely its administration, and it rejected Air Canada's defence based on its return on its investment, which would be lower for older pilots: "It has been accepted that economic considerations generally cannot be invoked to establish the bona fide occupational requirement defence". "Accordingly, a cost justification defence is not usually available in such circumstances". This view was upheld by the Review Tribunal (1983), 5 C.H.R.R. D/1857.<sup>13</sup>

It is also evident that the burden of proof for a BFOQ defence lies on the employer:

*The application of a B.F.O.Q. test, however, demands a factual basis to be shown to support the employer's fear that disabled workers will create safety problems, or will be unable to perform job requirements before that fear will be judicially sanctioned (Cook, 68).*

Peter Cumming states in *Robertson v. Metropolitan Investigations Security (Canada) Limited* (Ontario, 1979) that the standard of proof for the employer is a preponderance of evidence relating to specific job and issue. That case concerned a female applicant for the position of security guard on the Dryden Reid Paper Plant site and construction site, and Professor Cumming found that there was discrimination on the ground of sex.

Indeed, the test may be even more stringent than proving the characteristic is necessary for the job; the employer may have to show that there is not a less discriminatory way to

achieve the same end: In *United States v. Bethlehem Corp.* 446 E.2d. (1971),

*The Court held that besides the showing that discriminatory action is fundamental to the safe and efficient operation of an employer's program or activity, there must be evidence that no reasonable alternatives can serve the same legitimate needs with less discriminatory effect (Cook, 62).*

This does not seem to have been adopted as the dominant test, although it was approved by Professor Eberts in *Malik v. The Ministry of Supply and Services*.

As will be discussed below, there are some cases in which the standard that must be met by the employer is lower; when the public safety is involved, the employer has to show a rational basis or that he had some basis for believing that danger might result. Cumming, in the Tribunal decision of *Bhinder*, states that the standard is always "some rational basis".

The dominant tests in the United States were developed in *Weeks v. Southern Bell Telephone* 408 F.2d 228 (1969) (U.S. Court of Appeals, 5th Cir.) and *Diaz v. Pan Am World Airways, Inc.* 442 F.2d 385 (1971) (U.S. Court of Appeals, 5th Cir.) (Cert. denied 404 U.S. 950 (1971)).

The *Weeks* case was an action brought against a woman who had been refused a switchman's [sic] position with Southern Bell. The Court held that the burden was on the employer and that the defence of the BFOQ should be narrowly construed. The Court found that the employer had not discharged the onus upon it to show that gender was a BFOQ. It held that the bona fide occupational qualification applied only when there was "reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved". The only exemption would be if it was impossible or impractical to deal with persons with the particular trait on an individual basis.

*Diaz* involved a suit by a man who was rejected for the position of flight attendant because Pan Am hired only women for the position. The Trial Court held that being female was a BFOQ for the position, but the Court of Appeal reversed that decision. The exception was to be read narrowly so that it would not "swallow the rule". The *Diaz* suit was brought under Section 703(e) of the *Civil Rights Act, 1964*, which permits discriminatory hiring "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise...." It is to be noted that the Court's holding that it is only a business necessity, not business convenience, which justifies BFOQ was made because of the wording of Section 703(e). The Court stated that a BFOQ applies only when the essence of the business operation would be undermined by not hiring members of one sex exclusively and in this case, the employer cannot exclude all men because most men may not perform adequately tasks that all women can perform. Before sex discrimination can be allowed, the employer must show that not only is it impracticable to find a man who possesses the abilities, but that the abilities are necessary to the business and are not tangential.

As stated, the particular characteristic or quality involved must be necessary to the business. That means that the



court is to apply a business necessity test, not a business convenience test. That is to say, discrimination based on sex is valid only when the *essence of the business operation* would be undermined by not hiring members of one sex exclusively (*Diaz*).

Similarly, in relation to race the "courts have indicated that a discriminatory practice must do more than serve legitimate management functions in order to constitute a business necessity" (Cook, 62).

A 1976 case combined the *Weeks* and *Diaz* tests: *Usery v. Tamiami Trail Tours Incorporated* 531 F.2d 224 (Ca). *Usery* concerned a prohibition against applicants for bus drivers for persons between the ages of 40 and 65, a claim of discrimination under the *Age Discrimination Employment Act*. The Court stated that whether or not age was a BFOQ was to be decided on both the *Diaz* "prong" of the BFOQ test, which is whether or not the essence of the business involved safety risks, and the "*Weeks* Footnote 5" burden, which is that the only practical hiring test is automatic exclusion on a basically arbitrary basis. The "*Weeks* Footnote 5" burden is not met, the Court stated, by the added expense of individual dispositions or by statistical evidence of a correlation between age and accident frequency. It found that the *Diaz* element (that the essence of the business was safety) was met in *Usery* and it then applied *Weeks* to determine whether or not there was a factual basis for this holding or that it was impossible and impractical to deal with persons over 40 on an individual basis. The cases have generally found that it is in fact impossible and impractical to deal with age on an individual basis.

The importance of wording is indicated by *High v. Power-Flame Division, Inc.* 29 EPD. No.32866 (1982), in which a Kansas District Court considered how far the Court's duty went in determining whether a requirement was *bona fide*. The *Kansas Act Against Discrimination* defined a handicap as a "physical condition... which constitutes a substantial disability, but is unrelated to [the complainant's] ability to engage in a particular job or occupation". The nature of the job involved was such that the applicant's back injury "made it substantially more likely" that repeated injury would occur. The Court stated that there should be more than a hypothetical or speculative relationship between the physical condition and the job, but once that relationship has been shown by medical and other evidence, the Court "should not endeavour to weigh the degree or substantiality of the relatedness or balance the risk to the employee of injury against the demands of the job". If the employer has a "good faith" belief that the physical condition would lead to injury, it should not have to test that belief by hiring. This is a lower onus than the courts usually apply and is explained by the wording of the statute; the Court indicated that if the term "reasonable" had appeared in the provision, it would have been necessary to investigate the substantiality of the job-relatedness and to do individual testing as well.

As indicated by *Diaz* and *Weeks*, as an exception the BFOQ is to be interpreted narrowly. In relation to sex, "in the United States, the exception has operated only when physical features of one sex are essential to performance of the job, when authenticity is required, or when the interests of decency or privacy are involved" (Land, 1005). Traits or characteristics such as strength, which are non-sexual but

are associated more with one sex than with the other, are not sufficient to bring the BFOQ defence into operation.

#### b) The Test when Safety is a Factor

The courts have been more lenient in cases involving public safety. This issue has come up most often perhaps, but not exclusively, in the bus driving cases, and usually the ground for discrimination has been age. Bus companies may set a maximum age for a beginning driver, perhaps as young as 35 or 40. These age limits have been upheld because there is no adequate way to measure or predict the *individual's* response to age and ability to handle stress, reaction time, etc., and therefore, given the high priority of public safety in this kind of job, the arbitrary setting of age limits is the only way to deal with the problem. There is no less discriminatory alternative.

The American case of *Hodgson v. Greyhound Bus Lines* 499 F.2d 859 (U.S. Court of Appeals) was cited in the case of *Canadian Human Rights Commission v. Voyageur Colonial Ltd.* (1980), 1 C.H.R.R. D/239, a decision of A.D. Abbott. *Hodgson* seems to modify the *Weeks* test: when public safety is involved, the employer does not have to show that "all or substantially all" bus drivers over 40 could not perform safely.

As interpreted in *Usery*, however, the *Weeks* and *Hodgson* tests do not seem to be different. The employer must show that the qualification is "reasonably necessary" on the business necessity test; if public safety is involved, it can set stringent qualifications that are job (safety) related. Then the employer has to apply the "all or substantially all" test from *Weeks* or show that "it is impossible or impractical to test job applicants over a certain age or on an individualized basis to determine whether they meet the stringent job qualifications required by safety concerns" (*Carson v. Air Canada*, Tribunal decision). It is the latter that seems to apply in the pilot and bus driver cases.

In *Voyageur Colonial*, Abbott considered medical and other expert testimony and concluded that, although there was no reliable scientific or statistical evidence to establish a relationship between age and ability to cope with stress, particularly in the specific circumstance of Voyageur job conditions, there was no better evidence available. There was some general evidence but not any satisfactory evidence of an experimental or observational nature. He considered age a BFOQ for bus driving because the ability to cope with the stress on the job (including specific conditions of new drivers who may be called upon at short notice and who have no choice of routes) decreases with age and if the stress is not coped with, it leads to the endangering of public safety. Therefore, the company had to establish some test to minimize the danger to the public and age 40 was honestly selected. Abbott cites the head note of *Hodgson*:

*While a company must demonstrate that it has rational basis in fact to believe that elimination of its maximum hiring age will increase likelihood of risk of harm to its passengers, it need demonstrate only minimal increase of risk of harm since it is enough to show that elimination of challenged hiring policy might jeopardize life of one more person that might otherwise occur under that policy.*

He pointed out that the wording dealt with by the Court in *Hodgson* was under the *Age Discrimination and Employment*

Act of 1967; a *bona fide* occupational requirement had to be "reasonably necessary to the normal operation of that particular business". Abbott concluded that as far as sex is concerned, the issue is the welfare of the job applicant but that the burden of proof on the employer is lighter where the public safety is involved. Here the burden is light since safety is of the essence of the operation and one reasonably reliable predictor of the ability to cope with the stress is age. The standard set by Abbott in *Voyageur Colonial* seems to be consistent with McIntyre J.'s analysis of the kind of evidence required, since in this case it does not seem possible to present other than general scientific evidence (see discussion of evidence required, below).

The Manitoba Court of Appeal held in *Manitoba Human Rights Commission and John W. Finlayson v. The City of Winnipeg* (1983), 4 C.H.R.R. D/1255 that for a police officer in Finlayson's position, retirement at age 60 was a BFOQ since part of his job was to attend at major occurrences that could be dangerous and that involved the safety of the public and other police.

It should be noted that *bona fide* occupational retirement guidelines set out in the *Canadian Human Rights Act* address the question of safety. Specifically in relation to physical handicap, the guidelines state that it is a *bona fide* occupational requirement when an employer refuses employment to a handicapped person "since the person's handicap would create a safety hazard to the employees of that employer or to the general public". The guidelines require that the employer show that there is a rational basis for this conclusion and that "the safety hazard has been evaluated on the basis of (a) the probability of the occurrence of accident as a result of the performance of the job by the handicapped person; (b) evidence that the safety hazard is significantly greater than if the person were not a handicapped person; and (c) the relation of the safety hazard to the specific physical handicap of the handicapped person".

### c) The Nature of the Evidence Required

In the normal case, boards and courts have required considerable evidence of how the trait that is claimed to be a BFOQ is related to the job, that is, that the trait is necessary to the job. In *Hawkes v. Browns Ornamental Ironworks* (Ontario, 1977), D.A. Soberman stated that there must be "sound reasons for the qualification". In that case, which involved a 51-year-old woman who had applied for a welder's position, there was no evidence led by the respondent giving a detailed description of the duties of a welder and in fact the description varied from witness to witness. There was no evidence "to provide a sound basis for classifying men or women over the age of 50 as being disqualified for the job". Similarly, in *Segrave v. Zellers Limited* (Ontario, 1975), the respondent was unable to prove its contention that being female was a BFOQ of the job of personnel manager. It had argued that female employees would not bring their problems to a male personnel manager, but Zellers led no evidence that this was in fact so, and indeed the company could produce no experiential evidence because there had never been a male personnel manager employed by the company. Furthermore, the essence of the job was not personal counselling of female employees. The Board found that the BFOQ defence under the *Ontario Human Rights Code* applies "only when discrimination based on sex

affects the Respondent's business as a commercial enterprise and the primary function of the business or enterprise would be undermined by not hiring members of one sex exclusively".

Furthermore, the evidence must be based on objective information. The evidence in the *Hall and Gray* case was similar to that in *Cosgrove*, in Professor Dunlop's words, "impressionistic". It consisted of testimony by other firefighters and in *Cosgrove*, by the fire chief and *Cosgrove's* counterpart in Sudbury. McIntyre J. termed this evidence "inadequate to discharge the burden of proof lying upon the employer". In *Hadley v. City of Mississauga* (Ontario, 1976), Professor Lederman found that there was no "concrete evidence" to support the *bona fide* occupational qualification requirement defence and that such concrete evidence was required. The Divisional Court was of the view that Professor Dunlop also required concrete evidence. O'Leary J. stated that the requirement of scientific evidence was more than was necessary to support the limitation in fact and reason based on the practical reality of the work-a-day work but this seems to be wrong in light of McIntyre J.'s comments in *Etabicoke*.

While each case differs, Mr. Justice McIntyre said, "It would seem to be essential that the evidence should cover the detailed nature of the duties to be performed, the conditions existing in the workplace, and the effect of such conditions upon employees, particularly upon those at or near the retirement age sought to be supported". McIntyre J. went on to explain

*I am by no means entirely certain what may be characterized by 'scientific evidence'. I am far from saying that in all cases some 'scientific evidence' will be necessary. It seems to me, however, that in cases such as this statistical and medical evidence based upon observation and research on the question of aging, if not in all cases absolutely necessary, will certainly be more persuasive than the testimony of persons, albeit with great experience in firefighting, to the effect that firefighting is a 'young man's game'.*

The evidence that had been presented in *Hall and Gray* was "impressionistic" and of "insufficient weight".

In his reasons, McIntyre J. referred to *Little v. St. John Ship Building & Dry Dock Co. Ltd.* (1980), 1 C.H.R.R. D/1, as well as the American case of *Hodgson v. Greyhound Lines*, as indicating the nature and sufficiency of evidence required. The *Little* case was a New Brunswick decision which found that mandatory retirement at 65 for crane operators at the dry dock was not a BFOQ. The case must be seen in the context of the requirement, unique to New Brunswick, that the Human Rights Commission determine whether a qualification is *bona fide*, intimating that the employer must apply to the Commission for such a determination. This was not done in the *Little* case. The Board found that the reason advanced by the employer was not genuine and that the employer was merely enforcing its usual retirement policy, not one in relation to crane operators based on danger or inefficiency resulting from age. The Board did, however, refer to testimony by an expert in the area of geriatrics who indicated the difference between biological or functional age and chronological age and who testified that "tests are now

available to measure the functional ability required of crane operators and particular attention was made of tests for hearing, vision and reflexes". Such tests would have to be administered more than once (assuming that the individual passed each time), but how often is not clear; it would also be necessary that such tests have some predictive value, that is, beyond the day when the test was given, but there was no evidence of the predictive utility of the test referred to. The Board stated "if such medical tests are not available, then there is a greater possibility of a *bona fide* occupational qualification based on age being necessary".

As for statistics, the Board pointed out that they became available only with failure in the job and the risk of danger to the public outweighs that method of acquiring evidence. General statistics might be available, however, relating age and various disabilities, and again chronological age limits will have to suffice.

The Board appeared to believe that there might have to be a "trade-off" between some risk to the public and protection of employment rights — the minimum acceptable risk factor.

The Court in the *Hodgson v. Greyhound Bus Lines* case had held that increased danger to one person was above such minimum risk factor — in other words, no such trade-off is allowed — but that may well be because there is greater public danger in bus driving than crane operating (that is, that the consequences are likely to be more serious or there is a greater likelihood of serious or fatal injury from a bus accident than from an accident in the operation of a crane). The dangers of crane operation were discussed by the Little Board, although without detailed evidence (which the Board suggested be presented to the Commission for its determination of the BFOQ issue) and the Board concluded:

*Although a mistake in operating such a crane could cause serious damage to equipment and personal injuries, it appeared that safety factors built into the cranes themselves as well as available medical tests to determine the functional ability in terms of the operator's sight, hearing and reflexes would reduce to a reasonable level any risk factor associated with a person over 65 years of age operating that crane.*

In *O'Brien v. Ontario Hydro* (1981), 2 C.H.R.R. D/504, O'Brien had been discouraged from applying to an apprenticeship program because he was 40 years old, and this was treated as rejection for entry to the program. In that case, Peter Cumming reviewed the case law on BFOQ and concluded that "type of job and the evidence of age related capacity are the two important considerations in assessing the validity of an occupational qualification". In considering how these will be applied, he said the following (references omitted):

*Where the job is hazardous, an arbitrary age limitation may be tolerated if supported 'in fact and reason'; scientific data is [sic] not necessary....However, if medical tests are readily available, they may go to show that an age limitation is unnecessary....Where no element of risk is involved, merely the ability of the employee to carry out his or her function, then 'convincing evidence' or 'sound reasons' must be brought forward to show that age was a reliable indicator of capacity....The ancillary requirement is that the age limitation was imposed*

*'honestly' or 'sincerely'; ...it must not exist merely to avoid the provisions of human rights legislation.*

Professor Cumming compared the U.S. and Canadian decisions and found that the burden on the employer was more stringent in the American cases; the Board decision in *Hall and Gray* was more consistent with the U.S. decisions but was overturned by the Divisional Court. Since the *O'Brien* decision, however, the Supreme Court of Canada has reinstated the Board decision in *Hall and Gray* and the United States and Canadian positions appear to be similar in that both require some type of concrete evidence and not merely impression; they will only allow the employer to avoid an assessment of individual merit if it is impossible to show the relationship between the trait and the job requirements on an individual basis.

#### **d) Types of Requirements Allowed**

As indicated above, an employer will be able to impose a *bona fide* occupational requirement if it is a business necessity to do so or if the safety of co-workers and/or the public will be endangered if it is not imposed.

Certain "defences" have generally been ruled out by the courts and boards assessing BFOQs. One of these is the preference of fellow employees or customer/clients.<sup>14</sup> The only qualification to this might be if the customer preference "is based on the company's inability to perform the primary function or service it offers" (*Diaz*). Again, the *Canadian Human Rights Act* states that "a requirement based on co-worker or customer preference not related to an individual's ability to perform the job" is not a *bona fide* occupational requirement.

In *Berry v. The Manor Inn* (1980), 1 C.H.R.R. D/152 (Nova Scotia), Berry was refused a job serving in a lounge by The Manor Inn because the owner's policy was to hire only waitresses, since he believed that to be his customers' preferences. The Board held that to say that the preference of customers or clients resulting in economic differences for the respondent is a BFOQ, would be to create a "community standard test" and that would be unacceptable. The Board rejected the complainant's argument that for sex to be a BFOQ, the respondent must lead factual evidence showing economic loss: clearly for this Board, no amount of loss could have justified the discrimination, for the business necessity test just did not apply. *Bish v. Chez Moi Tavern* (1981), 2 C.H.R.R. D/372 came to the same conclusion: the owner's preference for waitresses only in the dining room did not constitute a BFOR and the opposite situation in *Dupnickzy v. J.L.K. Kiriakopoulos Co. Ltd., and Tiffany's Restaurant* (1981), 2 C.H.R.R. D/485 (Ont.), in which the owner wanted only waiters in the dining room on the European model, prompted the Board to state that to allow such a BFOQ would make the "statutory prohibition on discrimination...meaningless".

The sex discrimination cases also raise the issue of risk to the applicant, and the cases have generally found that this risk is to be assumed by the applicant and not to be determined by the employer.

A major Ontario case is *Shack v. London Driv-Ur-Self Limited* (Ontario, 1974). Betty-Anne Shack was denied employment as a rental clerk because the job involved driving five-ton trucks, stripping down trucks, and working in the evenings alone. Professor Lederman cited the *Weeks* case



proposition that an employer has to show that it "had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved" (it should be noted that the *Ward* case discussed above seems to say that even if that is the case, the employer must still show that the applicant cannot do the job and certainly this conforms to the general rule that only when it is not possible to show that the applicant cannot do the job, is it permissible to resort to general statistics). Lederman also adopted the essential function test from *Diaz*. Finally, he held that it is up to the applicant to decide whether she wants to take the extra risk involved with late evening work (although he pointed out that the employer had not shown there was in fact a greater risk involved in her working alone in the evenings). It is not up to the employer to make that decision.

The *Weeks* case had also dealt with the question of whether the employer can use late night work as a justification for excluding women. The Court, in that case, stated that the *Civil Rights Act*

*...rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle.*

There have been several cases involving female guards at all-male penitentiaries and vice versa. Although these cases have variously been decided as accepting BFOQ on the grounds of decency or danger to the women and as rejecting the BFOQ argument, they do indicate the kinds of considerations that are made in relation to sex discrimination.

The Saskatchewan Social Services Corrections Branch sought an exemption from the *Human Rights Act* to exclude women as corrections officers and workers in male jails and men as officers in a female centre on grounds of public decency, since security required random observation, searches, and similar invasions of privacy. (A new facility to be opened in the future would have a physical plant that would have allowed women access to similar positions.)

The Board considered an American case, *Cynthia Gunther v. Iowa State Men's Reformatory* 19 E.P.D. 6492 (1979), where the sex bar was not held to be a BFOQ: "The defendants had failed to show that there were no reasonably available alternate practices with less discriminatory impact that would satisfy the legitimate needs of the prison". The Board applied the same criterion to Saskatchewan's "reasonable occupational occupation". Under Regulation 1(b) of the *Human Rights Act*, the sex bar must involve the preservation of the essence of the operation in question or an essential or overriding legitimate business purpose. The essence of the job in this case was to monitor inmates at random, and thus the sex bar is legitimate when tight security is at stake requiring such random observation. In the existing facilities, however, the problem was really the obsolete nature of the physical plant, not security itself; the Board therefore granted a temporary exemption in order to allow provision for restructuring the physical plant, which could not be done immediately because of budget restriction, thereby almost applying a business convenience test.

The other American cases also illustrate the problems to be dealt with in such cases. The first concerns female guards in Alabama male-inhabited prisons, and the second concerns male guards in New York female-inhabited facilities.

In *Dothard v. Rawlinson* 433 U.S. 405 (1977), the United States Supreme Court allowed women to be excluded as guards in male prisons because conditions in Alabama prisons were particularly horrendous; in particular, prisoners were not separated according to crime, and thus the sex offenders (approximately 20 per cent of the total prisoners) were among the general population of the prison, posing a threat to women which in turn would pose an increased security problem. Marshall J., in his dissent, viewed this as stereotyped and paternalistic reasoning and declared that women could decide to take the risk; he believed there was no doubt that some women would be able to cope with this particular situation. The Court did strike down facially neutral height and weight requirements as unconstitutional. The majority also emphasized that their decision did not apply to other prison systems.

*Forts v. Ward* 471 F.Supp. 1095 (1978) involved male guards at a female facility. It is of note because it approaches the problem slightly differently by treating *bona fide* occupational qualification as purely a functional question: "the Court found that since the job can be equally well performed by any qualified and trained man or woman sex is therefore not a *bona fide* occupational qualification (BFOQ)". The Court then set up against the right to employment another right constitutionally recognized in the United States (not yet in Canada but likely to be addressed under section 7 of the Charter of Rights): "Equal job opportunity must in some measure give way to the right of privacy". The District Court found that men could be guards during the day, when accommodation could be made, but not at night; they could not make the first count in the morning unless a warning were given. On appeal, the Court made recommendations that allowed men to be guards at night, as well, and these are discussed below under the Reasonable Accommodation Section, but essentially they require restrictions on the freedom of dress of the inmates.

Pregnancy has been found to be neither a business necessity nor a BFOQ for an X-ray technician because it was not related to the ability to take X-rays in *Hayes v. Shelby Memorial Hospital* 30 E.P.D. 33058. The hospital had argued that the possible harm to the fetus could lead to future litigation and that it was entitled to avoid this by refusing to allow pregnant women to be X-ray technicians. The Court held that even if such a prospect were relevant to the determination of BFOQ, the hospital had not shown that there was not an alternative method of dealing with the issue that would not result in discrimination on the grounds of sex.

In *Phillips v. Martin Marietta Corp.* 400 U.S. 542 (1971), the employer established different hiring policies for men and women with preschool-aged children, hiring men but not women. The District Court granted summary judgement for Martin Marietta, affirmed on appeal. The Supreme Court of the United States vacated this judgement and remanded on the basis that the evidence had been inadequate for summary judgement. The Court stated: "The existence of such conflicting family obligations, if demonstrably more relevant

to job performance for a woman than for a man, could arguably be a basis for distinction" under the *Civil Rights Act* "but that is a matter of evidence tending to show that the condition in question 'is a *bona fide* occupational qualification reasonably necessary to the normal operation of that particular business or enterprise' ". Marshall J., concurring, was critical of the Court because he feared that it had "fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis of discrimination". While the employer may legitimately have rules about ensuring the case of pre-school children, such rules must apply to men and women uniformly.

In *Bosi v. Township of Michipicoten* (1983), 4 C.H.R.R. D/1252, the Board found no discrimination on grounds of marital status occurred when Cindy Bosi had been refused a position of clerk with the township because her husband was employed by the police force; she would have been processing her husband's expense forms and would have had access to police documents. M.L. Friedland found that "the absence of a potential conflict of interest should be considered a '*bona fide* occupational qualification and requirement' ". He also noted that "there is no evidence" that women would suffer more than men from a policy of not hiring spouses, but in fact there was in this case no such policy. The *Bosi* case can be compared with a decision by the Canadian Human Rights Commission that a woman rejected by the Northwest Territories Public Works Department because her husband was an engineer with Public Works had been discriminated against; in that case, there was no conflict or little potential for it (*CHRC decisions*, May-June, 1982, 10).

In the United States there is a reluctance to allow employers to establish a *bona fide* occupational qualification that would actually not take effect until sometime in the future. In *Chrysler Outboard Corp. v. Dept. of Industry, Labor & Human Relations* 13 EPD No. 11,526 (1976), Chrysler had made its employment decision on a doctor's recommendation that acute lymphocytic leukemia meant that the applicant ran a high risk of infection from minor or normal injury, prolonged recuperation and complications, all of which would mean lost time and a higher cost to the company for insuring the complainant. The Court found that the only exception is the inability to perform efficiently the duties required at the standard set by the employer, and it pointed out that the statute was in the present tense and did not refer to future inability.

The *Canadian Human Rights Act* occupational requirement guidelines indicate that it is possible that there may be a BFOQ based on future abilities as far as disabled people are concerned. No. 11 of the Guidelines is as follows:

*Where an employer refuses an employment opportunity to a handicapped person and the refusal is based on a bona fide occupational requirement related to the predicted future work abilities of that person, the employer shall establish that*

- (a) *the abilities of the handicapped person will diminish to such an extent and at such a rate that he or she will not be able to perform the job for a reasonable period of time; and*
- (b) *the diminution referred to in paragraph (a) will result in destruction of the employer's business.* (Emphasis added.)

### ● BFOQ and Disability

Several cases have dealt with disability as a BFOQ. A Quebec case found that weighing less than a specified minimum was a BFOQ for firefighters because of the need for agility, speed, ease of removal in case of accident, and so on. Excess weight was considered a disability in that case (*La Commission des Droits de la Personne du Québec c. La Cité de la Côte St. Luc* (1983), 4 C.H.R.R. D/1287 (Que. Superior Ct.)). The absence of air bubbles in the lungs was a BFOQ for a flight steward: *Valdère Brideau v. Air Canada* (1983), 4 C.H.R.R. D/1314. In *Foreman v. Via Rail Canada Inc.* (1980), 1 C.H.R.R. D/111, a Federal Tribunal found that the standard of visual acuity set by Via Rail for the positions of waiter and waitress were not a BFOQ. The Tribunal considered the derivation of the standards and found "no satisfactory evidence" of their derivation, of any updating, or of whether they had evolved according to accepted medical standards. The Tribunal applied the MacKay test and found that the medical evidence did not show that the standards were based on the practical reality of the work-a-day world. It is to be noted that in none of these cases was there individual assessment of the complainants except in the last one, when in fact, given the holding of that case, it was not necessary for the Tribunal to determine whether or not the individual could do the job.

A similar failure to establish that the standard was developed reasonably and according to criteria led to a finding that a refusal to hire Robert Barton by the New Brunswick Electric Power Corporation because of damage to his leg caused by a prior motorcycle accident was not based on a BFOQ. Furthermore, "none of the other candidates appear to have been asked whether they would have difficulty standing, walking and climbing for six continuous hours" (*Robert Barton v. New Brunswick Electric Power Commission* (1981), 2 C.H.R.R. D/541).

On the other hand, a refusal by CN to hire Foucault as a bridgeman was not discriminatory because medical requirements were a BFOQ (*Foucault v. Canadian National* (1981), 3 C.H.R.R. D/677). Adopting the MacKay test, the Tribunal examined statistics showing a percentage of claims made to the Workmen's Compensation Board that were back injuries and the proportion of railway injuries, specifically in the Bridges and Structures Section, that were back injuries. A comparison of hours lost from injuries was made; a job study was entered as evidence along with medical evidence regarding Foucault's injury. CN discharged the burden on it to show that the requirements were rationally based and not founded on unwarranted assumptions or stereotypes (here the Tribunal cited the *Bhinder* Federal Tribunal decision, which was overturned by the Federal Court of Appeal, but this burden is the generally accepted one). Again, the Tribunal did not require individual assessment as such.

Although the case law appears to apply the same test for BFOQ when disability is involved as when other characteristics are in issue, human rights legislation seems to apply a different standard. These have been set out in the Introduction to this section. It will be recalled that the Ontario Code has a specific provision that states that there is no infringement of the prohibition against discrimination where the only reason for the denial of the right is that the disabled person cannot perform "the essential duties or requirements" of the

right. New Brunswick and Nova Scotia also have specific provisions concerning disability, as well as the more general BFOQ provisions. The Manitoba Act, as explained above, appears to place a higher burden on handicapped persons to show they can perform the job than on other persons. These provisions appear to offer disabled persons a lesser degree of protection than is available to other persons. If this is a correct interpretation, such provisions may be challenged under the section 15 of the Charter as infringing a disabled person's right to the equal protection and equal benefit of the law.

#### 4. Conclusion

The insistence on individual consideration, it has been argued, makes it difficult for employers to establish *bona fide* occupational qualifications. Black suggests there are two versions of the BFOQ doctrine. The first requires individual assessment, and the defence then applies "if the employer, in fact, had reasonable grounds for determining that the physical or mental condition prevented *this* applicant from performing the required duties" (at p.1 of his unpublished paper; emphasis added). The second version allows class assessment, and a good example of this form of BFOQ are the cases involving age and safety that have been discussed above. It would seem that the general rule is that individual assessment is required when possible but that if it is not possible, as in some age cases, then the group approach will be accepted.

It has even been argued that "the BFOQ doctrine is virtually extinct in the United States with respect to the rights of handicapped employees" because it is not possible to make pre-employment inquiries about disabilities, employers must make individualized assessments of applicant's ability to do the job, and the employer must be prepared to make reasonable accommodation (Linn, unpublished paper).

These criticisms have some validity, although within the scope of this definitional paper they can merely be raised. The *bona fide* occupational defence is an attempt to provide a fair consideration of the employer's control over the nature of the job. That such an attempt may conflict with the general framework of human rights legislation was explicitly acknowledged by the Saskatchewan Human Rights Commission in the *Saskatchewan Mining Association* case. If a position truly requires particular qualifications that cannot be met by persons with certain characteristics, the employer can stand on the BFOQ defence. In Canada, Linn's comments are less applicable because the individual assessment requirement is less definitively established here and there appears at present to be no duty to accommodate despite the Canadian Human Rights Commission's efforts to institute one. But Canadian authorities agree that the term is to be narrowly interpreted and any definition should take that into account. The Supreme Court's definition, it will be noted, does not explicitly refer to "essential functions" of the job; it leaves open the possibility of a somewhat — but not considerably — wider application of the defence than the *Weeks* and *Diaz* tests. And it is generally accepted both in Canada and the United States that the employer is to have a freer hand in situations involving public safety and safety to other employees (but not necessarily when there may be risk to the employee herself or himself).

Any definition should probably include notions of honesty or genuineness and *necessity* to the performance of the job; although if the requirement is necessary, it is difficult to see how it could not be genuine. The "good faith" strand of the MacKay test seems hardly necessary, and the point of the reference to "genuine" or "honest" is to emphasize that that is not sufficient, because even honest belief about a group's capabilities may be based on outmoded stereotypes or on ignorance. The Supreme Court having incorporated the "genuine" requirement, however, it seems to now be part of the meaning of the term.

Finally, it must also be decided whether efforts at reasonable accommodation must be considered an integral aspect of the concept of BFOQ.

#### D. Reasonable Accommodation

##### 1. Introduction

Even if a requirement is found to be a *bona fide* occupational qualification, it may not be enough that an employer consider whether a person can do a job in spite of his or her disability; the employer may also have to consider whether reasonable accommodation will enable a disabled person to do a job that in the first appraisal it was believed he or she could not do.

For example, the Regulations for Section 504 of the U.S. *Rehabilitation Act* require that aids, benefits, and services be as effective for the handicapped as the non-handicapped, and thus the conditions under which such services are provided may have to be adjusted accordingly. In other words, it is not enough to say that persons in a wheelchair are not prevented from obtaining certain benefits if to obtain them they have to enter a building with steps or that deaf people are not prevented from certain benefits if to obtain them they have to deal with someone who does not know sign language. To make the benefits as *effectively* available to such people as to people who can walk or hear requires the installation of a ramp or the availability of an interpreter. The standard to be met is an "equal burdens standard": the handicapped should face the same burdens as the non-handicapped — and no more, particularly when not related to the handicap (Martin, 899). A person who is blind already has a higher burden than someone who has sight (although, of course, that person may not be able to hear or to walk or may have diabetes — we are not comparing burdens here), but that burden should not increase when sight is not a necessary requirement for a job.

Examples of reasonable accommodation undertaken include installing ramps, lower water fountains, wider restroom stalls, raised letters on hallways, signs and warning lights on machinery (Wolff, 36). Reasonable accommodation might also take the form of rescheduling, or of providing a reader or an interpreter.

It should also be remembered that reasonable accommodation is relevant to sex discrimination as well — a common example is the need for washroom facilities for the previously excluded sex — and also to religious discrimination, as in rescheduling to allow a Seventh Day Adventist to have Saturdays off.

##### 2. Definitions and Examples

Reasonable accommodation means providing or permitting alternatives to an individual who cannot perform a job in



the standard way. The best way to define this concept is through illustration.

#### a) Canadian Sources

Although not an employment situation, reasonable accommodation was addressed by a Board of Inquiry under the *Ontario Human Rights Code* in *Singh v. Workmen's Compensation Board Hospital and Rehabilitation Centre* (1981), 2 C.H.R.R. D/459. Singh wore his kirpan or dagger as required by his religion, and other patients responded by expressing fear and concern. Professor Zemans found that the hospital had a duty to accommodate Singh's religion, primarily by educating staff and patients about the use of the kirpan. This case has been appealed. It raises the issue of the responsibility for adaption by the complainant. For example, it might have been possible for Singh to wear a symbolic kirpan while taking treatment at the centre. In *Heather Waplington v. Maloney Steel* (1983), 4 C.H.R.R. D/1262, a Board considered in great detail the options available in relation to separate washroom facilities; it did not accept that they were a BFOQ that could not be accommodated by the employer.

A woman working in the federal Department of Supply and Services had a bad back and varicose veins. The Commission rejected her complaint when it found the department had made many efforts at accommodation. The department had tried to arrange a transfer, had reduced her workload to limit lifting, had provided mechanized equipment, and had sought the assistance of other employees. It was prepared to make even further accommodation (*CHRC Decisions*, September 1981, 2).

Bell Canada also did all it could when one of its operators developed voice problems requiring surgery. Bell gave her temporary clinical assignments and encouraged her to upgrade her skills, but the woman did not want to be a clerk. When she returned to operating on a part-time basis, she was given a two-week trial period but was then dismissed when her voice did not improve. The Commission did not pursue her complaint because it found, not surprisingly, that speaking was central to her work and also that Bell had made reasonable efforts to fit her in elsewhere (*CHRC Decisions*, March-April 1982, 3).

In another complaint that did not go beyond investigation, Canada Post rearranged shifts to allow a regular routine for a diabetic who could handle his disability more easily on a regular routine (*CHRC Decisions*, April 1981, 3).

#### b) American Sources

In *Vickers v. Veterans Administration* 30 E.P.D. No. 33, 099 (1982) (Dist. Ct.), Vickers had a sensitivity to smoke that was found to be a handicap. The Court found that it was not necessary to decide whether reasonable accommodation was required because there had been no discrimination. Nevertheless, several forms of accommodation had been attempted, including separating smokers' and non-smokers' desks, encouraging voluntary non-smoking, and allowing smoking in one of the administrator's offices (the administrator had in fact provided a fan at his own expense) and so on. A somewhat exasperated Court suggested Vickers might make some efforts himself to ease the problem.

In *Gurmankin*, there was evidence showing that blind teachers were accommodated by not being required to perform certain tasks and by receiving some assistance.

### 3. Issues

#### a) What is Reasonable

Reasonable accommodation includes the notion of undue hardship — that is, one of the factors that makes the accommodation reasonable is that it does not impose an undue hardship on the employer. This can be determined only on a case-by-case basis, by considering the nature and size of the business, the number of persons who will benefit, the financial cost of the changes or accommodation, and so on. The courts will consider as a defence the cost of compliance and impairment of a program's services — that is, that the cost is such that it is no longer possible to offer the services at all or at a highly reduced effectiveness. At least one commentator has suggested that high cost or even very high cost should not be sufficient to constitute a defence — only cost high enough to endanger the program itself (Martin, 900-901).

The cost of reasonable accommodation was briefly dealt with in 1969 EEOC practice decision number 6010, case no. YNY9-047. The respondent would not hire women as pursers on ships because there were no berthing or other facilities for women. The Commission's guidelines on discrimination because of sex stated that the need to provide separate facilities would not justify discrimination under the BFOQ exception "unless the expense would be clearly unreasonable". "Reasonable adjustments" must be made unless "at the unreasonable expense of male new members, or where actual financial cost to the employer is unreasonable". Here neither applied, and the Court carefully considered how the women could be berthed and found berthing them would not be unreasonable.

The cost may not only be to the employer, however; in *Forts v. Ward* the Court of Appeal decided that the male guards could work at night if the female inmates wore a certain kind of nightwear. The right of privacy of the inmates did not extend to the choice of nightwear or of not wearing clothes at all at night (the trial judge thought that the women should not be forced to wear the equivalent of "Dr. Dentons").

Accommodation apparently becomes unreasonable when it changes the applicant's relationship to the job. In *Coleman v. Darden* 595 F. 2nd 533 (U.S. Court of Appeals), Coleman was refused a position as a research analyst with the Equal Employment Opportunity Commission because he was blind. He had worked for the EEOC as a law clerk and had at times been provided with a reader. After considering the duties of the position and comparing them with other positions, including law clerk, the Court concluded that being able to read was a necessary requirement. Coleman said he could do the job if he had the assistance of a reader. The defendants had decided that in the case of the research analyst, the job would be performed by the reader and not by Coleman if he had a reader. The Court found that this was a rationally based decision. (Cert. denied 444 US 927 (1979), with no discussion.)

#### b) Status of Reasonable Accommodation Doctrine in Canada

In the Federal Court of Appeal decision in *Bhinder*, Heald J. found there was no duty on CN to make reasonable accommodation because the *Canadian Human Rights Act* did

not require it<sup>15</sup> (the majority had found that wearing a hard hat was a BFOQ).

LeDain J., in dissent, found that CN had a duty to accommodate and that the possibility of increased liability for compensation to Bhinder and others if he or they had an accident was not a hardship (and if it were, freedom of religion should prevail). Not many cases in Canada have considered reasonable accommodation, but of those that have *Bhinder* is the only one holding it is not required. However, the Federal Court of Appeal is the highest Court to have considered the matter.

The Board of Inquiry in *O'Malley* had found that Simpsons-Sears had an obligation to try to accommodate O'Malley's religious observance of the sabbath but that the onus was on the Commission to show that the company had not acted reasonably in trying to accommodate her. This seems to reverse the usual onus. In the Tribunal decision of *Bhinder*, the Tribunal states its disagreement with the O'Malley Board's interpretation:

*It is our understanding that the burden of proof is on the respondent to show that its employment requirement is bona fide. Part of that burden may be the adduction of evidence showing that the accommodation of an employee's religion would cause the employer undue hardship. At no time though, does the burden shift to the employee to show that the employer's policy was unreasonable. This would be inconsistent with the basic legal position of the parties in a human rights case.*

Professor Cumming finds the duty to accommodate arising directly out of the narrow interpretation given the *bona fide* occupational defence. He held in *Robertson v. Metropolitan Investigation* that:

*...the onus should fall upon the employer to demonstrate that he is unable to reasonably accommodate to a prospective employee's gender without undue hardship on the conduct of his business, once a prima facie case has been established of discrimination through the application of the employer's employment regulations.*

The Canadian Human Rights Act *bona fide* occupation requirements guidelines appear to require reasonable accommodation but include specific provision in relation to handicap and religion:

9. Where an employer finds that he or she cannot make reasonable accommodation in order to offer an employment opportunity to a handicapped person and before he or she refuses such employment opportunity based on a *bona fide* occupational requirement, the employee shall support his or her findings based on evidence that (a) no method of accommodation exists that would permit a handicapped person to perform the job in a safe and satisfactory manner; (b) to make an accommodation would impose an undue hardship involving either financial cost or business inconvenience to the employer; or (c) to make an accommodation would create a predictable safety hazard for other employees or the general public.

In relation to religion, the evidence required relates only to undue hardship (financial cost or undue hardship).

Other than that which can be inferred from the guidelines, the Act imposes no duty on an employer to make reasonable accommodation, but the Act is intended to protect an employer who does make reasonable accommodation or establishes a special program to benefit a disadvantaged group from actions brought by other employees; the Ontario Code has a similar provision in section 13(1). Not only does the Ontario Code not impose a duty of reasonable accommodation, it states that the employer does not have to accommodate in case of handicap: section 16(1)(a) states that there has not been actionable discrimination only because a

*person does not have access to premises, services, goods, facilities or accommodation because of handicap, or that the premises, services, goods, facilities or accommodation lack the amenities that are appropriate for the person because of handicap.*

#### 4. Conclusion

Although it might seem that reasonable accommodation is a natural corollary to the BFOQ doctrine and that it is an integral element in a fully developed theory of discrimination, it remains an undeveloped concept in Canada, particularly compared to its application in the United States. Nor has there been any conclusive assessment of the undue hardship aspect, which is at the heart of the reasonableness of accommodation. In Canada, at least, this concept remains only tentatively developed.

### III. CONCLUSION

Although this survey of four aspects of the terms of reference indicates that there is not unanimity in regard to their meanings or to the various issues discussed, certain patterns do emerge.

The concept of disability is given wide scope, encompassing at least some so-called "voluntary" and short-term and less-severe disabilities. On the other hand, the legislation continues to treat the disabled differently than other protected groups, in the sense of seeming to assure (for example) employers that they will not be expected to hire people who lack the capacity to perform the job. Despite the fact that this is true of all grounds of discrimination, specific provision is often made in respect of the ground of disability.

There is an increasing tendency to consider that a prohibition of discrimination includes prohibition against unintentional as well as direct discrimination. Although the *O'Malley* and *Bhinder* cases, as decisions of appellate courts, cannot be ignored, the response of boards and tribunals determining subsequent complaints appear to consider those decisions as anomalies within the general development of the concept. Both cases await deliberation by the Supreme Court. Already, there have been attempts to distinguish the cases or to develop a broad concept of intent in order to avoid their ramifications. Human rights legislation may explicitly prohibit indirect discrimination should the Supreme Court uphold *O'Malley* and *Bhinder*, of course, as the Ontario Code does and the proposed Manitoba Act would. Finally, a decision by the Supreme Court that the wording of neither the Canadian Act nor the predecessor Ontario Code constitutes a prohibition of unintentional discrimination need not determine the

interpretation of section 15 of the Charter (this would be equally true of a reversal of those cases by the Court).

The major defence available to an employer under most human rights legislation is the *bona fide* occupational qualification that has been defined by the Supreme Court of Canada to include both a subjective "good faith" component and an objective "reasonable connection" strand. The need for concrete evidence except where it is not feasible to provide it means the defence is not easily available. It has been primarily limited to the notion of capacity, which again limits its availability.

The situation is not as clear in relation to reasonable accommodation, which has not yet gained a strong footing in

Canada. In fact, we "reasonably accommodate" without thinking much about it in many instances; for example, we do not expect people to take eye examinations without corrective lenses where such examinations are necessary to obtain a benefit or employment. But a more formal requirement of reasonable accommodation raises questions of employer responsibility to provide the accommodation and cost, and such variables are less easily accepted than simply permitting people to wear corrective lenses.

Nevertheless, for the most part, the legislation and case law have developed a doctrine of impermissible discrimination with broad implications for extending equality in the workplace.



## NOTES

1. It should be pointed out that the federal government apparently does recognize indirect discrimination, despite the position taken by its counsel in *Bhinder*: *Toronto Star* (September 10, 1983, p. A/1).
2. In American constitutional equal protection law, a certain few bases of discrimination (such as race) receive strict scrutiny by the courts; most grounds, such as disability, receive lower scrutiny (the government merely has to show there was a rational basis for the discrimination). Sex discrimination has been treated in different ways, including assessment on the basis of a third test, intermediate scrutiny.
3. The order was revised to reflect an arbitration decision interpreting it, although the intent of the order remained the same (*Saskatchewan Mining Association* (1982), 4 C.H.R.R. D/1239). Employers are permitted to ask the threshold question: "Do you have a disability which will interfere with your ability to perform the job for which you have applied?" However, medical examinations must be required of all employees, where they are permitted because of a reasonable occupational requirement. The Commission also took the opportunity to indicate that questions about menstrual periods and pregnancy cannot be asked prior to employment. "After employment, such inquiries are only legitimate where there is a reasonable occupational requirement for a position or employment which affects only women."
4. The proposed new *Manitoba Human Rights Act* would define discrimination as, *inter alia*, "a failure to make reasonable accommodation for the special needs of individuals or groups".
5. This view of constitutional interpretation has been mandated by the Supreme Court of Canada in *Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97.
6. This should no longer be a concern since the Supreme Court in *Hunter v. Southam Inc.* has made it clear that it is the legislature's responsibility to ensure statutes conform to the Charter and the courts will not involve themselves in the legislative drafting function.
7. A decision of a five-member panel of the Ontario Court of Appeal, written by Mr. Justice Tarnopolsky, has stated that effect is to be considered under the charter: *R. v. Videoflicks, et al.* (1984) 9 C.C.R. 193. The case involved section 2(a) of the Charter (freedom of conscience and religion) but the comments on effect were not limited to that section. It is expected that the case will be appealed.
8. It should be noted that under the Charter there is a legal burden on the government under section 1: "some" evidence will not be sufficient to satisfy that onus: *Hunter v. Southam*.
9. The discriminatory pattern approach was employed in *McDonald v. Knif-Rite Mills Ltd.* (1983), 5 C.H.R.R. D/1944 (Man.), which involved sex-based wage differentials resulting from previous discriminatory job classifications.
10. It should be noted that the British Columbia Code has been repealed. The "reasonable cause" provision will not apply under the new legislation.
11. Since this paper was written, a decision of the Manitoba Court of Queen's bench has treated the tests of *bona fide* qualification and reasonable qualification differently (see discussion of the *Canada Safeway* case below).
12. This was the position taken by a Saskatchewan Board of Inquiry in *Day v. The City of Moose Jaw* (1983), 4 C.H.R.R. D/1805 (retirement of firefighter at 62 not a reasonable requirement since individual assessment is possible).
13. The Review Tribunal in *Carson v. Air Canada* applied the *Etoibcoke* test to Air Canada's policy of requiring older applicants for pilot positions to meet stricter qualifications as follows: only if the job requirements involve risk that increases or skill that deteriorates with advancing age as shown by concrete evidence and individual testing is not feasible, can age be a qualification. It found the test was not satisfied on the facts of the case.
14. Wright J. made a distinction between a *bona fide* requirement, to be defined narrowly, and a reasonable requirement, to be defined more broadly, in *Canada Safeway Limited v. Steel and Manitoba Human Rights Commission*, [1984] 4 W.W.R. 390 (Man. Q.B.). Customer preference could be taken into account in determining whether a ban on beards for Safeway's male employees was reasonable. However, this view should be compared with the Regulations under the *Saskatchewan Human Rights Code*, which state that a reasonable occupational qualification is one necessitating the hiring of persons of one sex or age group or of a certain physical ability to prevent the undermining of "the essence of the business operation". They explicitly exclude the preferences of co-workers, clients, or customers.
15. The *Bona Fide Occupational Requirement Guidelines* now require that an employer who cannot make reasonable accommodation in relation to religion must support that position by "evidence that to make an accommodation would impose an undue hardship involving either financial cost or business inconvenience".

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PART II

**CONSTITUTIONAL ISSUES**



## THE CONSTITUTIONAL DIMENSIONS OF PROMOTING EQUALITY IN EMPLOYMENT

Marc Gold

### Sommaire

L'étude examine les aspects constitutionnels des mesures fédérales éventuelles visant à favoriser l'égalité des femmes, des autochtones, des personnes handicapées et des minorités visibles en matière d'emploi. La première partie porte sur les limites de la juridiction législative fédérale qui vise à favoriser l'égalité en matière d'emploi. Étant donné la primauté de la compétence provinciale dans ce domaine, l'étude porte principalement sur les sociétés d'État, le pouvoir de dépenser du gouvernement fédéral et les questions de mise en application.

La deuxième partie analyse les conséquences de la *Charte canadienne des droits et libertés* et comprend quatre sections. La première étudie les questions fondamentales de la portée de la Charte, notamment si elle s'applique à l'entreprise privée, aux sociétés d'État ou encore à l'exercice du pouvoir de dépenser du fédéral. La deuxième examine brièvement les dispositions de la Charte qui vise l'égalité en matière d'emploi. La troisième analyse les possibilités de garantir dans une plus grande mesure l'égalité en vertu de la Charte et expose les solutions possibles en vertu de la Charte. Enfin, la dernière section examine la fragilité des programmes fédéraux qui peuvent être contestés en vertu de la Charte et leurs conséquences sur la négociation collective.

### Summary

This paper examines the constitutional dimensions of potential federal action to promote equality in employment, with particular reference to the situation of women, native people, the handicapped, and visible minorities. Part I explores the limits of federal legislative authority in relation to promoting equality in employment. Given the primacy of provincial jurisdiction in this area, special attention is devoted to Crown corporations, the federal spending power, and issues of enforcement.

Part II concerns the impact of the *Canadian Charter of Rights and Freedoms* and is divided into four sections. The first examines certain threshold questions relating to the scope of the Charter. Does the Charter apply to private activity, to Crown corporations, or to the exercise of the spending power? The second section provides a brief overview of those provisions of the Charter relevant to the promotion of equality in employment. The third section analyses the possibilities of securing a greater measure of equality under the Charter and contains a general discussion of the remedies available under the Charter. The final section analyses the vulnerability of federally initiated programs to attack under the Charter, with special reference to the impact of such programs on the collective bargaining process.





## THE CONSTITUTIONAL DIMENSIONS OF PROMOTING EQUALITY IN EMPLOYMENT

Marc Gold\*

Equality is the great political issue of our time. Liberty is forgotten: Fraternity never did engage our passions: The maintenance of Law and Order is at a discount. Natural Rights and Natural Justice are outmoded shibboleths. But Equality—there men have something to die for, kill for, agitate about, be miserable about. The demand for Equality obsesses all our political thought. We are not sure what it is...but we are sure that whatever it is, we want it.<sup>1</sup>

The inclusion of "equality rights" in the *Canadian Charter of Rights and Freedoms*<sup>2</sup> has precipitated eager and anxious reactions from all sectors of Canadian society. Eagerness is felt by those who expect (or at least hope) that the Charter will be applied by the courts in such a way as to eliminate discriminatory laws and practices in Canada; anxiety probably characterizes the reactions of most governments in Canada, whose three-year grace period to remove such discriminatory laws and practices will soon come to an end.<sup>3</sup>

Any attempt to predict the impact of the equality rights provisions on present or future laws or programs must confront a number of almost insurmountable obstacles. The first is not unique to equality rights. Quite apart from the inherent difficulty in predicting what a court will do in any given case, it is too early to say anything confidently about how the courts will discharge their responsibilities under the Charter. How searching will be the judicial analysis of the reasons advanced in justification of an impugned law? To what extent will the courts' traditional deference to the legislative process carry over into the post-Charter era? No clear trend emerges from the case law already decided, and it is unrealistic to assume that the first set of decisions handed down by the Supreme Court of Canada will provide sufficient guidance to enhance our predictive abilities.

If this uncertainty pervades the entire Charter, it is exacerbated in the case of equality rights. As I have noted elsewhere,<sup>4</sup> equality is an inherently controversial concept, one that embodies competing and irreconcilable conceptions of equality.<sup>5</sup> Moreover, the concept of equality loses little of its controversial nature when it is transposed into a legal context. Even if constitutional adjudication were exclusively an affair of analysing the words in the constitutional document—which it most clearly is *not*—the text does not provide clear answers to the kinds of questions inevitably raised by constitutional litigation.

This paper examines the constitutional dimensions of federal action to promote equality in employment, with particular reference to the situation of women, native people, the handicapped, and so-called visible minorities. There are three major questions that are addressed herein. First, what is the scope of federal legislative jurisdiction to implement measures to promote equality in employment? Second, to what extent would litigation under the Charter be effective to achieve a greater measure of equality in employment? Finally, assuming that federal initiatives are introduced to promote

equality, to what extent would such initiatives be vulnerable to attack under the Charter?

The first part of the paper explores the limits of federal competence in relation to promoting equality in employment. I begin with a general analysis, followed by more specific consideration of the issues of Crown corporations, the spending power, and questions of enforcement.

The second, and major, part of the paper examines the impact of the Charter. The first section is concerned with a number of formative questions: To what range of activities and relationships does the Charter apply? Are Crown corporations subject to the Charter? Does the exercise of the spending power attract judicial scrutiny under the Charter? This analysis is followed by an overview of those provisions of the Charter relevant to this inquiry. The third section analyses the possibilities of using the Charter to secure a greater measure of equality in employment and contains a general discussion of the remedies available under the Charter. The final section analyses the vulnerability of federally initiated programs to attack under the Charter, with special reference to the impact of such programs on the collective bargaining process.

### I. FEDERAL INITIATIVES TO PROMOTE EQUALITY: THE REACH OF FEDERAL JURISDICTION

Given that the Charter represents a potentially revolutionary change in our legal culture, it is tempting to ignore traditional constitutional analysis while focusing exclusively on the impact of the Charter. This is a mistake. Parliament must have the legislative authority to enact a given law before one can worry about whatever limits to that authority could be imposed by judges interpreting the Charter. Thus we must begin with an analysis of the division of powers relating to the promotion of equality in employment.

For the purposes of this analysis, I assume that Parliament wishes to create an agency with the responsibility of overseeing (and possibly enforcing) the development of programs to promote equality for the various target groups herein considered. In terms of the programs contemplated, I assume that they could range from enhanced support services for various groups (e.g., daycare, parental leave) to targets or quotas for the employment and promotion of various groups.

Leaving aside the monitoring function contemplated for a new federal agency, there are two major techniques available to Parliament which, although they both will likely deploy legislation, ought to be distinguished for analytical purposes.

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The first is direct legislative intervention in the employment practices of bodies subject to the jurisdiction of Parliament. (I include in this category the situation where Parliament leaves it to a given body to derive its own targets and goals, but where Parliament retains the authority to intervene if it is not satisfied that that body has satisfied the applicable norms.) The second is by attaching conditions to its contracts with the private sector (contract compliance), to its financial grants to the private sector, or by attaching conditions to its grants of money to the provinces (conditional grants). We begin with the question of direct legislative intervention.

#### A. Legislating Equality: Who Can be Covered?

The difficulty in deploying direct legislative intervention arises because of the primacy of provincial legislative jurisdiction over labour relations. Federal jurisdiction over labour relations arises only where a) the enterprise in question is engaged in activities subject to federal legislative competence, and b) the regulation of the labour relations of that enterprise is deemed integral to the jurisdiction Parliament exercises over the area in question.<sup>6</sup>

This clearly excludes the great majority of enterprises from the legislative control of Parliament. If these sectors of the economy are to be "swept into" the recommended programs, it will require legal instruments other than direct legislative intervention, as defined.

The primacy of provincial jurisdiction over labour relations may also pose a problem in the case of Crown corporations. As Professor Swinton accurately puts it, "[f]ederal ownership is not determinative of the application of federal labour laws".<sup>7</sup> It may be, therefore, that a Crown corporation such as de Havilland, engaged in activity traditionally subject to provincial labour law, will *not* be subject to federal labour law, whereas other Crown corporations will be subject to federal labour law by virtue of the nature of the activities in which they are engaged. But there is more to it than this.

One must distinguish between two stages in the process of promoting equality in employment—the initial setting of the appropriate standards, and the review of such standards by some regulatory authority.

In its capacity as employer, the Crown can establish the terms and conditions of employment, including targets for the hiring and promotion of members of the target groups, just as any other employer can do. Like all employers, however, this power to fix employment standards is subject to a) the existence of any collective bargaining regime(s) in place, and b) to any applicable law governing employment.<sup>8</sup> It would appear that there is no impediment to Parliament legislating such employment standards for all of the employees of Crown corporations, regardless of the activities in which they are engaged. Such legislation properly could be considered to be in relation to the "public property"<sup>9</sup> and not in relation to property and civil rights.<sup>10</sup>

As noted above, such standards would be subject to the collective bargaining process and to the existence of any applicable law governing that process.

Collective bargaining poses no legal or constitutional problem at this level of the analysis. The parties will either agree or not to institute the appropriate regime as contemplated by the recommendations. It is only if the process fails to yield an

appropriate regime, or if the regime, once in place, is not working adequately, that we have to worry about federal legislative competence to compel compliance with the norms contemplated. In other words, it is at the "reviewing" stage (broadly conceived) that the division of powers issue rears its head.

As mentioned above, the Crown, *qua* employer, will be subject to applicable law. The issue is whether it is provincial or federal law. If federal law applies, we can assume that all relevant legislation would be adjusted so as to enable the reviewing agency to function effectively.

In cases where provincial labour laws apply, the practical problems arise only if provincial law either prohibits the kinds of programs sought to be implemented or otherwise requires advance clearing of such programs by some provincial agency.<sup>11</sup> It is beyond the scope of this paper to assess the magnitude of this potential problem, but it appears prudent to recommend that negotiations take place between the relevant federal and provincial actors so as to minimize the actual difficulties that the distribution of powers in this area might engender.

A word or two about the native people. Parliament has exclusive jurisdiction to legislate in relation to "Indians and lands reserved for the Indians".<sup>12</sup> It is clear that this jurisdiction does not insulate native people from the normal operation of provincial laws relating to employment,<sup>13</sup> and it is equally clear that otherwise valid provincial laws may apply on "lands reserved for the Indians".<sup>14</sup> It may be possible for Parliament to legislate positively in such a way so as to secure jurisdiction over labour relations on such lands, thereby removing the problem of having provincial labour laws apply, but this remains an area clouded by considerable uncertainty.<sup>15</sup>

#### B. Other Legal Instruments: The Spending Power and Contract Compliance

The above analysis suggests that Parliament has the constitutional authority to intervene directly in most, but not necessarily all, sectors within its legislative jurisdiction. A vast sector of the economy is excluded from Parliament's jurisdiction, and other instruments are therefore required to increase the scope of whatever program is to be recommended.

In general terms, the instrument available is the so-called spending power of Parliament and the apparent ability of Parliament to attach conditions on its grants of money. A related power is the right of the government, as contractor, to include provisions in its contracts that require the persons contracting with the government to comply with certain conditions.

##### 1. The Spending Power

The federal government spends public money in a number of areas outside the legislative jurisdiction of Parliament, and many social welfare programs exist because the money so spent carries with it certain conditions that must be met before it can be used by the provinces.<sup>16</sup> Despite the fact that this is a common feature in Canadian federalism, the authority to so act is not free from doubt, both with respect to the constitutional anchor for this spending power and regarding the ability of Parliament to attach conditions to grants to the provinces, where the conditions relate to areas within provincial jurisdiction.<sup>17</sup>



With respect to the source of spending power, I agree with LaForest, who argues that it is rooted in sections 91(1A) and 102 of the *Constitution Act, 1867*, rather than in the royal prerogative or the "peace, order and good government" clause of section 91, as some have argued.<sup>18</sup>

That Parliament can spend money in areas not subject to its legislative jurisdiction also seems fairly clear. Such grants may be made to the provinces, or to individuals, groups, or corporations.<sup>19</sup> The trickier question is the validity of the conditions that may be attached to grants.

In the *Unemployment Insurance Reference*,<sup>20</sup> the Judicial Committee of the Privy Council offered some observations on the spending power, observations that, as Professor Smiley remarked, have been cited by both the supporters and opponents of conditional grants.<sup>21</sup>

*That the Dominion may impose taxation for the purpose of creating a fund for special purposes, and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities, could not as a general proposition be denied. Whether in such an Act as the present compulsion applied to an employed person to make a contribution to an insurance fund out of which he will receive benefit for a period proportionate to the number of contributions is in fact taxation it is not necessary finally to decide. It might seem difficult to discern how it differs from a form of compulsory insurance, or what the difference is between a statutory obligation to pay insurance premiums to the State or to an insurance company. But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.*

*It may still be legislation affecting the classes of subjects enumerated in s. 92, and, if so, would be ultra vires. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the Provincial domain.<sup>22</sup>*

LaForest is of the view that this passage upholds the spending power "so long as it is not in substance legislation on a provincial matter",<sup>23</sup> and derives some support from dicta of the Supreme Court in the same Reference case, as well as other case law on the subject.<sup>24</sup> This is the dominant academic view on the subject.

It is unnecessary (and impossible) to come to a firm conclusion on the matter. It is clear that the federal government is of the view that it has the authority to attach conditions on its grants to the provinces, even when the conditions relate

to areas of provincial jurisdiction.<sup>25</sup> Although in no way determinative of the constitutionality of conditional grants, the federal position suggests that any recommendation that relies on this device will not be deemed unacceptable by reason of strong doubts as to its constitutionality on the part of the federal government.<sup>26</sup>

## 2. Contract Compliance

It is generally assumed that, relying on the spending power, Parliament could legislate a framework within which persons doing business with the government could be required to comply with conditions and standards as a condition of the contractual relationship. The issues are canvassed admirably in the paper by Marilyn Leitman,<sup>27</sup> and I shall do no more than highlight one problem area and offer my views on it. The issue is one of paramountcy.

Assume that a contract compliance program was somehow in conflict with applicable provincial law. Tarnopolsky is of the view that the ordinary rule of federal paramountcy applies, while others argue that the paramountcy rule would not apply.<sup>28</sup> In my view, both are correct. How can this be?

We must distinguish between the legislative framework authorizing the program, and the terms of a given contract executed pursuant to that legislative framework. Paramountcy would apply in the case of a conflict between the federal legislation and whatever provincial legislation might apply, but such cases of conflict will be rare. The federal legislation, for it to be *intra vires* Parliament, would have to be framed in such a way so as to avoid directly regulating the affairs of persons otherwise within provincial jurisdiction. It follows that only where both levels have enacted laws that could apply to persons entering into contracts with the federal government could conflict arise that would attract federal paramountcy.<sup>29</sup>

In the more realistic case of provincial law being silent on this point, but making provisions that in some ways conflict with the terms of a contract executed under the federal framework, federal paramountcy would not apply. This, in my view, follows from a) the voluntary nature of the contractual process and b) the assumption that, were the federal law to prevail, it would then have to be characterized as one in relation to an area *outside* federal jurisdiction.

As discussed above in connection with Parliament's legislative jurisdiction as it relates to Crown corporations, the magnitude of this problem is difficult to assess. It would seem to require some intergovernmental understanding so that the areas of actual conflict could be reduced.

## C. Enforcement

What are the constitutional limits on Parliament's authority to establish an enforcement mechanism for the various regimes likely to be recommended? In the absence of detailed information about the kind of agency to be recommended, I restrict this discussion to the broad issues of constitutional principle that pertain to this issue.

Once again we must distinguish between those areas over which Parliament has direct legislative jurisdiction, and those areas where the federal standards are being applied (either through the spending power, or through the capacity of the Crown as employer) in areas of provincial jurisdiction. In fact, this line of distinction may break down somewhat, due to

recent judicial pronouncements on the meaning of the jurisdiction sections of the *Constitution Act, 1867*, to be discussed below.

Where Parliament has the authority to legislate directly, and has done so, the general rule is that it is empowered to stipulate the forum wherein disputes arising from the federal law should be resolved.<sup>30</sup> Thus Parliament could vest enforcement powers in existing federal agencies, create new ones, or vest it in the provincial superior courts or in the Federal Court of Canada.<sup>31</sup> Subject to a possible problem with section 96 of the *Constitution Act, 1867*, to be discussed below, there appears to be no constitutional problem when the government seeks only to enforce its regime against those directly subject to its legislative jurisdiction. The issue of vesting rights in third parties who may deal with persons subject to federal legislative competence is another matter.

Where Parliament is without direct legislative authority, a number of problems arise. The major one is the authority of the provinces to establish courts and tribunals for the administration of justice in the provinces.<sup>32</sup> Where, by definition, the relevant relationship is governed by provincial law, Parliament lacks the authority to stipulate *fori* for enforcement or dispute resolution. This, however, is subject to a potentially important wrinkle.

Notwithstanding the restrictive interpretation given to the jurisdiction of the Federal Court, the Supreme Court has held that the Federal Court is available for the government to enforce contracts (e.g., student loans) where the transaction is governed by a federal enactment in a substantial way.<sup>33</sup> By analogy, a contract compliance program, if the enabling legislation is suitably framed, might be enforceable in the Federal Court (or perhaps some new federal agency). It would be far more difficult to extend this to third-party actions against a person contracting with the government. It is hard to see how this relationship could be governed substantially by federal law—the condition precedent to federal enforcement power—without that federal law being judged to be *ultra vires*.

A second wrinkle, in this case one that potentially limits federal authority, is imposed by section 96 of the *Constitution Act, 1867*.

In situations where, but for the federal legislation setting up a forum for dispute resolution, the issues would have been resolved by the provincial superior courts, section 96 may preclude Parliament from ousting such superior court jurisdiction. This arises because section 96 recently has been held to apply to Parliament in *McEvoy v. A.G. New Brunswick et al.*<sup>34</sup>

The case concerned the ability of Parliament to vest exclusive jurisdiction in criminal law matters in the provincial "inferior" courts of New Brunswick. The Supreme Court, invoking section 96 and the value of an independent judiciary, unanimously was of the view that this would be unconstitutional. At the same time the Court acknowledged that some tinkering with the traditional jurisdiction of the Superior Courts is permissible.

Without entering into a detailed analysis of the case, it is unlikely that it would pose an insurmountable problem. First, it concerned a transfer of judicial power to provincially appointed judges; one of the reasons invoked by the Court concerned the appointment power of the Governor-General,

contemplated by section 96. In a federally created agency, this power is not being given away. Second, this would not be the "wholesale" transference of jurisdiction that was at issue in *McEvoy* (at least as characterized by the Court). Nevertheless, the Superior Courts have been flexing their muscles lately, and one should be careful about recommendations that have the effect of reducing substantially their traditional jurisdiction.

This leads to one final point. The Superior Courts have asserted their authority to decide questions of the constitutional division of powers, notwithstanding any apparent legislative limitation on that authority.<sup>35</sup> There is no reason to assume that the same will not obtain vis-à-vis issues raised by the Charter.<sup>36</sup> Moreover, the Supreme Court in *McEvoy* hinted that it might be prepared to strike down a federal privative clause if it had the effect of insulating a regime from judicial review by a superior court. All of this suggests the importance of either providing for judicial review from decisions of the new federal agency, or of carefully considering the ways in which such review could be ousted, if so desired.

## II. THE CHARTER OF RIGHTS

### A. The Scope of the Charter

As noted in the introduction, the Charter poses two broad questions in the context of the issue of equality in employment. First, under what circumstances can the Charter be used to remedy existing or future inequalities in employment? Second, assuming legislative (or other) measures to promote equality, under what circumstances could the Charter be invoked to strike down such measures? Although these specific questions are addressed in subsequent sections of this paper, they clearly are relevant to the issue considered here: What is the scope of the Charter? To whom and to what does it apply?

To the extent that the Charter is given a narrow scope—i.e., applying to a limited range of activity in Canadian society (e.g., legislation and governmental actions)—the range of persons who could invoke the Charter to redress inequalities is relatively small.<sup>37</sup> If the focus is on the use of the Charter in this way, then one committed to equality in employment will want the Charter to apply as broadly as possible.

At the same time, however, as the scope of the Charter is broadened, so too does it broaden the range of persons who could use the Charter to assail whatever measures are implemented to promote equality. In evaluating the following discussion of the scope of the Charter, one should reflect upon which route to equality is most likely to be effective, legislative measures or Charter litigation. To the extent that one believes that the former route is the preferable one, the fact that the Charter may not extend to *all* activities and relations in society may turn out to be a blessing in disguise.<sup>38</sup>

Turning to the question of the scope of the Charter, a number of points are tolerably clear. The Charter applies to all legislation, either federal or provincial, to delegated legislation, and to all actions taken under legal authority.<sup>39</sup> A number of issues are quite unclear. Does the Charter apply to private activity? To Crown corporations? To the exercise of Parliament's spending power? To a contract compliance program? These issues will be addressed in turn.<sup>40</sup>

### 1. Does the Charter Apply to Private Activity?

The conventional understanding of the scope of the Charter is that it does not apply directly to private activity.<sup>41</sup> A survey of the literature, however, reveals that there is no one conclusive argument that demands this conclusion. Instead, one confronts a web of argumentation, rooted in text, history, prudence, and aspiration—arguments that I shall attempt to evaluate here.

Three lines of argument support the position that the Charter does not extend to private activity. The first is a textual argument, founded on section 32(1) of the Charter, which provides:

*32(1) This Charter applies*

*(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and*

*(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.*

It is argued that the reference to legislative bodies and governments reveals the scope of the Charter to be limited to official action, and this conclusion is said to be reinforced by the words "in respect of all matters within the authority" of the relevant legislative bodies.<sup>42</sup>

This textual argument is said to be reinforced by the legislative history of this section. An earlier draft had provided that the Charter was to apply to the legislative bodies and governments "and to all matters" within their respective legislative jurisdiction.<sup>43</sup> For Professor Swinton this change is "significant";<sup>44</sup> for Professor Hogg, the change in wording is practically conclusive.<sup>45</sup>

History figures in the argument in another way. Various representatives of the federal government, testifying before the Special Joint Committee on the Constitution, expressed the view that the Charter was not to apply to private activity,<sup>46</sup> and official government publications appear to assume the same.<sup>47</sup> More generally, commentators invoke the "general understanding" that a constitution is meant to restrict government action rather than extend pervasively to all relationships in society.<sup>48</sup>

Finally, a variety of prudential or pragmatic arguments have been invoked on this point. Worries are expressed about the consequences of "constitutionalizing" much of so-called private law that would result were the Charter to extend to private activity. As well, concerns are expressed as to the merits of "trumping" the various non-judicial mechanisms (e.g., conciliation) that currently exist under human rights legislation—a result that could follow if all activities and action are potentially justiciable under the Charter. As well, concerns have been expressed as to the difficulty courts would have in accommodating the competing values implicated in applying the Charter to private activity, inasmuch as the Charter "provides no guidelines for its application".<sup>49</sup>

As the following discussion reveals, some of these arguments appear stronger than others, but it bears repeating that neither these, nor the arguments that follow, are conclusive of the issue.<sup>50</sup>

A number of arguments can be invoked in support of the application of the Charter to private activity. Before turning to those that appear in the literature, it is helpful to consider an argument based on general principles. The strengths and weaknesses of such an argument should help to illuminate the persuasiveness of the more modest arguments considered below.

We begin with the proposition that all activity is, in some sense, regulated by law. The law, whether legislation, regulation, or common law, enjoins and authorizes the various activities of individuals and groups in society. Even where the law appears silent on an issue, and one is thus at liberty to act as one wills, it is the absence of legal constraint that regulates the activity in the same manner as the activity would be regulated by law were the law explicitly to empower one to do that activity.

It is clear that the Charter applies to legislation. Can it be argued that the common law is immune from the Charter? For a variety of reasons, the answer must be in the negative.

Courts have suggested that, for the purposes of section 1 of the Charter, the term "prescribed by law" includes rules of the common law.<sup>51</sup> If a common law rule can count as a justification for a limitation on a Charter-guaranteed right or freedom, it must obviously be capable of *not* counting as such a justification. Since this is so as a matter of logic, it seems clear that a rule of common law could itself be found to violate the Charter.

More generally, the common law must be subject to the Charter, otherwise an absurd anomaly would result. In Quebec, all private law is codified—i.e., is in the form of legislation. Assume that rule X in the *Civil Code* is identical in substance to a common law rule Y, in force in Ontario. Assume further that these rules offend the Charter in some way. If this were so, and the Charter applied only to legislation, the rule would be struck down in Quebec but would stand in Ontario.<sup>52</sup> This would be formalism with a vengeance!

If this much is granted, the next step is to observe that (subject to the Charter itself) either Parliament or a provincial legislature is competent to legislate changes to the law governing private activities. In other words, all private activities are subject to the actual or potential reach of competent legislation.

The next step is more controversial. The idea is that the failure to legislate a change in the law is every bit as much "government action" as is the decision to legislate in a way that permits or constitutes a violation of the Charter. For example, assume that the law of contract, as it has evolved, does not enjoin a contractor from discriminating against a potential contractee. (It is no answer to this argument to say that the law does enjoin such discrimination. To the extent that it may, the law, whether legislative or common law, would be relatively safe from Charter attack.) The provincial legislature could enjoin such practices. Why is its failure to have done so significantly different from a decision to legislate in a way that authorizes such discrimination? If this is admitted, then it would follow that all private activity is subject to the Charter in the sense that the legal framework itself is subject to the demands of the Charter.

There are two obvious responses that can be anticipated. The first is to deny that the Charter imposes any positive duty on legislative bodies to address issues of discrimination,



etc., in the context of private activity. Legislative bodies remain free to respond to their own agendas as they did prior to the Charter, subject only to *limitations* imposed by the Charter on what they can do (and how they can do it).

Butressed by arguments rooted in democratic theory, this position has an obvious allure. Although one can find positive duties in the Charter,<sup>53</sup> there does not appear to be a systematic "cue" in the Charter that would impose this pervasive duty on legislative bodies.<sup>54</sup>

There may be an answer to this objection, although I offer it here in a very tentative way. If we accept the proposition that all private activity lies within the authority of either Parliament or a provincial legislature, in the sense explained above, then it follows that such activities can be described as "matters within the authority" of one of these bodies. Assuming that such activity appears to violate the Charter, the reference to Parliament and provincial legislation in section 32 could be interpreted as imposing a duty to legislate to enjoin such violations of the Charter. (To get this argument "off the ground", one would also have to argue that the language of the Charter, vesting rights in individuals, reveals an intent to have all activities subject to the Charter, as discussed below.)

The second general objection to the argument presented here is that it is inherently circular. One must *assume* that private activity can violate the Charter in order to make out the argument that the Charter applies to private activity. For the moment, I am unable to argue my way around this one.

In any event, there are more conventional arguments that one could make in support of the extension of the Charter to private activity, and to these we now turn.

The strongest arguments for extending the scope of the Charter are textual. Respecting the words of section 32(1), a number of arguments can be made. First, one can read the reference to the legislative bodies and governments as not exhaustive. Had the drafters intended to restrict the scope of the Charter, they could have inserted the term "only" after the word "applies".<sup>55</sup> Second, the reference to "government" can be construed as designed to ensure that the Charter applies to the Crown, given the rule of statutory interpretation that holds that the Crown is not to be presumed to be bound by legislation.<sup>56</sup> As is readily apparent, these arguments do not establish much in a positive way, but they do offer a competing interpretation of section 32 that might blunt somewhat the force of the textual argument noted earlier.

In a more positive vein, one can point to the words used in various provisions of the Charter. On their face, these provisions do not appear to be limits on government power; they appear to be vesting rights in individuals.<sup>57</sup> This is to be contrasted with the terms of the American Bill of Rights, where the rights are expressed as limitations on official action.<sup>58</sup>

As is the case with all arguments rooted primarily in the text, they must confront the competing arguments based on history, conventional wisdom, and prudence. The dominant technique in responding to such arguments is to deny their relevance. Thus one must argue that the views expressed before the Special Joint Committee are simply irrelevant. The issue is not what was intended to be accomplished, but what was actually embodied in the text. Moreover, it can be

argued that it is dangerous to rely upon an imputed legislative intent, as it is by no means clear whose intentions are to be counted (to say nothing of the problems in discovering what those intentions might have been).<sup>59</sup> The same general argument applies to the argument based on the conventional understanding of the scope of the Charter.

Respecting the prudential or pragmatic arguments alluded to earlier, a number of fairly compelling responses can be offered. Most generally, one might plead confession and avoidance. Conceding that private law would be constitutionalized, that human rights agencies could potentially be avoided by litigants invoking the Charter, and that a great burden thereby falls on the courts (with very little to guide them), so what? Is this significantly different from the consequences of having entrenched the Charter assuming that it applied only to public activity?

If tort law, in some aspect or other, violates a right or freedom guaranteed by the Charter, what is wrong with a court modifying the impugned doctrine and providing a remedy under the Charter? If the answer is that this would inhibit the otherwise plenary authority of legislature to effect changes in private law, why is this so terrible? Legislative bodies clearly are constrained by the Charter, and the objection appears ultimately to rest on the assumption that it is better for the legislature to be constrained in a narrower range of their activities. But this is hardly self-evident, once one accepts the premise that a Charter is, in some ways, a good thing to have.<sup>60</sup> (It may not be unfair to speculate that those who would narrow the scope of the Charter are also those with the greatest reservations about the general value of a Charter.)

Furthermore, how relevant is the concern expressed that the Charter does not provide guidance to the courts in fashioning a balance between the competing values of, say, liberty and equality—a balance that can be struck by legislation? Continuing with the language of the forms of action, one may enter a demurrer to this argument. After all, the same difficulty is posed when a court reviews legislation under the Charter. It still must find the same balance between competing rights and interests, and it gets no more guidance from the Charter than it would were it reviewing some private regime. The crucial difference is, of course, that in the former case the balance may have been struck initially by the legislature. But the nature of the judicial inquiry does not appear to be fundamentally different nonetheless. The problem of "what binds the judge" is an endemic one in the context of constitutional adjudication: the nature of the *lis* before the court is largely irrelevant to *this issue*. (Indeed, in terms of judicial competence, surely it is *easier* to defend the role of the court in typical private law matters than it is to defend the courts' second-guessing complex economic and social legislation, often enacted against the backdrop of complicated and protracted studies and non-legal analysis.)<sup>61</sup>

Finally, concerns were expressed that a consequence of extending the Charter to private activity would be to somehow emasculate (or at least frustrate) the activities of various agencies currently charged with enforcing human rights legislation in Canada. The issue is a difficult one, but it is sufficient here to observe the following.

First, it is important to appreciate the parameters of the issue. The Charter clearly applies to the *terms* of the various

statutes setting up human rights agencies, and the guarantees in the Charter will be applied to such legislation as would the Charter apply to any legislation. Thus it is possible (though by no means certain) that certain provisions in a human rights statute could be altered as a result of incompatibility with the Charter.<sup>62</sup> Moreover, the procedures of any statutory agency will have to conform to whatever guarantees of a fair process are guaranteed by the Charter. So, in certain fundamental ways, there is no escaping the conclusion that, even giving the Charter a narrow scope, it will have an impact on the private activity covered (or excluded from coverage) under such human rights legislation.

Second, the concerns expressed ultimately turn on a perception that the mechanisms and procedures under such human rights legislation are preferable to straightforward litigation under the Charter. While there is some doubt as to the merits of some human rights procedures,<sup>63</sup> and widely acknowledged concern about the time that human rights complaints take to be resolved ultimately, there is considerable force to the argument that such procedures are superior to litigation. Indeed, inasmuch as one hopes to achieve positive results for the target groups, success must be measured by the extent to which all sectors of society move in the direction of promoting equality in employment. Although a battle may be won in court (or before a human rights agency), the victory may be at the cost of alienating the private sector. There is force to the argument that a non-adversarial approach may bear more fruit in terms of results than would a series of court battles.

In any event, it is not self-evident that courts would ignore the existence of human rights agencies and their procedures, and allow persons to avoid those processes altogether. Just as the Supreme Court relied on the existence of such enforcement mechanism to refuse to elaborate a tort of discrimination,<sup>64</sup> courts under the Charter have invoked the principle of "exhaustion of remedies" to deny relief under the Charter.<sup>65</sup> Conceding that nothing forces the courts to respect the domain of other legitimate governmental institutions, it would certainly be reasonable for them to do so.<sup>66</sup> To extend the Charter to private activity does not necessarily mean that all other decision-makers in society are out of a job, just as the extension of the Charter to executive decision does not necessarily mean that the court will review the defence treaties of the Canadian government.<sup>67</sup>

Assuming that the judiciary does decide to supplant the human rights agencies, or at least to offer itself as a parallel forum for the resolution of private disputes under the Charter, Professor Swinton urges the court to apply different standards to private and public activity.<sup>68</sup> Her concern is rooted in the belief that values of autonomy and privacy should allow private persons a greater leeway to, say, discriminate than should be allowed government. Leaving aside the merits of the argument, it is clear that courts are perfectly competent to fashion different standards. Indeed, if the concern is that courts will be too "egalitarian" vis-à-vis private activity, it does not appear to be well-founded. Courts traditionally have leaned on the side of liberty values,<sup>69</sup> and continue to do so in the context of reviewing awards made by human rights commissioners.<sup>70</sup>

I have devoted considerable attention to these arguments, notwithstanding my instinct that the courts will not interpret

the Charter to apply to private activity.<sup>71</sup> I do so because it is by no means clear that, however the courts draw the line initially, such a line (between public and private) will be stable over the long run. Faced with a clear case of unjust treatment by a private employer (or trade union), there may be powerful forces pushing the courts to extend the protection of the Charter. It is not unfair to see this as informing the rather twisted shape of American doctrine concerning "state action".<sup>72</sup> In any event, despite the rhetoric of the neo-conservatives, it is unlikely that we will see a massive movement of deregulation in Canada. On the contrary, it is likely that government will continue to expand the areas of private activity subject to explicit regulation. All of this is to note that the boundary lines between public and private activity are both constantly shifting, and forever somewhat elusive.

## 2. The Charter and Crown Corporations

Assuming that some line is drawn between public and private activity, upon what side of the line fall Crown corporations? The application of the Charter to the activities of Crown corporations will turn on the meaning attributed to "government" in section 32(1) of the Charter. Beneath the surface of this apparently simple issue, however, lies the more fundamental question of what the Charter was designed to accomplish.

The meaning of a word does not inhere intrinsically within it, but rather is a function of conventions of meaning accepted by the community called upon to interpret the word.<sup>73</sup> These conventions will vary and evolve in light of the purpose for which the act of interpretation is being undertaken. It is therefore important that we evaluate the various tests offered in the literature against the backdrop of the functions that these tests served in their original context.

At the outset it is clear that the Charter binds the Crown. The reference to "government" in section 32(1) suffices to satisfy either the common law test<sup>74</sup> or the standard set out in the federal *Interpretation Act*.<sup>75</sup> This conclusion is also consistent with what a majority of the Federal Court of Appeal decided in the "Cruise missile" case.<sup>76</sup> This, however, would not resolve the question of whether Crown corporations are subject to the Charter, unless the fact of Crown ownership itself was determinative of the issue.

It is unlikely that Crown ownership alone would determine the issue. Many of the activities of Crown corporations are indistinguishable from those of private sector corporations, even though Crown corporations exist to serve policy goals of the government.<sup>77</sup> If the private-sector corporation is not subject to the Charter, why should the Crown corporation, all other things being equal? Moreover, an analogy can be drawn with the general principle that government ownership, although bestowing certain powers, does not necessarily entail legislative competence.<sup>78</sup>

Academic commentators have been reluctant to predict what test courts will apply, and often have refrained from suggesting what the appropriate test ought to be. Suggestions include the application of the law of Crown agents,<sup>79</sup> the elaboration of a "government functions" test,<sup>80</sup> and the application of the common law test of agency.<sup>81</sup>

In my view, the test for Crown agency as applied in Canadian courts—*de jure* control<sup>82</sup>—is too narrow. Note that the function of the test is to bestow immunity from all laws

not expressly made applicable to the Crown, an immunity available so long as the Crown agent is acting to effect Crown purposes.<sup>63</sup> Given that the Charter extends to the Crown, the underlying purpose of the doctrine does not apply. Granted, it is a relatively easy test to apply, but I am not convinced that only those Crown corporations that could enjoy Crown immunity from ordinary laws should themselves be subject to the Charter. A better test, in my view, although one exceedingly difficult to apply, is a government purpose test. Such a test should incorporate "Crown agents", considerations of *de facto* control by government (the common law test), and a careful examination of the government purposes served by the Crown corporation under question.

All of this, it should be obvious, is predicated on the assumption that the terms and conditions of employment are arrived at in some way *other* than being imposed legislatively. If Parliament legislated in this area, pursuant to its jurisdiction over the kind of activity in which the corporation is engaged, such legislation would be subject by review as would any other legislation.

### 3. The Spending Power and Contract Compliance

Is the exercise of the spending power subject to the Charter? Professor Swinton argues that it is, inasmuch as it is government action.<sup>64</sup> In my view, we must draw a few distinctions.

Assume that Parliament made a grant to a province for the purpose of enhancing the employment conditions of some group. The grant itself would not be subject to the Charter; no private citizen would be granted standing to challenge the grant absent a *prima facie* showing that his or her rights were violated.<sup>65</sup> It would be the program initiated that would be the focus of a Charter challenge. If such a program were one initiated by government, it would come under the scope of the Charter.

In the case of the spending power being used to create a contract compliance program in the private sector, the issue is more difficult. It is perfectly reasonable to argue that the Charter would apply to such a program: it was initiated by government action for the purpose of carrying out a governmental purpose (i.e., equality in employment). At the same time, one could argue plausibly that the Charter ought not to apply. Contracting is a voluntary process: no company is compelled (in theory) to agree to the terms attached to a government contract. Viewed in this light, an affirmative action program adopted pursuant to a contract compliance program would be in no different a position than would one adopted voluntarily (and unilaterally) by a private employer. If the Charter would not apply in the latter case, why should it in the former?

How does one choose between these two alternatives? Much will depend on one's background theory of what the Charter is intended to accomplish. Moreover, it reveals the instability of the public/private distinction noted above. On balance, I am inclined to think that courts *will* hold the Charter applicable to such programs, although I have difficulty in explaining why. In any event, for reasons to be explored below, a sensibly framed affirmative action program is likely to be upheld against a Charter attack, so in this regard, nothing much turns on the point.

## B. Overview of the Charter

In this section I offer a general overview of the provisions of the Charter that pertain to equality in employment. Because the Charter contains provisions that pertain to some, but not all, of the target groups, it is helpful to begin our discussion with those provisions that do apply to all of the target groups. We can then assess what changes, if any, are effected by the more specific provisions that apply to some of the groups.

### 1. Section 1<sup>66</sup>

We begin with the proposition that none of the rights and freedoms guaranteed in the Charter is absolute. Subject to the question of section 28, to be considered below, a law may validly infringe upon a right or freedom if it can be justified by the party seeking to uphold the law.

While it is clear that the onus is on the person seeking the protection of section 1 to establish that the limit on the right or freedom in question satisfies the conditions set out in section 1,<sup>67</sup> the actual standard(s) of review contemplated under section 1 is not clear. Various verbal formulae have been offered in the case law—often a given case will offer one standard and apply another<sup>68</sup>—but one is entitled to be wary of any attempts to pin it down in words. The balancing of rights and interests appears to be done on a case-by-case basis, and in any event the tests that have been offered are too manipulable to be relied upon in predicting how courts will assess a given law.

In my view, the courts will ultimately come to view the standard of review as turning on a number of factors: the perceived importance of the right or freedom at issue, the degree of interference with the right or freedom, and the perceived importance of the governmental interest asserted in justification.<sup>69</sup> It must be admitted, however, that the cases do not yet reveal much of a clear trend.

For present purposes, it is sufficient to note that not all alleged violations of the Charter need be justified under section 1: other "savings" clauses exist within the definition of the rights themselves.<sup>70</sup> This is significant because of the requirement, in section 1, that limits on rights be "prescribed by law".<sup>71</sup> As will be discussed later, an affirmative action program that is developed voluntarily could not rely on section 1 (as there would be no "law"), but may still come within the terms of section 15(2) or section 6(4) of the Charter.

To satisfy section 1, the impugned law must have a legitimate objective, in the sense that courts will assess the "appropriateness" of the law's goal in terms of their sense of our society.<sup>72</sup> This means that, to the extent that a law or program can be seen to be furthering some goal that *itself* has some constitutional status, the task of defending the law under section 1 might be easier.<sup>73</sup>

### 2. Section 6<sup>74</sup>

The potential impact of the mobility rights provisions is very difficult to assess, and the matter is complicated by competing interpretations of these provisions in the case law. What follows is therefore very tentative and impressionistic.

The issues that are posed by section 6 are as follows: 1) If a program in place has some preference for workers in the target groups, and a person is denied employment because he or she does *not* come within the program, does this *prima*



*facie* violate the right "to pursue the gaining of a livelihood in any province"? 2) Would such a program, if in place in an area of federal jurisdiction, come within the saving clause of section 6(3)(a) as a law or practice "of general application in force in a province"? 3) Would any program, whether federal or provincial, be deemed to be of "general application"?

Respecting section 6(2)(b)—the right to pursue the gaining of a livelihood in any province—the Supreme Court of Canada has held in *Law Society of Upper Canada v. Skapinker*<sup>95</sup> that the right only applies in the context of inter-provincial movement. The right is not free-standing, as had been held by a majority of the Ontario Court of Appeal.<sup>96</sup>

Of course, this does not render section 6 of no potential force in our context, for it is possible that a person moving from one province to another may fail to find employment as a result of some affirmative action program, and challenge it under section 6. The issue here (as it would have been had section 6(2)(b) been interpreted as "free-standing") is whether such a program can be saved under section 6(3)(a).

The anomaly in all of this is that section 6(3) appears to speak to the existence of provincial, not federal, laws. And yet, assuming that the program is authorized by federal law, there does not appear to be a compelling reason why section 6(3) should not apply, subject to it satisfying the criteria of generality contemplated therein.

In the *Skapinker* case, the Court of Appeal had held that two criteria must be met before a law could be considered to be one of general application: a) it must extend uniformly throughout the territory; and b) while it may have a differential impact on a person or class of persons, it must not go so far as to impair the status or capacity of a particular group.

The first issue is whether a program authorized by federal law could satisfy the first prong of this test. In my view, it could. While it is true that such a law or program would, by hypothesis, be restricted to certain employers and activities under federal jurisdiction, it could be made to apply to all such employers or activities within Canada (and hence within any given province). To fix ideas, consider a provincial minimum wage law. This would clearly be deemed a law of general application, but it will not apply to some enterprises within federal legislative jurisdiction.<sup>97</sup> One can argue that the concept of a "law of general application" must take into account the jurisdictional limits of the enacting legislative body.

If this is correct, then the last issue is whether any program, whether federal or provincial, can satisfy the second prong of the test under section 6(3). (Let us assume that no such program will be designed so as to run afoul of the requirement in section 6(3) that it not discriminate "primarily on the basis of province of present or previous residence".)

An affirmative action program designed to benefit, say, women obviously will have a "differential impact" on men. This, alone, does not offend section 6(3). Does such a program "impair the status or capacity" of men (or non-natives, etc.)? I think not. In *Skapinker*, the majority of the Ontario Court of Appeal held that the requirement in the *Law Society Act* (that one had to be a Canadian citizen or British subject to qualify for admission to the bar in Ontario) impaired the status of all permanent residents: "The section purports to take away from [permanent residents] the right given to them under the Charter".<sup>98</sup> Even accepting this view of the

Act, an affirmative action program need not distinguish between citizens and permanent residents, nor will it tend to bar all non-target group members from employment opportunities, etc. Moreover, it is at least arguable that reduced opportunities in a given job market do not *per se* constitute an impairment of status or capacity.

Assuming that a program challenged under section 6 fails to satisfy the criteria of section 6(3), can it be saved under section 6(4)?

First, section 6(4) is only applicable where "the rate of employment in that province is below the rate of employment in Canada". Although the section clearly was included to permit provinces to "prefer their own", there does not appear to be a good reason why federal programs could not enjoy the protection of this clause. But it clearly means that the availability of the clause will depend on the province within which an action is brought.

Assuming that it is *prima facie* available, section 6(4) would "save" a program if the program is designed to ameliorate the conditions of socially or economically disadvantaged individuals. What possible constraints this might impose is best deferred until we examine the analogous wording of section 15(2).

### 3. Section 26<sup>99</sup>

No rights are guaranteed by this section. It is, in Professor Hogg's words,<sup>100</sup> a "cautionary" provision designed to refute any argument that the Charter is an exhaustive and exclusive list of all rights enjoyed by Canadians. But it does not "constitutionalize" such rights, removing them from the normal processes of legislative change. Nor does it direct the court to construe the Charter in a manner consistent with these other, non-constitutional rights.<sup>101</sup> So, if a common law or legislatively conferred right, when exercised, amounts to a violation of some right guaranteed by the Charter, then the latter clearly prevails. As we shall see, this may be of great significance in the context of the collective bargaining process.

### 4. Section 36<sup>102</sup>

#### a) Section 36(1)

Generally conceded to be hortatorial, the provisions of section 36(1) do have relevance to our subject matter. A number of issues are tolerably clear.

First, section 36 expressly retains the boundaries of legislative authority imposed by the Constitution: it does not create new legislative powers.<sup>103</sup> Second, it seems clear that if any of these provisions are justiciable, it would *not* be open to an individual to seek to force some expenditure contemplated in section 36. The opening words appear to retain Parliament's "right...with respect to the exercise" of its legislative authority, which could be construed as retaining Parliament's power to decide whether or not to act in a given way. This interpretation is rendered compelling by the French version of the clause, which begins as follows:

*Sous réserve des compétences législatives du Parlement et des législatures et de leur droit de les exercer...* (Emphasis added).

The literal translation of the emphasized clause would be "their right to exercise" (the legislative powers). In my view,

no one could invoke section 36 against action, or inaction, by any legislative body.

The importance of section 36(1) lies in its ability to function as a legitimating device for measures actually taken by Parliament. As noted above, assuming a challenge to some measure and a finding by a court that some right has been *prima facie* infringed, the inquiry shifts to section 1 of the Charter. Part of that inquiry is directed to assessing the legitimacy of the objectives that the impugned law or program seeks to achieve. To the extent that the person defending the program can "locate" it as furthering the goals of section 36(1)(a), it should enhance the legitimacy of the governmental object, thereby assisting in upholding the law or program.

Of the three sub-clauses of section 36(1), the first is the one most obviously relevant in this regard. The clause concerning the "furthering of economic development to reduce disparity in opportunities" could be invoked in cases where monies are provided for job creation, with conditions attached so that certain groups are benefitted especially. (In other words, the "disparity in opportunities" could be construed as referring not only to disparities between geographical regions of Canada, but as between groups in Canada.)

The last clause, concerning "essential public services", would have a limited role to play. It might be applicable in the case where public services such as childcare were expanded under the recommended measures. Here, however, it is not clear how such services could be attacked as violating the Charter.

#### **b) Section 36(2)**

Although section 36(2) does not begin with the "disclaimer" that 36(1) does, it is difficult to read this section as creating any enforceable rights. Nor is it apparent how one could use this section to enhance an argument under section 1.

### **5. Section 15(1)<sup>104</sup>**

We come finally to the provision most obviously relevant to our inquiry. We begin with a general look at section 15(1), turning then to the situation pertaining to the physically and mentally disabled. In both cases there is no need to go beyond the terms of section 15. We will then turn to the question of visible minorities, examining the potential impact of section 27 in this regard. A discussion of the question of native rights follows, with reference to section 25 of the Charter and section 35 of the *Constitution Act, 1982*. Finally we consider the question of gender, examining section 28 as it may pertain to section 15(1). This will provide a convenient bridge to an analysis of section 15(2).

In an earlier article<sup>105</sup> I offered a general analysis of section 15(1), and I do not propose to repeat that analysis here. It is sufficient to note that section 15 invites the court to review all laws that distribute burdens and benefits in an unequal way, with the ultimate issue being one of assessing the justification offered in support of the impugned distribution. As noted earlier, the effectiveness of section 15 will be a function of the level of judicial scrutiny imposed in a given case.

It is clear that laws that classify on grounds other than those enumerated in section 15(1) are subject to review under section 15. To succeed in such a case, one would have

to show either an arbitrariness in the manner in which the law was framed, or an unjustifiable discrimination implicit in the impugned law. In such cases, it matters not whether the question of justification is addressed within section 15 itself, or under section 1. In the great run of cases, laws that do not deploy "prohibited" grounds of classification (or use neutral criteria that clearly are proxies for such prohibited grounds) will likely survive challenge under section 15.<sup>106</sup>

#### **a) Mental or Physical Disability**

With respect to the physically and mentally disabled, it is reasonable to assert that the level of judicial scrutiny over laws that burden such groups should be higher than in the normal run of cases. At the same time, there are likely to be more "good reasons" for drawing distinctions here than there may be in other contexts. This, I believe, explains why American courts have applied a very relaxed standard of review in such cases.<sup>107</sup> It is appropriate, however, for Canadian courts, given the explicit reference to disability in section 15(1), to assess carefully the underlying motives for any classification on the basis of disability. To the extent that such a classification reflects stereotypical images of the disabled, rather than a good faith attempt to assess their true capacities, the law ought not to stand.

#### **b) Systemic Discrimination**

So far we have been discussing section 15(1) in the context of laws that classify in some (presumptively) prohibited way. It is clear, however, that the real problems faced by the disabled are not usually a function of laws that overtly discriminate against them, but of the operation of apparently neutral laws and programs that do not take their special needs into account. Although we will analyse this issue in the context of the disabled, it clearly is relevant to any claim brought under section 15.

We posit a law or program that does not classify on the basis of disability, but operates so as to burden (or fail to benefit) the disabled disproportionately. Within this framework, there are two situations that should be distinguished.

In one set of cases, there may be evidence that the ostensible neutrality of the law or program is either a smokescreen for an intent to discriminate against a particular group, or that the law or program is being applied in an intentionally discriminatory fashion. In either case (and subject to problems or proof) they should be treated in the same way as would a law that explicitly classified on the basis of disability.

In another set of cases, there will be no such evidence of bad faith. Instead, the disparate impact of the law or program could be explained only in terms of historically generated patterns of education, opportunities, expectations, etc. When faced with allegations that a neutral law, passed with no intent to discriminate, nonetheless perpetuates such "systemic discrimination",<sup>108</sup> how will our courts react?

It is possible to analyse this issue from a number of perspectives. Relying on both American jurisprudence,<sup>109</sup> and on the decisions of human rights commissions,<sup>110</sup> some have argued that section 15 would extend to cases of systemic discrimination. But one could also invoke the recent judicial decisions construing various human rights legislation for the proposition that, at least in the absence of clear statutory

direction, the concept of discrimination entails some intent to discriminate.<sup>111</sup> (In my view, the text is inconclusive, as is the legislative history.)

What will inform the court in a case such as this? It appears as if the following questions would have to be addressed. First, what is the extent, if any, of the duty on government to act positively to counteract and remedy such systemic discrimination? Second, assuming some positive duty is accepted, to what extent ought the courts to be the initiating force in such matters? Finally, assuming the court thinks it appropriate that it should intervene in such matters, what kinds of remedies do the courts feel justified in granting in such cases?

It must be emphasized that there is *nothing* in the Charter that leads one inevitably to any answers to these questions. Indeed, even the fact that the Charter is entrenched in our Constitution does not necessarily dictate any answers: as the cases reveal, the tension between continuity and change runs through all issues arising under the Charter.<sup>112</sup>

Can one answer these questions by reference to some political or moral theory of rights? I once thought so,<sup>113</sup> but I am less confident now. In the first place, there is the problem of the indeterminacy inherent within any one particular theory: it is not clear that one can derive the desired specificity from any given theory of rights.<sup>114</sup> Second, and more importantly, there is the question of *what* theory one invokes. How does one choose between, say, Rawls, Nozick, or Feinberg?<sup>115</sup> At the very least, one must make out the case that the Charter, characterized as a whole, points towards one rather than another theory. If a theory is not rooted in the Charter, then it hardly seems appropriate to invoke that theory to resolve issues arising *not* in the seminar rooms of a philosophy department, but in a court of law. Finally, one must be able to say that a given theory fits not only the structure of the Charter, but comports with the conception of the judicial function internalized by the members of the judiciary. And if anything has become clear in these early years of the Charter it is that there is no homogenous conception shared by all judges.

With all of these reservations, I am still attracted to the view that the Charter suggests a fairly modest role for the courts in areas such as this. Notwithstanding the presence in the Charter of certain positive duties on government, the general position is likely to be that the Charter does *not* impose such positive duties on government. As I have argued elsewhere,<sup>116</sup> the terms of the Charter must be understood as a reflection of a post-liberal conception of justice, one in which a considerable measure of legislative flexibility over matters of social policy ought to be tolerated. The key assumptions upon which this view is predicated are as follows. First, that in a democratic society the primary responsibility for law-making rests with the legislative bodies (and their delegates). Second, that the court's role is essentially supervisory; to ensure that other institutions of government do not unreasonably compromise those values enshrined in the Charter. Finally, that the court ought to be sensitive to the controversial and plastic nature of the values so enshrined, intervening only in cases where it is clear that an injustice has been perpetrated. All of this leads me to the (tentative) conclusion that the Charter will not be an effective instrument by which systemic discrimination will be remedied.

### c) Visible Minorities and Section 27

A minority might be deemed "visible" because of ostensible differences in religion, colour, national or ethnic origin from the majority population. Laws that discriminate on any of these grounds will tend to attract a fairly rigorous level of review. Discrimination on the basis of colour serves no apparently legitimate purpose. Religious discrimination ought to be scrutinized carefully, especially given section 2 of the Charter. National and ethnic origin is slightly more complicated, as American jurisprudence suggests,<sup>117</sup> but it is reasonable to assume a fairly rigorous review in such cases.

What, if anything, is added by section 27?<sup>118</sup> It is a rule of construction only, but its impact will depend on the kind of issue in which it is invoked. On the assumption that some measures will be recommended for so-called "visible minorities", section 27 could be invoked to encourage the courts to interpret other relevant Charter provisions in such a way as to save the program, on the basis that the program is designed to preserve and enhance the multicultural heritage of Canada. Presumably, a program that is designed to open up employment opportunities for such minorities can be so characterized: is our heritage enhanced by squeezing visible minorities out of such opportunities, or more accurately, tolerating their exclusion from full participation in the economic life of the country?<sup>119</sup>

Could section 27 have any impact if a member of a visible minority challenges the *lack* of special measures for the benefit of the group to which s/he belongs? Clearly, section 27 is parasitic on other rights guaranteed in the Charter. This, in turn, raises the question considered above: does the Charter mandate the court to remedy inequalities not caused or created by government action? If I am right in concluding that it does not, then the practical significance of section 27 is limited indeed.

### d) Native People

It is beyond the scope of this paper to evaluate the impact of the Charter on native people in general. Given that Parliament has exclusive jurisdiction over Indians and lands reserved for the Indians, native people are treated differently in law than are their non-native counterparts in a host of contexts. I restrict myself here to a brief look at how the relevant constitutional provisions may relate to issues of equality in employment.

We begin with the proposition that laws that discriminate against native people will attract a fairly high level of scrutiny under section 15.<sup>120</sup> What is the impact of section 25 of the Charter?<sup>121</sup>

Section 25 functions like a mandatory rule of construction. It directs the court to interpret the Charter so as not to modify any of the rights contemplated in section 25. As Professor Slattery puts it:

*Section 25...limits the extent to which the other Charter provisions can adversely affect native rights and freedoms. But it does not establish these rights in a positive fashion. Neither does it screen them from the impact of ordinary federal and provincial laws, nor of constitutional provisions located outside the Charter.*<sup>122</sup>

A number of points are worth noting.



First, it is clear that section 25 is subject to section 28, so that while the Charter must be interpreted in a manner consistent with the native rights contemplated in section 25, to the extent that such rights are discriminatory between men and women, those rights yield to section 28 and must be equally available to members of both sexes.<sup>123</sup>

Second, the rights referred to in subsection (a) and (b) of section 25 (*Royal Proclamation, 1763* and land claims settlements) do not exhaust the range of rights contemplated by section 25. The rights include aboriginal, treaty, "or other rights or freedoms that pertain to the aboriginal peoples of Canada", and this would include any rights granted under legislation to native people *qua* native people.<sup>124</sup> Thus, if legislation implemented special programs for natives, it would appear that (subject to section 28) no Charter provision could be invoked to challenge such a program.

A word or two about section 35, which provides as follows:

35(1) *The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*

(2) *In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis people of Canada.*

Two additional sections ultimately may be added to section 35, pursuant to an agreement reached at the First Ministers' Conference on Aboriginal Constitutional Matters, March 16, 1983. They are:

(3) *For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.*

(4) *Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.*

First, section 35 does not form part of the Charter of Rights, and is therefore immune from the operation of section 1 and 33.<sup>125</sup>

Second, it is clear that the content of section 35, if amended as noted above, is variable. The nature, content, and scope of aboriginal rights will vary over time as land claims are settled. This, in turn, will influence the way in which the Charter is applied to areas of native concern, as section 25(b) also points toward future land claims settlement.

How would section 35 affect the issues surrounding equality in employment? In the absence of a detailed examination of specific treaties, or of the situation respecting aboriginal rights in any given area, it is impossible to say whether such rights could be construed as *generating* some rights to an equal (or greater than equal) share in employment opportunities. While at first blush such a possibility seems counter-intuitive, it may be that certain positive duties imposed, by treaty, on the Crown could be interpreted in a way so as to grant such rights. There is, therefore, the possibility that litigation under section 35 might generate some right in employment not at present enjoyed.

It is more likely that such rights could be generated by a given settlement between the government and native people. For example, in exchange for relinquishing their aboriginal rights, native people might secure both compensation and some guarantee of employment in the relevant territory

affected. If such were the case, it would appear as if the combined effect of sections 25 and 35 would be to insulate such a settlement from attack under the Charter, so long as no gender discrimination was a part of such a settlement.

An interesting issue arises with respect to any settlement that would grant a form of self-government to native people within a certain area. Assuming that this would include legislative competence over a given area, would this remove any such legislation from the reach of the Charter? If such legislation were to unreasonably discriminate against non-natives, would it be immune from challenge?

In order to answer this in the affirmative, one would have to establish two, somewhat debatable, propositions. First, one would have to read section 32(1)(a) as excluding such a legislature from the purview of the Charter. This would be a most restrictive and literal approach, and one that seems inconsistent with the general purpose of section 32—i.e., to make it clear that the Charter applies to all legislative and governmental action in Canada. Moreover, such an interpretation would appear inconsistent with the apparent intent of section 30, which clearly operates to have the Charter apply to legislative bodies having jurisdiction in the Yukon Territory and Northwest Territories.<sup>126</sup>

The second proposition that one would have to establish is that the reference to "rights or freedoms" in section 25 includes the right to exercise legislative authority. While it is true that "modern parlance has fostered loose language on lawyers",<sup>127</sup> and that people talk of Parliament's "right" to pass a law, it is a gross abuse of the terms "rights" and "freedoms" to extend them to legislative authority.<sup>128</sup> The Charter clearly makes the distinction between rights and freedoms on the one hand, and legislative authority on the other, and it accords with the proper way to use these terms. Thus I conclude that section 25 would not operate to so insulate such legislation from judicial review under the Charter.

To this it may be objected that, even if all legislation is not so immunized, surely that legislation creating rights in native people would fall within the terms of section 25. But the difficulty here is that only Parliament has the authority to pass laws in relation to "Indians and lands reserved for the Indians". Since only those rights that pertain to natives *qua* natives appear contemplated by section 25, it would appear that any attempt by a legislative body other than Parliament to create additional rights for native people *qua* native people would be unconstitutional.

#### • Gender Discrimination and Section 28

Where a law draws a distinction on the basis of gender, or uses a criterion (like pregnancy) that is clearly a proxy for gender, how rigorous will the courts' scrutiny be? Of what effect is section 28 of the Charter?<sup>129</sup>

If we focus on the legislative history of sections 15 and 28, and on the expectations of those who lobbied for section 28, one can plausibly argue that gender discrimination would attract the highest level of judicial scrutiny. This would also be consistent with the underlying reasons why certain legislative criteria are thought to be inherently suspect.<sup>130</sup> In this regard, nothing turns on the controversy surrounding the question of whether section 15 is to be construed "absolutely" (subject to section 1), or whether the rights in section 15 contain within them the notion that some inequalities can be justified. If an absolutist interpretation is given, section 28 is

not subject to section 1, so that any gender-based discrimination would be struck down. If limits are "read into" section 15 itself, it can be argued that section 28 directs the court to treat gender-based distinction as inherently suspect.

A more literal interpretation of section 28 suggests the possibility that a more relaxed standard of review could be contemplated in the case of gender-based classifications. After all, section 28 speaks of the Charter of rights being guaranteed equally to men and women,<sup>131</sup> leaving open the possibility that equality rights might be interpreted to demand something less than "strict scrutiny", this general standard being incorporated into the very conception of the right itself. How does one choose between the alternatives?

In my view, it is impossible to predict how courts will react to gender-based classification. It is reasonable to assume that their reaction will be influenced by much more than the words used in sections 15 and 28. The decision will be a function of the perceived injustice of the law under review, the court's sense of the institutional limits to its intervention, and the consequences, to itself and other institutions of government, of fashioning a remedy for the putative violation of the Charter. In other words, the determining considerations will be drawn from a fairly general sense of what a constitutional commitment to equality entails for the role of the judiciary vis-à-vis other institutions of government. And this, in time, will be a function of how the court perceives the "reasonableness" of a given law challenged under section 15. In my view, courts are apt to impose something less than strict scrutiny to cases of gender-based classification.

#### 6. Section 15(2)<sup>132</sup>

In general terms, it is understood that section 15(2) was designed to insulate affirmative action programs from attack under section 15(1). A threshold question, however, is whether this will be effective in the case of a plan for the benefit of women that is attacked by a man invoking sections 15(1) and 28.

Elsewhere I analysed the issue and concluded that the answer lies in giving section 15(1) a non-absolutist interpretation, so that such programs would not be held to violate section 15(1). My analysis has been challenged in the literature,<sup>133</sup> and not without some justification. For the following reasons, I conclude that section 28 does not pose a problem in this regard.

First, there is considerable force to Professor Tarnopolsky's view that section 15(2) qualifies the rights set out in section 15(1), so as to answer a challenge to an affirmative action program based on section 28.<sup>134</sup> Second, assuming that a given program otherwise satisfies the criteria of section 15(2), it is virtually unimaginable that a court would ignore the legislative histories of sections 15(2) and 28. In my view, whatever else section 28 may mean, it does not make gender-based affirmative action programs any more or less vulnerable to challenge under section 15(1) than would be programs for other target groups.

In the paragraphs that follow I shall examine certain formative issues concerning the scope of section 15(2). The first set of issues concerns the kinds of programs that could qualify under section 15(2).

A number of points are tolerably clear. The language of section 15(2) suggests that affirmative action programs need

not be "legislated" to fall within section 15(2); they could arise consensually (in the context, say, of collective bargaining) or be imposed by employers not subject to the constraints of collective bargaining. (It bears repeating that, unless the Charter is held to extend to all relationships in society, and not only ones implicating the government, the issues of section 15 would not arise at all, save as a gloss on the authority of human rights commissions and other agencies.)

Would section 15(2) be available in the case of a conditional grant to a province for the purpose of enhancing (directly or indirectly) the employment condition of some group? In the case of a challenge to the program once set up, the answer must be in the affirmative. However the program is initiated, once in place it falls within the opening words of section 15(2). For reasons considered earlier, the grant itself would probably not come within the scope of the Charter.

#### a) Need There be a Prior Finding of Discrimination before Section 15(2) is Available?

This issue arises out of American jurisprudence concerning the constitutionality of race-conscious remedies adopted either by private institutions or government. The basic position is that race-conscious remedies will only be approved by the courts if there has been a prior finding of illegal or unconstitutional discrimination by a judicial, administrative, or legislative body.<sup>135</sup> In my view, no such requirement inheres in section 15(2).

First, it must be remembered that there is no equivalent of section 15(2) in the American Constitution. It is not unreasonable for American courts to require some official determination of discrimination before remedial measures using otherwise forbidden classifications would be upheld.

Second, the text of section 15(2) does not refer to discrimination at all, but rather to a condition of disadvantage.

Need there be a prior finding of "disadvantage-ness" before section 15(2) is available? The text of section 15(2) is inconclusive, but a number of practical considerations suggest why such a finding would be preferable.

First, it seems obvious that courts would have the power to determine for themselves whether group X is "disadvantaged" for the purpose of section 15(2). Equally obvious is the fact that there will be strong self-imposed pressures on the court to defer to a legislative judgement that such a group is indeed disadvantaged. To the extent that such a legislative finding includes statistics, etc., respecting the disadvantaged position of a given group, this information will enhance the perceived legitimacy of the remedial measures under review.

Second, it is important to remember that section 15(2) operates only with respect to section 15(1). If a challenge is mounted under, say, section 6, the program would have to satisfy either section 6(4) or, more generally, section 1. In either case, a prior determination that a target group is disadvantaged will assist the task of the person seeking to uphold the program, at least inasmuch as it would confirm the "reasonableness" (if not the necessity) of the remedial measures impugned.

### b) Specific v. General Disadvantaged

For a program to fall within section 15(2), need the "disadvantaged group" be disadvantaged specifically in relation to the institution establishing the program, or will a general disadvantaged condition bring the program under section 15(2)? This question is linked with that considered above: need there be a finding of disadvantage? It is also linked with the issue to be discussed next: to what extent must a program be carefully fashioned so that only the disadvantaged individuals in the group benefit from the program?

The text (as usual) is inconclusive. As a matter of sound social policy, it is preferable that programs be tailored so as to minimize both their over- and under-exclusiveness, but it is recognized that such perfect fit is unattainable. It is reasonable to expect the courts to tolerate some "misfit" in these programs.

At the same time, one must not underestimate the degree to which judges may be concerned about the "fairness" of affirmative action programs. One may disagree with the philosophical criticisms of affirmative action, but one must concede that reasonable people may find such critiques persuasive. Again it seems prudent to have programs carefully designed, and to support them with a legislative record that argues for their justification.

### c) Quotas or Something Else?

Patricia Hughes asks whether quotas are necessary to achieve the goal of equality in employment, or would "something less discriminatory"<sup>136</sup> suffice? She then asks whether "overbroad programs offend the Charter's guarantee of equality",<sup>137</sup> I would phrase the issues implicit in these questions differently.

First, there will be cases where the use of quotas would *not* be overbroad, in the sense that any less intrusive measures would not succeed, in a substantial way, in redressing present inequalities in employment.

Second, even where quotas may not be *necessary* to achieve equality, that is not the test to be applied under section 15(2). On the surface at least, the criterion is that the program be designed with the object of ameliorating the conditions of disadvantaged individuals or groups.

Having said this, one returns to the pragmatic level once again. The use of quotas is the most sensitive aspect of affirmative action programs, an aspect upon which Mr. Justice Powell's opinion in *Bakke* turned.<sup>138</sup> Judges inclined to reject affirmative action in principle might be persuaded to read section 15(2) narrowly, or alternatively to give a broad reading to other Charter rights (e.g., mobility), so as to strike down quota-based programs. In my view, however, this would be an unwarranted interpretation of section 15(2).

We start from the assumption that the drafters of section 15 were aware of the American jurisprudence pertaining to equality rights. In general terms, a non-quota-based affirmative action program (otherwise validly enacted) does not offend the equal protection clause. If this knowledge is imputed to the drafters of section 15, it is possible to argue that section 15(2) was designed to insulate those programs that *would* run afoul of section 15(1), i.e., quotas. Admittedly, there is the "abundance of caution" rationale for section 15(2)<sup>139</sup> that is equally plausible, but I am persuaded that a

program with reasonable quotas, set in a realistic time-frame, would be protected by section 15(2).

There is another dimension to this issue. It has been argued that section 15(2) ought not to protect those programs which, although justified in terms of promoting equality, would not *in fact* achieve that goal. Carole Geller puts the argument this way:

*While special measures, such as providing training for women only, might at first blush appear to assist women, on its own, without quotas to ensure that the training is translated into employment or advancement, it will not convert women as a group from a position of inequality to one of equality. To use section 15(2) in that manner will, I believe, do a disservice to women.... Courts, when deciding whether section 15(2) should shelter a government initiative from the equality requirements, must look to the results that will ensue from the initiative and whether it will lead to equality for the group involved. The ends pursued by these 'laws, programs or activities' might be to achieve equality, but if the means used will not reach that goal, the court should not shelter the initiative under section 15(2).<sup>140</sup>*

I do not agree.

First, the underlying assumption in the argument is that any gender-based classification offends section 15(1). I take the view, however, that there may be legitimate gender- (or race-) based distinctions in the law that do *not* offend section 15(1). This is why a blind application of "strict scrutiny" is to be avoided, notwithstanding the enumeration of prohibited grounds of discrimination, and notwithstanding section 28.

Second, and more importantly, section 15(2) does not require that the program actually achieve equality. "Amelioration of conditions", as a concept, does not point to a particular "end state" that must be reached before section 15(2) is allowed to operate. I agree with Ms. Geller that a court should consider the likely effects of a given program, but I would expect the courts to be sensitive to the primary role that other institutions have in fashioning remedial plans in this area. So long as a program is designed with the proper objective, and the mechanisms are rationally related to that goal, courts should allow section 15(2) to operate so as to protect it from challenge under section 15(1).<sup>141</sup>

### C. Litigating to Achieve Equality

This section begins by briefly considering the possible use of the Charter to redress current inequalities in employment. It should be read against the backdrop of the issues canvassed earlier respecting the scope of the Charter, and of the discussion concerning systemic discrimination. The second part of this section concerns the remedial powers of the judiciary under the Charter.

#### 1. The Charter and Equality in Employment

Recalling that the great majority of employers are probably not subject to the Charter, the practical impact of litigation under the Charter to redress inequalities in employment will be negligible. Even if all suits were successful in establishing some violation of the Charter, it is unlikely that courts will grant sufficiently broad remedies so as to effectively resolve



the underlying problems constitutive of the inequalities impeached.

It is unnecessary to catalogue all of the factors contributing to the unequal shares in employment opportunities enjoyed by the various target groups. It is sufficient to note that, in most cases, the problems inhere *not* in legislative barriers to equality, but in societal attitudes and practices that have shaped the structure of the economy and influenced the goals and aspirations of various groups in society. Moreover, many of the practical problems that confront (say) women in employment flow from the failure of employers and/or government to act in providing them with essential "back-up" services (such as adequate daycare) so as to enable them to participate fully in the Canadian economy.

#### a) Equal Pay

Women are paid less than men. Handicapped people often are paid less than the minimum wage. How effective would the Charter be in redressing these inequalities?

In the case of women, whatever minimal progress has been made has been a result of legislation directing some equality norm in the rate of pay for similar work (i.e., work deemed of equal value). This legislation is, of course, subject to review under the Charter, but it is unlikely that courts would find it to violate the Charter. Even if one concedes that "equal pay for equal work" fails to address the problem of job ghettos, unequal educational patterns, etc., courts would not find it in violation of section 15. It would be viewed as a positive step forward (from the situation where no legislation spoke to the issue) and a reasonable effort to achieve a legitimate objective. The same consideration would apply to the concept of equal pay for work of equal value.

In the case where no such legislation exists, would courts impose such norms on the market? I think not, on the grounds that the Charter does not mandate positive government action to redress inequalities not of their own direct making.

#### b) Parental/Maternity Leave

A number of issues arise here. In many cases, the presence or absence of maternity or parental leave provisions will not attract judicial review under the Charter as they would be part of employment practices not subject to the Charter. Where the enterprise is subject to the Charter, I believe that the absence of maternity leave provisions would constitute a violation of section 15, for reasons I discussed in an earlier article concerning the Canadian Bill of Rights.<sup>142</sup> It must be acknowledged, however, that courts have taken a somewhat narrower view of the issue in the past.<sup>143</sup>

Would a maternity leave provision be vulnerable to challenge by a man claiming that he has a right to a parental leave? In principle, we would want to distinguish the various ways in which such a claim might be made. Respecting the pre-delivery period, I cannot imagine a maternity leave provision being struck down: there would be no justification for extending this to a man. In the post-partum period, it would be sound social policy to extend parental leave benefits to both men and women. This would clearly be appropriate in cases of fathers raising children on their own, but it should not be so restricted. Unless we are willing to affirm the traditional division of labour between the sexes, we ought to recognize (and facilitate) the choices that families might

make as to who stays home with the children. Would a court take the lead in this area? In practical terms, one can expect a court to act only when confronted with an actual claim by a man whose particular situation attracts the concern of the court. Most likely, this will be a case of a father raising children alone. I do not believe courts would be prepared to dictate a more expansive regime to recognize a family's choice as to which parent stays home. If this is correct, then it would appear that the impact of such litigation, although not trivial, would not go all the way towards eliminating the stereotypical image of the traditional roles in child rearing.

#### c) Pension Benefits

Claudia Losie, in an unpublished paper,<sup>144</sup> neatly summarizes the problems facing women with respect to the typical pension plan scheme: long vesting requirements, poor pension portability, an absence of indexing for inflation, and poor provision of survivor benefits. As she acknowledges, however, most of the operative pension plans in Canada would probably fall outside the scope of the Charter. With respect to those that would be subject to judicial review under the Charter, there is a good case to be made that certain aspects are vulnerable to an equality rights argument. But this would involve the court accepting a) a conception of equality rights that goes beyond the prohibition of overt, intentional discrimination, b) that focuses on equality of results as the "point" of section 15, and c) that mandates the court to intervene to direct the restructuring of such pension plans. Even accepting the first two elements (which are by no means uncontroversial), I suspect that courts will balk at the last step. For reasons to be canvassed in our discussion of remedies, courts are likely to impose limits on their power to redesign complicated social-security measures, tolerating a considerable degree of legislative freedom in structuring such plans. As in most, if not all, of these hard cases, success is more likely in the political, rather than the judicial, forum.

### 2. Remedies under the Charter

What is the range of remedies available under the Charter? Looking at the text of the Charter, the range seems to be unlimited. The text of section 24 is broad in scope.<sup>145</sup> On the surface, it appears to invite the courts to fashion whatever remedies thought "appropriate and just in the circumstances". Given the application of the Charter to government, there is no *textual* limit to the power of courts to issue injunctions, prohibitory or mandatory, other systemic remedies, as well as damages.

This having been said, one must distinguish between the remedies *possible* under the Charter and the remedies *likely* to be *granted* under the Charter. The latter category is considerably narrower than the former. Courts have already imposed a series of limitations on their remedial powers under section 24, and others are likely to be "read into" section 24 as the case law grows. Before considering the specifics of such limitation, let us consider why courts would tend to restrict their remedial powers in such cases. This leads us to some general observations about the practice of judging, and the link between rights and remedies.

It would make perfect sense, in analysing a given problem, to ask whether the Charter is violated by a given law or action, and then, having concluded that it was, to inquire into

the appropriate remedy. But it is a mistake to think that judges will necessarily dissociate these two steps in their minds. In anything but a clear-cut case, I imagine that judges will be concerned about the kinds of remedies pursued, and will be influenced, in their decisions as to whether the Charter has been violated, by their perception of the appropriateness of the remedy. (I refer here to the appropriateness of the court fashioning the requested remedy.)

The *Morgentaler*<sup>146</sup> case, decided by the Supreme Court some years ago, is instructive. In assessing (and rejecting) the argument that the abortion provisions of the Criminal Code violated section 1(b) of the *Canadian Bill of Rights* because the availability of abortion was not distributed equally throughout the country, Laskin C.J.C. thought it appropriate to observe that this would involve the Court in supervising the distribution of such services, and the Court would have to do so without manageable standards. One need not agree with this view of things to appreciate that it is a factor operative in the judicial mind. The difficulty of fashioning a remedy with which the judiciary feels comfortable is apt to influence the way in which judges interpret the rights guaranteed in the Charter.

This suggests that certain claims under the Charter may be rejected by the courts because of the perceived inappropriateness of the remedy. The classic situation might be one noted earlier: a claim that a facially neutral law perpetuates the systemic discrimination pervasive in the economy. The courts have the power *theoretically* to order a restructuring of the employment practices in a given sector, as they would to require some government study and eventual action, to be reported back to the courts. But many, if not most, judges will balk at playing such a role. For perfectly understandable reasons, they will not see it as their role to play such an interventionist and managerial role in these matters. In any event, the court will surely be influenced by what they perceive to be the causal factors contributing to the allegations of a violation of equality. To the extent that government has contributed positively to creating or exacerbating the situation impugned, the courts will feel more comfortable in finding a violation and fashioning some remedy. As the governmental link becomes attenuated, courts will be less inclined to intervene.

One can see this from another angle. It is a common-place that equality as a concept contains many competing, and sometimes irreconcilable, conceptions of equality. To insist on equality of result as the operative conception is to deny the legitimacy of other conceptions. Moreover, each conception of equality is part of a larger paradigm of justice, wherein other values, such as liberty, are interpreted differently.<sup>147</sup> Given that our Charter seeks to protect a variety of values, it is impossible to argue that equality of result be insisted on to the exclusion of all other considerations, for this would do violence to the rest of the Charter. It is one thing for a court to tolerate (as it should) legislative initiatives designed to bring us closer to equality of result in employment. It is quite another to expect the court to play the leading role in this endeavour.

It would be irrational to expect the courts to be the prime movers in the promotion of equality. All historical evidence is to the contrary. It was legislation, not judicial opinions, that created a regime where private acts of discrimination in

employment, etc., were enjoined. It was legislative action, in the form of drafting section 15, that increases the potential "bite" of judicial review under the Charter, not the pre-Charter jurisprudence. And it will be legislation, not litigation, that will contribute significantly to improving the employment condition of the various target groups.

For these reasons, it is reasonable to expect that the court will be somewhat conservative in fashioning non-traditional remedies under the Charter. Laws may be struck down, official action disapproved, damages sometimes awarded, but in the absence of some compelling demonstration that government or its agents have acted in a deliberate, discriminatory manner, courts are not likely to fashion broad and systemic remedies.

We now turn to a consideration of the remedies available and to some of the self-imposed limitations courts have read into section 24.

#### a) Retroactivity

A debate rages in the case law as to whether or not the Charter can be invoked against actions taken prior to the proclamation of the Charter. The issue typically is framed in terms of whether the Charter operates prospectively or retrospectively. The debate, though clearly important, is sterile in terms of the way in which the issue is posed.

Certain provisions of the Charter impose positive duties on certain official actions that were not present in the pre-Charter era. For example, the duty of an arresting officer to inform a person of his/her right to retain and instruct counsel [s. 10(b)] has been held *not* to apply when the failure to inform took place prior to the coming into force of the Charter.<sup>148</sup> This makes sense, as, at the time, no such duty was imposed on an arresting officer. In other contexts, it is appropriate to "count" events that took place prior to the Charter's proclamation, on the theory that the rights guaranteed by the Charter impose a correlative duty on some official that can be enforced now. An example of this situation can be found in the cases concerning one's right to be tried within a reasonable time [s. 11(b)], although the authorities are divided.<sup>149</sup>

How do equality rights fit within the framework? On one level, they are more like the latter example than the former: regardless of when a law or program was established, section 15 directs a court to assess that law or program as it operates now. This would clearly obtain in clear cases of overt and intentional discrimination.

In cases where the gravamen of the complaint is systemic discrimination, I have already suggested that courts will be reluctant to intervene. But even if they do, on the grounds that government has a positive duty to redress inequalities, it is likely that they would be reluctant to grant a remedy that extends back to the time prior to section 15 coming into force. At the most, they might require that government undertake some study of how to rectify the inequalities found, and report back to the court with some remedial plan. This, of course, is not an insignificant remedy, but it underscores the point made earlier that ultimate relief will be found through legislation, not litigation.

Would a court order an affirmative action program to be established as a remedy for a violation of the Charter? Carole Geller argues that the court should,<sup>150</sup> and I have no doubt

that in many cases this might be the most effective remedy that could be fashioned. I am inclined to believe, however, that courts will do no more than order government to devise some such plan, for reasons noted earlier. In this respect, remedies under the Charter may tend to be less extensive than those available under Human Rights Codes.

#### **b) Declaring Laws of No Force or Effect**

Section 52 of the *Constitution Act, 1982*, makes it clear that laws inconsistent with the Charter are of no force or effect to the extent of their inconsistency. The same conclusion can be reached in cases brought under section 24 of the Charter.

It is clear that a declaratory order is one of the remedies available. The Supreme Court has sanctioned such a remedy in cases of challenge to legislation based both in the distribution of powers in the Constitution<sup>151</sup> as well as in the *Canadian Bill of Rights*.<sup>152</sup> Academic commentators appear unanimous in concluding that a declaratory judgement is one of the remedies contemplated by section 24<sup>153</sup> and the Quebec Superior Court has so held.<sup>154</sup>

The only limitation on the availability of a declaratory order would flow from the concept of a "court of competent jurisdiction" set out in section 24. As discussed below, if the courts adhere to the view that a court must have had the remedial power apart from section 24, then only those courts with the jurisdiction to grant declaratory orders could do so under the Charter.<sup>155</sup>

#### **c) Competence Regarding Remedy**

Professor Hogg has argued that section 24 bestows increased remedial powers on all courts.<sup>156</sup> He views section 24 as bestowing such power in a way that overcomes whatever statutory limitations apply to the remedial power of a given court. In practical terms, this would mean that non-superior courts would have the full range of remedial powers as would a superior court—i.e., power to fashion one's own remedies.

The courts have not adopted this position. In interpreting the phrase "court of competent jurisdiction", courts have read into section 24 the requirement that the court not only have jurisdiction over the person and subject matter, but that the court must otherwise have the jurisdiction to award the remedies requested.<sup>157</sup> This may be significant regarding the range of remedies available against the Crown, to be discussed below, and it clearly limits the ability of some courts (e.g., criminal courts) to award damages for breaches of the Charter.<sup>158</sup> In the context of the issue of equality in employment, the limitation would not obtain, but it is an open question whether damages under the Charter is all that meaningful a remedy in our context.

#### **d) Limitations on Remedies against the Crown?**

If the phrase "a court of competent jurisdiction" is construed to invest new remedial powers in a given court, it is arguable that there would be no *legal* limitation on the kinds of remedies available against the Crown. Courts may balk at granting some such remedies, but the limitation would be self-imposed. If, however, the phrase is construed to refer to the pre-Charter jurisdiction of a given court to award the remedy requested, then a potential problem arises regarding the availability of certain equitable remedies against the

Crown. In the paragraphs that follow, I shall attempt to define briefly both the kinds of remedies potentially unavailable and the range of "Crown actions" to which this potential remedial limitation might apply, suggest an argument why such limitations ought *not* to be read into the Charter, and conclude by suggesting a way to overcome such limitations, assuming they are held to apply presumptively.

I begin with a caveat. This is an especially tricky area of law, one which, to some degree, is unsettled, and one which depends largely on the construction of the relevant statutory framework (if any) governing the impugned action. If my discussion is somewhat general and abstract, it is a function of the subject matter under discussion.

Professor Gibson suggests that the problem extends to all equitable remedies, given the Crown's historic immunity, as the "fount of Equity",<sup>159</sup> from such remedies. He does note, however, that the declaratory order is available against the Crown, but problems clearly are raised by such remedies as mandamus and the injunction (both prohibitory and mandatory).<sup>160</sup> Provincial legislation generally preserves the immunity of the Crown from such remedies,<sup>161</sup> and although no federal legislation expressly so provides, the courts have construed legislation against the backdrop of the common law rule and have preserved the Crown's immunity from such remedies.<sup>162</sup>

Who is protected by the unavailability of such remedies? As Justice Dickson noted, "[l]ike a corporation, the Crown must act through agents or servants".<sup>163</sup> The litmus test for whether Crown immunity from these remedies is available to an agent or servant appears to be whether the impugned action was taken pursuant to a duty owed by the Crown, or whether the action was taken pursuant to a statutory duty imposed on that agent or servant for the benefit of some third party.<sup>164</sup> In the latter case, the remedies will be available against the person designated by statute, even if, in other respects, s/he is an agent or servant of the Crown. Moreover, it is clear that such remedies are available against a Crown servant or agent in his or her private capacity if s/he takes action unauthorized by statute or the common law.<sup>165</sup> Thus, action taken under a law that itself is unconstitutional can be restrained by such remedies.

It is difficult to assess the impact of these remedial limitations, assuming they are read into the Charter. As Professor Gibson notes, this would not preclude the use of such equitable remedies to enforce the Charter against "police officers, administrative authorities, or municipal officials, who were not acting in a Crown capacity or with Crown authority".<sup>166</sup> In the case, say, of Crown corporations, it will be a matter of statutory interpretation to determine whether the remedial immunity applies.

All of this is premised, however, on the assumption that the common law immunity from such equitable remedies will be read into section 24. A number of considerations can be invoked against this premise.

The first is a function of section 32 of the Charter. It can be argued that the reference to "government", when conjoined with the broad language of section 24, evidences an intent to have the Crown subject to the full range of remedies potentially available against any violation of the Charter. As Professor Pilkington argues, "[s]ince the purpose of a bill of



rights is to protect guaranteed rights and freedoms from government action, it is important that courts be able to order the full range of remedies against governments".<sup>167</sup>

Professor Gibson offers some supplementary arguments in support of the same conclusion. Starting with the proposition that the Charter is part of the Constitution, he argues that analogies can be drawn from the refusal of courts to allow government to immunize itself from judicial review of the constitutionality of its actions.<sup>168</sup> The cases cited all concerned questions of the distribution of powers, but it can be argued that there is no relevant distinction between such cases and those where the Charter is at issue. Moreover, in the "Cruise missile" case, the applicants sought not only a declaration but injunctive relief and damages. Although the trial judge did express some reservations about the availability of remedies other than a declaration,<sup>169</sup> the issue was not addressed by the Court of Appeal.<sup>170</sup>

In principle, it is my view that such remedial limitations ought *not* to apply in the case of the Charter. Without intending any disrespect for our legal heritage, it is inappropriate to retain special rules for the Crown *qua* Crown, in an era where the formal reasons for the special rules have long lost all relevance. It would be a mark of our maturity as a legal culture to abandon such labels, and focus instead on the real reasons why certain remedies are, or are not, appropriate to award against the government. These considerations—institutional competence, democratic accountability, the presence or the absence of judicially manageable standards—do not necessarily lead to a broader remedial power in the courts, but at least they address, in an honest way, the core concerns one ought to have about such remedial power. In any event, it is reasonable to assume that such considerations will influence the courts heavily when they come to analyse the issue of Crown immunity from certain remedies, however the issue is framed.

One final note. Assuming that the courts continue to deny the availability of certain equitable remedies against the Crown, invoking the traditional common law rules, it is clear that this could be reversed by suitably framed legislation. If a given Act expressly provided that an injunction *would* lie against a given person, the courts would hold that this altered the common law rule.

#### **D. Challenges to Federal Measures to Promote Equality**

For the purpose of this section, I assume that 1) measures have been taken to promote equality in employment, 2) that are valid constitutionally, and 3) to which the Charter applies. This section examines a number of possible situations in order to assess the vulnerability of such measures to challenge under the Charter. This section should be read against the backdrop of the overview of the relevant Charter provisions presented earlier.

##### **1. Broadening Access to Employment Opportunities**

There is compelling evidence that the removal of overtly discriminatory barriers to employment opportunities, while essential, is not sufficient to ensure equality in employment. For the purposes of the following analysis, I assume that some positive measures will have been introduced to promote equality in employment in relation to the target groups.

It is helpful to distinguish broadly between two kinds of measures: those that provide for quotas or targets to be

reached in a given area, to be achieved through preferential hiring practices, and those measures that enhance the ability of the target groups to realize more fully the opportunities at present available.

In this latter category we might include measures to provide for better vocational training, expansion of support services (such as childcare), and the like. Would any of these measures be vulnerable to a challenge under the Charter?

We leave aside the obvious point that, with respect to challenge brought under sections 2 or 7 to 15 of the Charter, the application of the Charter can be ousted by recourse to the *non obstante* provisions in section 33.<sup>171</sup> Assuming no such recourse to section 33, I am of the view that the Charter does not present a problem for the constitutionality of such measures.

In terms of section 15(1), I have already suggested that, with respect to native people, no Charter argument could prevail against competent legislation vesting special rights in natives *qua* natives. Respecting the other target groups, there is no doubt that special vocational programs for, say, women, represent a "benefit" not distributed equally to all. But this does not necessarily mean that section 15(1) is violated thereby. If I am correct in arguing for a non-absolutist interpretation of section 15(1), I would argue that such measures are constitutional. My reasons are twofold.

First, such measures are clearly less intrusive than would be direct quotas on who gets access to given job opportunities. If the latter do not violate section 15(1), the former would not as well. It is unnecessary to detail the relevant considerations in this regard, except to note that some members of our Supreme Court appear to believe that intrusive measures designed to benefit a particular group would not offend equality rights.<sup>172</sup> Moreover, there is a lack of a clear message from the Supreme Court of the United States that even very intrusive measures would violate the equal protection clause of the fourteenth amendment.<sup>173</sup>

In more general terms, it can be argued that the underlying values served by the concept of equality rights—a concern for human dignity and a rejection of unjustified stereotyping—are not violated by such measures. The burdens imposed on those not benefitting from such programs are burdens imposed by the dominant groups in society on themselves. Such is surely the case regarding programs for native people, the handicapped, and, arguably, visible minorities. Regarding women, the numerical majority women enjoy is more than offset by their relative lack of political power within the institutions of government and the disadvantages traditionally suffered in the job market as a result of historical patterns of discrimination. If it is relevant to ask why certain legislative classifications are inherently suspect, surely it is relevant to consider "who is burdening whom".<sup>174</sup>

A similar analysis is available in the context of more intrusive measures aimed directly at access to employment opportunities. As noted above with respect to Canadian and American judicial attitudes towards affirmative action, it is not at all clear that section 15(1) would be violated by such measures, even if they involved quotas. This having been said, it is reasonable to assume that courts would focus on section 15(2) when faced with targets or quotas in some affirmative action scheme. For the reasons I set out in my earlier discussion of section 15(2), I am of the view that such

affirmative action measures would be upheld under section 15(2), notwithstanding the inevitability of some over- and under-inclusiveness in operation. (If I am wrong here, there is the possibility of justifying such programs under section 1, but it seems unlikely that a program, having failed to satisfy the broad criteria in section 15(2), would then be held valid under section 1.)

Could a person denied a job because of the existence of an affirmative action program invoke the mobility rights provision of the Charter? I have canvassed the relevant issues in an earlier part of this paper, and shall not repeat the analysis here. In my view, section 6(3) will not be interpreted in such a way so as to frustrate an affirmative action program designed to benefit any of the target groups (as opposed to distinguishing between residents and non-residents of a given province). It would be an unwarranted interpretation of the concept of a law or practice "of general application" to read into it a requirement that such a law make no distinction whatsoever between groups to which the law or practice extends. At most, the "status and capacity" component of section 6(3)(a) should refer only to distinctions drawn between citizens and permanent residents, and not to distinctions drawn on other grounds.

If this is not accepted, and an affirmative action program was held to violate section 6(2)(b), and was not saved by section 6(3), it remains possible to invoke section 6(4) to save the program in those provinces that come within its terms. Regarding those provinces outside the scope of section 6(4), one must invoke section 1. For reasons set out earlier, I believe that section 1 would function to uphold such a program, assuming it were "prescribed by law", and assuming that an adequate evidentiary record would be produced.

Could one invoke section 7 to challenge such a program? On one level, the argument seems fairly straightforward. Whether one relies on the right to life, or to the security of the person, few would deny that a job is an important component in these rights. But to make the case in a court of law, one would have to confront the following obstacles.

First, there is the conventional (though not universal) understanding that section 7 refers to legal rights.<sup>175</sup> Second, to interpret "security of the person" as entailing a right to employment, however attractive that might be, would be to run counter to the prevailing political and social philosophy that informs our political culture: for better or worse, a constitutional right to a job remains a matter of aspiration only in a society committed to using market mechanisms as the dominant way of allocating goods and services. Third, it is arguable that the right is not independent of the provision referring to fundamental justice: i.e., that the right is one not to be deprived of security, etc., "except in accordance with the principles of fundamental justice". If this is so, the question becomes one of assessing what fundamental justice entails.

The conventional view is that it refers to fair process, not to the substantive content of legislation.<sup>176</sup> If so, legislated programs would escape the reach of section 7 so long as the procedures for deciding who qualifies for a job are considered fair.

If fundamental justice carries a substantive bite to it, as the Supreme Court will be deciding relatively soon,<sup>177</sup> then the inquiry shifts to the justice or injustice of an affirmative action

program. Reasonable people differ as to the justice of such measures, but for a variety of reasons one should expect the courts to allow them to stand. Given the apparent contemplation of such programs in both sections 15(2) and 6(4), it would certainly be anomalous for a court to seize upon section 7 to strike them down. Moreover, as discussed in connection with sections 1 and 36, a strong case could be made for the reasonableness of such programs, especially given the constitutional "anchor" implicit in section 36.

## 2. The Charter and Collective Bargaining: Altering the Seniority System

The seniority system in place in collective bargaining agreements is important in two basic ways. First, if an affirmative action program to increase the representation of members of the target group is to be effective in the long run, some changes to the "last-hired, first-fired" rules would be required. Otherwise, short-term gains in representation could be wiped out whenever economic conditions deteriorate. Second, to break the tyranny of job ghettos within a given industry, some alterations to the promotion practices of a given company could be required, alterations that could affect seniority-based rules for job advancement.

Assume such alterations to the seniority system are placed in a given company. Could a person who is somehow disadvantaged by such alterations invoke the Charter to attack the plan? In the paragraphs to follow I examine the potential arguments that such a person might invoke, but I do not propose to examine the equality rights provisions again. For reasons canvassed earlier, I am of the view that alterations to the seniority system, such as affirmative action, are not violative of section 15.

Legislative measures concerning the collective bargaining process will be scrutinized as possibly affecting the freedom of association guaranteed by section 2 of the Charter. In the *Broadway Manor*<sup>178</sup> case, the Supreme Court of Ontario held that freedom of association includes the freedom to organize, to choose a union, to bargain, and to strike. Would it include the right to have the bargained-for regime (seniority) insulated from legislative change?

A good case can be made that freedom of association is not violated by changes to the seniority system. The freedom to organize, choose a union, to bargain, and to strike are not affected in the same way as they were under the *Inflation Restraint Act*, and the court recognized that statutory regulation of the collective bargaining process was permissible under the Charter. Respecting future negotiations (after the measures were in place), an affirmative action program could be considered just another element in the legal environment governing the bargaining process, not attracting judicial scrutiny *per se*. Respecting those whose advancement or increased vulnerability to being fired is affected, one could still argue that their basic freedoms under section 2 have not been infringed.

Nevertheless, it is reasonable to assume that judges would be concerned about the perceived unfairness of legislation "changing the rules of the game" that have been worked out in the collective bargaining process. This could lead some judges to construe section 2 in such a way so as to include the terms and conditions bargained for pursuant to the exer-

cise of one's freedom of association. Assuming such an interpretation, the issue would become one of justifying the law under section 1.

Could the disgruntled employee invoke section 26 to "constitutionalize" the rights of seniority s/he would have enjoyed but for the hypothesized alterations? As I argued elsewhere in this paper, section 26 does not function to constitutionalize such rights. Nor does it demand that the Charter be construed in such a way so as to avoid affecting such rights. (Nonetheless, it cannot be denied that, if a judge were concerned about the fairness of interfering with "vested" rights, s/he could find a way to entrench them.)

Might one invoke the mobility rights provisions to impugn such measures? In my view, such an argument would fail. Section 6, whatever else it may mean, cannot be construed as a "right not to be fired" provision. The obvious and dramatic consequences of such an interpretation aside, there is absolutely no evidence that anything like this was contemplated by the drafters of the Charter. Even assuming that section 6(2)(b) had been interpreted as "free-standing", legislative alteration of a given seniority scheme would not appear to violate anyone's "right...to pursue the gaining of a livelihood in any province". Nor could the right plausibly include the right to be promoted on the basis of seniority, or more generally, on the basis of the rules of the game when one was hired. Even assuming section 6(2)(b) is to be interpreted as referring to one's preferred vocation, the measures contemplated here would not affect that right. At most, one's "progress through the ranks" could be slowed down.

Even if section 6(2)(b) were held to be violated in this case, the measures could be saved by section 6(3)(a). If the measures were imposed by legislation, such legislation would have to be deemed a "law of general application". As discussed elsewhere, a problem could arise if it is federal legislation that mandates these measures, but a fairly good case may be made for such legislation to fall within section 6(3). (No such problem would arise were the law to be provincial, enacted (say) as a result of some financial or political incentives on the part of the federal government.) In both cases, however, one would have to have such laws apply throughout the relevant territory; selective targeting of some enterprise could run afoul of the requirements of section 6(3).

Similar considerations apply in cases where the measures are not legislated, but are imposed by the government in its capacity as employer. But here the measures would either have to be negotiated (in which case the disgruntled employee would appear to have no greater claim under section 6 than s/he would ever have in the context of new terms and conditions being agreed to), or imposed on the collective agreement by legislation that would alter the labour relations law that prohibits unilateral alteration of a collective agreement. In such a case, the analysis is the same as that considered above.

Even if section 6(3) is not available, section 6(4) contemplates some affirmative action plans, and could be available in some provinces to save such measures. If all else fails, there is always section 1.



## NOTES

1. Lucas, "Against Equality", in Bedau, ed., *Justice and Equality* 138 (1971).
2. *Canada Act 1982*, c. 11 (U.K.), Schedule B ( *The Constitution Act, 1982*), Part I (hereafter "The Charter").
3. Section 32(2) provides that section 15 (equality rights) is not to come into force until three years after proclamation.
4. Gold, "Equality Before the Law in the Supreme Court of Canada: A Case Study", (1980) 18 *Osgoode Hall Law Journal* 336 at 358-368.
5. On the distinction between concepts and conceptions, see Dworkin, *Taking Rights Seriously*, 134-135 (1978).
6. Hogg, *Constitutional Law of Canada* 304-308 (1977). Section 31 of the Charter makes it clear that the Charter does not extend the legislative authority of either Parliament or the provincial legislatures.
7. Swinton, "Restraints on Government Efforts to Promote Equality in Employment: Labour Relations and Constitutional Considerations", Paper prepared for the Commission of Inquiry on Equality in Employment, 15 (1983).
8. The question of the Charter is addressed in Part II, *infra*.
9. *Constitution Acts, 1867 to 1982*, s. 91(1A).
10. *Constitution Act, 1867*, s. 92(13).
11. See, e.g., *Human Rights Act*, S.N.B., 1971, c. 8, s. 13.
12. *Constitution Act, 1867* s. 91(24).
13. Hogg, *supra* note 6 at 387-390.
14. See, e.g., *Four B Manufacturing Ltd. v. United Garment Workers of America et al.* (1980) 102 D.L.R. (3d) 385 (S.C.C.).
15. To my knowledge, Parliament has never attempted to extend its legislative jurisdiction in such a comprehensive way.
16. The paradigm case is that of medicare. In general, most of Canada's social security system is a product of this basic device. See generally Banting, *The Welfare State and Canadian Federalism* (1982).
17. See LaForest, *The Allocation of Taxing Power Under the Canadian Constitution* 46-47 (2d ed., 1981).
18. *Id.*
19. See generally, Smiley, *Constitutional Grants and Canadian Federalism* (1963).
20. *Attorney General for Canada and Attorney General for Ontario* (1937) A.C. 355 (J.C.P.C.).
21. Smiley, *supra* note 19 at 19.
22. *Supra* note 20 at 366-367.
23. LaForest, *supra* note 17 at 48.
24. See, e.g., *Francois-Albert Angers and The Minister of National Revenue* (1957) Ex. C.R. 83.
25. See Bill C-3, Second Session, Thirty-second Parliament, 32 Elizabeth II, 1983.
26. The form in which these conditional grants are established may be important. See Smiley, *supra* note 19 at 21.
27. Leitman, "A Federal Contract Compliance Programme for Equal Employment Opportunities", Paper prepared for the Commission of Inquiry on Equality in Employment (1983).
28. Tarnopolsky, "Legislative Jurisdiction of Anti-Discrimination (Human Rights) Legislation in Canada" (1980) 12 *Ottawa Law Review* 1, at 43-44. For the contrary view, see Leitman, *id.*, at 22-23.
29. The conception of "conflict" that has been accepted for the purpose of the paramountcy rule is where compliance with one law entails breach of the other. See *Multiple Access Ltd. v. McCutcheon* (1982) 138 D.L.R. (3d) 1 (S.C.C.).
30. Hogg, *supra* note 6 at 116.
31. Where the Crown is the plaintiff, the Federal Court has a concurrent jurisdiction with the provincial superior courts in actions founded on existing and applicable federal law.
32. *Constitution Act, 1867*, s. 92(14).
33. *Rhine v. The Queen* (1980) 2 S.C.R. 422.
34. *McEvoy v. Attorney General of New Brunswick et al.* (1983) 48 N.R. 228 (S.C.C.).
35. *Attorney General of Canada et al. v. Law Society of British Columbia et al. Jabour v. Law Society of British Columbia et al.* (1982) 137 D.L.R. (3d) 1 (S.C.C.).
36. But see *Re Gandam and Minister of Employment and Immigration* (1982) 140 D.L.R. (3d) 364 (Sask. Q.B.).
37. For example, most employees could not invoke the Charter to impugn the employment practices of their employers. Nor could action be brought against their union for a breach of the Charter.
38. Of course, it is unnecessary to make a stark choice between legislation and litigation. The possibility of litigation can encourage a re-thinking of legislation as we are seeing with respect to the equality rights provisions.
39. Hogg, *Canada Act 1982 Annotated* 75 (1982). The only wrinkle may concern action taken pursuant to the royal prerogative. See *The Queen et al. v. Operation Dismantle et al.* (1983) 49 N.R. 363 (Fed. C.A.), on appeal to the S.C.C.
40. The major issue is whether the Charter applies to private relationships. If it does, then the remaining issues are irrelevant.
41. I use the term "directly" advisedly, as it is clear that the Charter applies to legislation regulating "private" activity. This, in my view, includes human rights legislation. In principle, such legislation could be found to violate the Charter, thereby having the Charter apply (indirectly) to the relationships governed by that human rights legislation.
42. Hogg, *supra* note 39 at 76-78; Swinton, "Application of the Canadian Charter of Rights and Freedoms", in Tarnopolsky and Beaudoin, ed., *The Canadian Charter of Rights and Freedoms* 41, at 44-49 (1982).
43. Noted in Swinton, *id.*, at 45.
44. *Id.*
45. Hogg, *supra* note 39.
46. See, e.g., Jordan, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, First Session of Thirty-second Parliament, 1980-81*, p. 49:47 (January 30, 1981).
47. Government of Canada, *The Charter of Rights and Freedoms: A Guide for Canadians* 32 (1982).
48. Swinton, *supra* note 42; Hogg, *supra* note 39.
49. Swinton, *supra* note 42 at 47.
50. On the non-conclusive nature of legal argumentation, see Gold, "Constitutional Fate: the Rhetoric of Constitutional Argumentation", (1985) *U. of T. L.J.* (forthcoming).
51. *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983) 147 D.L.R. (3d) 58 (O.H.C.), *aff'd* by O.C.A., (1984) 5 D.L.R. (4th) 766, on appeal to the S.C.C.
52. The same would obtain as between two common law provinces, one of which codified the common law rule in statutory form.
53. See, e.g., the language rights provisions of section 23.
54. *The Queen et al. v. Operation Dismantle et al.*, *supra* note 39 at 7 (per Pratte J.A.).
55. Manning, *Rights, Freedoms and the Courts* 115 (1983).
56. Hogg, *supra* note 6 at 172-176.
57. See, e.g., section 2: "Everyone has the following fundamental freedoms..."
58. See, e.g., First Amendment: "Congress shall make no law..."
59. For an example of this reasoning, see Slattery, *Comment* (1983) 61 *Can. Bar Rev.* 391.
60. My own views aside, this premise underlies the fact that we have entrenched the Charter in our constitution.
61. Gold, *supra* note 4 at 389-394.
62. For example, some legislation extends protection against age discrimination only with respect to a limited range of "age". Would this be consistent with section 15 of the Charter?
63. See, e.g., Strauss, "Complaints about racism don't fare well", *The Globe and Mail*, December 9, 1981 at 1.

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- 64 *Board of Governors of Seneca College v. Bhaduria* (1981) 124 D.L.R. (3d) 194 (S.C.C.)
  - 65 *Supra* note 51
  - 66 See Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982) 4 *Supreme Court Law Review* 131.
  - 67 *Supra* note 39
  - 68 Swinton, *supra* note 7 at 48-49
  - 69 Hunter, "Human Rights Legislation in Canada: Its Origins, Development and Interpretation" (1976) 15 *Univ. of Western Ontario Law Rev.* 21 at 24. A contrary assessment is advanced by Heakes, "The Ontario Human Rights Commission: Troubled Times", (unpublished, 1983)
  - 70 *Ontario Human Rights Commission v. Simpson-Sears* (1982) 38 O.R. (2d) 423 (O.C.A.); *Bhinder v. Canadian National Railway* (1983) 147 D.L.R. (3d) 312 (F.C.A.)
  - 71 My guess is that the courts will seize upon the language of section 32, reinforced by their understanding of what a constitution is supposed to do
  - 72 Tribe, *American Constitutional Law* 1147-1174 (1978).
  - 73 Wittgenstein, *Philosophical Investigations* (transl. by Anscombe, 3d ed., 1978), Gold, *supra* note 50.
  - 74 At common law, the Crown was not bound by a statute unless (1) the Crown was named expressly therein, or (2) the Crown was bound by necessary implication.
  - 75 R.S.C. 1970, c. 1-23. The Supreme Court has held that neither the federal nor provincial Interpretation Acts apply to the construction of the Charter. *Skapinker v. Law Society of Upper Canada* (1984) 53 N.R. 169
  - 76 *Supra* note 39
  - 77 See Pritchard, ed., *Crown Corporations in Canada* (1983)
  - 78 Hogg, *supra* note 6 at 392-395
  - 79 Hogg, *supra* note 39 at 76
  - 80 Swinton, *supra* note 42 at 59
  - 81 Swinton, *supra* note 7 at 23
  - 82 See *Queen v. Eldorado Nuclear Ltd. et al.* (1984) 4 D.L.R. (4th) 193 (S.C.C.)
  - 83 *Id.*, at 25 (Dickson, J.)
  - 84 Swinton, *supra* note 7 at 21
  - 85 *Thorson v. Attorney General of Canada* (No. 2) [1975] 1 S.C.R. 138. For the American position, see *Fullilove v. Klutznick* 100 S. Ct. 2758 (1980)
  - 86 The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society
  - 87 See, e.g., *The Queen and the Federal Republic of Germany v. Rauca* (1982) 38 O.R. (2d) 705
  - 88 See, e.g., *Quebec Association of Protestant School Boards et al. v. A.-G. of Quebec et al.* (No. 2) (1982) 140 D.L.R. (3d) 33
  - 89 This is the general approach that unifies the various standards of review operative in American jurisprudence. It is also implied in the definition of equality before the law offered by McIntyre J. in *MacKay v. The Queen* (1981) 114 D.L.R. (3d) 393. See Gold, *Comment* (1982) 60 *Can. Bar Rev.* 137
  - 90 See, e.g., sections 6(3)(4), 15(2). Other rights have "reasonableness" standards incorporated into their definition. See sections 8, 9, 11(a)(b)(e).
  - 91 Policy directives without binding force do not qualify as being "prescribed by law". *Re Ontario Film and Video*, *supra* note 65. What is unclear is how much discretion will be tolerated (by the courts) in laws reviewed under section 1.
  - 92 See *Quebec Association of Protestant School Boards*, *supra* note 88
  - 93 See *infra*.
  - 94
    - 6 (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
    - (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
      - (a) to move to and take up residence in any province; and
      - (b) to pursue the gaining of a livelihood in any province
  - (3) The rights specified in subsection (2) are subject to
    - (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence, and
    - (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services
  - (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada
- 95 *Supra* note 75
  - 96 (1983) 40 O.R. (2d) 481
  - 97 See, e.g., *Commission du Salaire Minimum v. Bell Telephone Co.* [1966] S.C.R. 767
  - 98 *Supra*, note 96 at 487 (per Grange J.A.)
  - 99 26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada
  - 100 Hogg, *supra* note 39 at 70
  - 101 If it were so intended, one would have expected language similar to that used in section 25. See *infra*
  - 102 36 (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to
    - (a) promoting equal opportunities for the well-being of Canadians,
    - (b) furthering economic development to reduce disparity in opportunities, and
    - (c) providing essential public services of reasonable quality to all Canadians
  - (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonable comparable levels of public services at reasonably comparable levels of taxation
- 103 Nor does the Charter itself. See section 31.
  - 104 15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability
  - 105 Gold, *supra* note 66
  - 106 *Id.*
  - 107 As far as I can tell, the courts will apply minimal scrutiny to laws that classify on the basis of disability
  - 108 Systemic discrimination may be defined as situations where neutral systems, applied impartially, operate so as to exclude certain groups for reasons unrelated to the capacities of those groups. For variations on the definitions of discrimination, see Tarnopolsky, *Discrimination and the Law* 83ff (1982)
  - 109 See, e.g., *Griggs v. Duke Power Co.* 401 U.S. 424 (1971)
  - 110 See decisions discussed in Tarnopolsky, *supra* note 108 at 113-122
  - 111 *Supra* note 70
  - 112 Thus we find some courts asserting that the era of Parliamentary supremacy has passed, while others assert that the Charter has not transformed our legal system
  - 113 Gold, *supra* note 4
  - 114 Fried, "The Artificial Reason of the Law or What Lawyers Know", (1980-81) 60 *Tex. L. Rev.* 35
  - 115 Ely, *Democracy and Distrust* 58 (1980)
  - 116 Gold, *supra* note 66
  - 117 See Tribe, *supra* note 72 at 1052ff.

118. 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.
119. Not all "visible minorities" may be at a disadvantage economically. It will be an empirical question as to which groups are in need of special measures.
120. *Queen v. Drybones* [1970] S.C.R. 282.
121. 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
  - (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1963; and
  - (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.
122. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights", (1982) 8 *Queens Law J.* 232 at 239-40.
123. *Id.* at 240-242.
124. *Id.* at 237-238.
125. It is expected, however, that courts would read a "reasonableness" standard into section 35. Accord Slattery, *id.* at 234.
126. 30. A reference in this Charter to a Province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.
127. *Attorney-General of Canada v. Dupond* (1978) 84 D.L.R. (3d) 420 at 439 (per Beetz J.).
128. On various uses of the language of rights see: Feinberg, *Social Philosophy* (1973).
129. 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.
130. See discussion in Gold, *supra* note 66.
131. Compare the wording of the proposed Equal Rights Amendment to the Constitution of the United States. It provides, in part, that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex".
132. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
133. Swinton, *supra* note 7 at 28-31.
134. Tarnopolsky, "The Equality Rights", in Tarnopolsky and Beaudoin, eds., *Canadian Charter of Rights and Freedoms* 395 at 437 (1982).
135. Fullilove, *supra* note 85 at 2784-85.
136. Hughes, "Issues Under the Charter", Paper prepared for the Commission of Inquiry on Equality in Employment, 23 (1983).
137. *Id.*
138. *Regents of the University of California v. Bakke* 98 S.Ct. 2733 (1978).
139. Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983) 61 *Can. Bar Rev.* 242 at 257.
140. Geller, "Section 15(2), The Charter of Rights and Freedoms: Affirmative Action and the Judiciary", 89 (unpublished, 1983).
141. Most of the analysis offered in connection with section 15(2) would apply in the case of section 6(4). The issue is whether the object of the law, program or activity, not its effect, is to ameliorate the conditions of the disadvantaged. What is unclear is what is meant by the phrase "socially or economically disadvantaged". As in the case with section 15(2), the courts will assume the authority to assess whether the benefited individuals or groups do, in fact, come within this criterion, but as I noted earlier, there will be a self-imposed inclination to defer to a legislative or administrative finding that certain groups are so disadvantaged. This underscores the desirability of having such programs accompanied by as comprehensive an evidentiary base as is possible.
142. Gold, *supra* note 4.
143. The case of *Bliss v. A-G Can.* [1979] 1 S.C.R. 183, although not concerned with the absence of maternity benefits, is nonetheless indicative of the court's attitude in this area. For American examples more directly on point, see *Geduldig v. Aiello* 417 U.S. 484 (1974); *General Electric Co. v. Gilbert* 429 U.S. 125 (1976). See also the *Pregnancy Discrimination Act* 42 U.S.C.A. section 2000e (reversing, in effect, the *Gilbert* case).
144. Losie, "Employer-Sponsored Pension Plans and the *Pensions Benefits Act*: A Challenge under the Canadian Charter of Rights and Freedoms" (unpublished, 1983).
145. 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
146. *Morgentaler v. The Queen* (1975) 53 D.L.R. (3d) 161.
147. Gold, *supra* note 4 at 358-370.
148. See, e.g., *Regina v. Milton and Beaveridge* (1982) 70 C.C.C. (2d) 99.
149. *R. v. Belton* [1983] 2 W.W.R. 472 (Man. C.A.), *Cf. R. v. Antoine* (1983) 148 D.L.R. (3d) 149 (O.C.A.).
150. Geller, *supra* note 140 at 99ff.
151. *Thorson v. Attorney-General of Canada* (No. 2), [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil* (1975) 55 D.L.R. (3d) 632.
152. *Minister of Justice of Canada v. Borowski* (1981) 130 D.L.R. (3d) 588.
153. Hogg, *supra* note 39 at 65; Gibson, "Enforcement of the Canadian Charter of Rights and Freedoms", in Tarnopolsky and Beaudoin, eds., *Canadian Charter of Rights and Freedoms* 489 at 503 (1982).
154. *Supra* note 88.
155. Superior courts have the inherent authority to grant equitable remedies (like declaratory orders). Unless authorized by statute, "inferior" courts would not have the authority to grant a declaration. For the position of the county courts in Ontario, see *Judicature Act*, R.S.O. 1980, at 223, s. 18.2; *Re Town of Deep River and Incumbent Rector and Wardens, Saint Barnabas Parish* (1972) 3 O.R. 90 (County Court may grant declaration); *Cf. Matthews v. Dickson et al.* (1979) 24 O.R. (2d) 351 (County Court has jurisdiction to grant declaration [or injunction] only where claim for such remedy is ancillary to the damage claim).
156. Hogg, *supra* note 39 at 65.
157. See, e.g., *Re Seaway Trust Co. et al.* (1983) 41 O.R. (2d) 532 (O.C.A.).
158. On damages as a remedy for violations of the Charter, see Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984) *Can. Bar Rev.* (forthcoming).
159. Gibson, *supra* note 153 at 507.
160. See, generally, Hogg, *Liability of the Crown* (1971).
161. See, e.g., *Proceedings Against the Crown Act*, R.S.O. 1980, c. 393, s. 18.
162. *Grand Council of the Crees (of Quebec) et al. v. The Queen in Right of Canada et al.* (1981) 124 D.L.R. (3d) 574 (F.C.A.).
163. *The Queen v. Eldorado Nuclear Ltd. et al.*, *supra* note 82 at 16.
164. *Re mandamus*, see Hogg, *supra* note 160 at 12-15. *Re injunction*, see *Grand Council* case, *supra* note 162. See generally, Evans, *de Smith's Judicial Review of Administrative Action* 445 ff (4th ed., 1980).
165. Hogg, *supra* note 160 at 25.
166. Gibson, *supra* note 153 at 507.
167. Pilkington, *supra* note 158.
168. Gibson, *supra* note 153 at 507.
169. *Operation Dismantle Inc. et al. v. The Queen et al.*, [1983], F.C. 429.
170. One must concede that this fact alone does not establish the availability of such remedies against the Crown.
171. 33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
  - (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
  - (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
  - (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).



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(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

172. *Re Athabasca Tribal Council and Amoco Canada Petroleum Co. Ltd.* (1981) 124 D.L.R. (3d) 1.

173. For discussion and analysis, see Tarnopolsky, *supra* note 134 at 424-435.

174. See Tribe, *supra* note 72 at 1044 for an argument along these lines.

175. Hogg, *supra* note 39 at 26-27. Cf *The Queen in Right of New Brunswick et al. v. Fisherman's Wharf Ltd.* (1982) 135 D.L.R. (3d) 302, *rev'd* on other grounds 144 D.L.R. (3d) 21 (N.B.C.A.).

176. Hogg, *id.* Cf *Reference re Section 94(2) of the Motor Vehicle Act* (B.C.) (1983) 4 C.C.C. (3d) 243 (B.C.C.A.).

177. The case cited in note 176 is on appeal to the Supreme Court.

178. *Service Employees' International Union, Local 204 et al. v. Broadway Manor Nursing Home, et al.*, (1984) 4 D.L.R. (4th) 231.

# RESTRAINTS ON GOVERNMENT EFFORTS TO PROMOTE EQUALITY IN EMPLOYMENT: LABOUR RELATIONS AND CONSTITUTIONAL CONSIDERATIONS

Katherine Swinton

## Sommaire

L'auteure examine les questions constitutionnelles et de relations de travail susceptibles de gêner les mesures gouvernementales visant à aider les groupes spécifiés dans le mandat de la Commission, soit les femmes, les autochtones, les personnes handicapées et les minorités visibles.

Le gouvernement n'aurait peut-être pas à intervenir si le secteur privé adoptait de son propre chef les mesures nécessaires. Par conséquent, l'auteur analyse d'abord la possibilité de recourir à la négociation collective pour favoriser l'égalité. Des exemples de conventions collectives sont données et les limites de cette formule sont exposées.

Les contraintes constitutionnelles sur des mesures gouvernementales comme l'adoption de normes d'embauchage pour les groupes cibles ou le traitement préférentiel sont ensuite analysées. Entre autres, la répartition des pouvoirs en vertu de l'*Acte constitutionnel de 1867* pourrait limiter l'action gouvernementale. La garantie de l'égalité en vertu de l'article 15 de la *Charte canadienne des droits et libertés* peut aussi être une source encore plus importante de contrainte. L'auteure examine les possibilités d'interprétation de la garantie de l'égalité énoncée à l'article 15(1), la protection des mesures d'action positive aux termes de l'article 15(2), et les conséquences de l'article 28 qui garantit les mêmes droits aux hommes et aux femmes. La question de savoir si les sociétés d'État sont automatiquement assujetties à la Charte est aussi étudiée.

Même si les mesures gouvernementales sont fondées du point de vue constitutionnel, elles peuvent être sujet à controverse lorsqu'on aborde les questions de relations de travail. La conciliation du régime fondamental de l'ancienneté dans un milieu de travail organisé avec le traitement préférentiel des groupes cibles, lorsqu'il s'agit de promotions et de licenciements, est un problème complexe. La situation aux États-Unis eu égard à la législation sur les droits civiques est examinée ainsi que les moyens proposés pour éviter un conflit, notamment le travail partagé pour pallier aux licenciements.

## Summary

This paper examines constitutional and labour relations constraints that may affect government measures to assist the groups under study by the Commission—women, native people, disabled persons, and visible minorities.

Government initiatives may not be necessary if private ordering can address equality concerns. Thus, the study begins with an overview of the feasibility of collective bargaining to promote equality, using examples from existing collective agreements but noting the limitations of this institution.

Constitutional constraints on government action, such as protective employment standards for target groups or preferential treatment, are then reviewed. The distribution of powers under the *Constitution Act, 1867* is one possible source of restraint on governmental action. More significant may be the equality guarantee in section 15 of the *Canadian Charter of Rights and Freedoms*. This paper canvasses possible lines of interpretation of the guarantee of equality in section 15(1), the protection for affirmative action measures in section 15(2), and the impact of section 28, guaranteeing rights equally to men and women. As well, the question whether Crown corporations are automatically subject to the Charter is discussed.

Even if governmental initiatives are valid constitutionally, they may be controversial when labour relations considerations are brought to bear. In particular, resolution of the conflict between the fundamental institution of seniority in the organized workplace and preference in promotion or layoff for target groups is a complex problem. The experience under American civil rights legislation is discussed, as are some of the suggestions for avoidance of the conflict, such as work sharing on layoff.





# RESTRAINTS ON GOVERNMENT EFFORTS TO PROMOTE EQUALITY IN EMPLOYMENT: LABOUR RELATIONS AND CONSTITUTIONAL CONSIDERATIONS

Katherine Swinton\*

## I. INTRODUCTION

The demand for affirmative action programs is heard increasingly in Canadian society—from women's groups, native peoples, the handicapped, and racial minority groups. These demands are not going unheard: recent government studies, including those of the House of Commons Special Committees on the Disabled and the Handicapped, on Employment Opportunities in the '80s, and on Visible Minorities have all recommended positive government initiatives to increase employment opportunities for women, native people, visible minorities, and the handicapped.<sup>1</sup> The major recommendation has been affirmative action by the federal government and its Crown corporations to increase participation of these groups in public employment, while contract compliance programs for private sector employers dealing with government have been suggested to provide an incentive for private affirmative action initiatives. The federal government already has an affirmative action program in place to facilitate employment opportunities for women in the public service.<sup>2</sup> Both the Ontario Federation of Labour and the Canadian Labour Congress have endorsed affirmative action for women as well.<sup>3</sup>

Those calling for action by governments and employers have several reasons for doing so. They are concerned about the high unemployment rates among certain groups in our society who have suffered not only from the economic recession affecting most sectors in the workplace, but who also bear the brunt of past and present discrimination. The result is disproportionately high rates of unemployment—estimated to be at least 50 per cent for the handicapped<sup>4</sup> and 9.8 per cent for women 25 years and over as compared to 8.9 per cent for men.<sup>5</sup>

Even when employment is available, the remuneration may not be comparable to that of white males. Workforce statistics indicate, for example, that women generally make 62 per cent of male wages.<sup>6</sup> This differential can be explained in part by direct discrimination, although significant as well is the fact that women's work has been traditionally in the clerical, service, and retail sectors, which have been remunerated at lower rates than male-dominated craft and manufacturing jobs.

The discrimination such groups suffer may be direct—the result of an intention by employers to deny equal opportunity, perhaps because of stereotyping about the capacity of members of such groups to fulfil a given role, which inhibits a

fair and open consideration of an individual's ability to fill a position. Often, these groups are the victims of indirect discrimination. Employment practices that appear neutral on their face may have a disproportionate impact on a particular group: weight and height requirements may bar many women and some racial groups from consideration; lack of benefits for part-time workers will hurt women more than men, for the vast majority of part-timers are female. As well, these groups may suffer from systemic discrimination: from employment practices, again neutral on their face, that act as barriers to equal opportunity in employment. The handicapped often face physical barriers to employment, needing special resources to adapt the workplace for them, such as wheelchair ramps or reading machines for the blind. Women, too, face many barriers to equality in employment: inadequate maternity leave, lack of daycare facilities, and inflexibility in work scheduling can put into conflict the desire for, and often necessity of, employment with the obligations to family.<sup>7</sup>

This paper does not examine the employment problems of the four target groups in detail. Rather, it studies some of the mechanisms by which employment opportunities for women, native people, the handicapped, and visible minorities can be improved, with emphasis on employment in federal Crown corporations. Constitutional constraints arising from the *Canadian Charter of Rights and Freedoms* and the *Constitution Act, 1867* and the labour relations implications of various government initiatives are important elements in designing any policy, and an examination of these issues forms the bulk of this paper. In order to set the scene for this discussion, the following section outlines the ways in which collective bargaining has responded, or failed to respond, to equality concerns. Following this is a brief description of the types of policy initiatives the federal government might take to increase employment opportunities for these target groups.

## II. THE ARGUMENT FOR GOVERNMENT INTERVENTION: THE MERITS AND DEMERITS OF COLLECTIVE BARGAINING

Government intervention is frequently a response to the failure of private initiatives to deal adequately with a problem. For those groups who work in unionized workplaces, it may be suggested that government intervention is unnecessary: collective bargaining is a useful tool to promote equality in employment, and it has been used for that purpose. A brief canvass of the collective agreements operative in the various Crown corporations under consideration discloses many examples of the kind of protections that unions have sought to remove barriers to employment or to prevent discrimination.

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At the most general level, one finds in some collective agreements a prohibition on discrimination by the employer, and often forbidden grounds of discrimination are specified—usually sex, age, race, religion, and union activity, although sexual harassment may be included as well.<sup>8</sup> The advantage of such clauses is the access to arbitration provided for those with discrimination complaints. For example, such a clause was relied upon by an adjudicator in *Re Dhillon and Treasury Board*<sup>9</sup> to find that a probationary employee in the postal service had been improperly released, in part because the employer had failed in its duty to take reasonable steps to eradicate racial harassment by fellow workers. An employee may prefer arbitration to a complaint before a human rights commission, for the delay in resolving human rights cases can be a drawback.<sup>10</sup> If the grievance route is chosen, the union will carry the case for the employee and may be able to obtain a resolution in the grievance procedure.<sup>11</sup>

For many women, a major concern in employment is the availability of maternity leave. While employment standards legislation sets out a right to unpaid maternity leave<sup>12</sup> and unemployment insurance may be available during that period,<sup>13</sup> there are significant costs associated with maternity leave in the form of lost income and, in many workplaces, forgone seniority credits which do not accrue during such leave. Women seeking leave for adoption purposes face even greater obstacles, for employment standards legislation and unemployment insurance have not, until the recent past, recognized any claim to protection.<sup>14</sup>

Paid maternity leave was negotiated by the Canadian Union of Postal Workers with Canada Post in 1981, and other unions and employers have followed this example, including the Communication Workers of Canada (CWC) and Telelobe; NABET and the CBC; the Council of CUPE Broadcast Bargaining Units and the CBC. These agreements provide that an employee who qualifies by length of service is entitled to a percentage of her salary for the two-week waiting period under the *Unemployment Insurance Act*, followed by a supplemental allowance which, when combined with unemployment insurance benefits, will produce a percentage of her basic weekly salary. The crucial percentage varies—95 per cent for the CWC, 75 per cent during the 15-week period for NABET. Some agreements also provide the employee with an entitlement to extend her maternity leave beyond the usual 17 or 19 weeks set out in the agreement. Under the CBC and NABET (Technical Unit) agreement, an employee has a right to take 35 additional weeks of leave without salary following the expiry of her paid maternity leave. An employee who does not qualify for unemployment insurance nevertheless has a right to two weeks' paid maternity leave and a total of 50 weeks' leave.

Adoption leave is also a feature of some agreements. Air Canada and both the Canadian Air Line Flight Attendants Association and the International Association of Machinists and Aerospace Workers allow either parent to take unpaid adoption leave for up to 90 days. The NABET (Technical) Unit agreement with the CBC provides for two weeks' paid leave and 50 weeks' unpaid leave.

Women who take maternity or adoption leave may have their accrued seniority protected by legislation, but they often fail to earn seniority credits during the period of leave.

Since seniority can be a determining factor in promotions, layoffs, and benefit entitlement, accrual during the absence is important. The de Havilland and UAW agreement covering office and clerical workers allows for accrual of seniority for vacation purposes during maternity leave, while the Air Canada and the Flight Attendants agreement allows full accrual of seniority while on leave.<sup>15</sup>

It is less usual to find provisions directed at the other target groups under study, although those who are injured or disabled may be given special consideration in filling vacancies. The de Havilland and UAW Plant agreement, for example, gives special bumping rights to physically restricted employees.

These provisions are only illustrations, and they are by no means found in every collective agreement. While collective bargaining can be used to promote equality, it has drawbacks. The first concern is coverage: 39 per cent of paid non-agricultural workers were union members in 1982, while in 1980, 58.3 per cent of all employees were covered by collective agreements.<sup>16</sup> That coverage varies with the type of work: 38 per cent of office workers are covered compared to 73 per cent of non-office workers and 69 per cent of all other employees.<sup>17</sup> Women have traditionally been employed in clerical jobs, which have been the least likely to be organized, except in public administration.<sup>18</sup>

The structure of Canadian labour legislation and the certification policies of labour relations boards can also be an obstacle to effective bargaining over equality issues. Labour legislation excludes from its coverage those employed in a managerial or confidential capacity with regard to labour relations.<sup>19</sup> For these people, equality initiatives depend on their individual bargaining power or employer goodwill. As well, some groups are excluded from collective bargaining: domestics and farm workers and some professionals in Ontario.<sup>20</sup>

Bargaining unit configuration also has an important impact on the bargaining process. A labour board will be empowered by the applicable labour legislation to determine a unit "appropriate" for collective bargaining.<sup>21</sup> The legislation may provide some guidelines: the *Canada Labour Code*, for example, states that the board may establish a separate unit for professional employees or for supervisory employees, and it must do so for private constables.<sup>22</sup> Where no criteria for unit determination are spelled out, the board itself will develop its own. The main concerns are community of interest of the employees weighed against the impact on an employer of bargaining with fragmented units and the effect of a given determination on union organization. For example, the Canada Labour Relations Board ordered certification of banks on a branch-by-branch basis, rather than on a regional or nation-wide basis, in part in order to facilitate unionization.<sup>23</sup> The Ontario board has a policy of separate bargaining units for full- and part-time employees, as well as for plant and office workers.<sup>24</sup> Finally, there has been a tradition of separate craft unions in many industries.<sup>25</sup>

These unit determinations have an important impact on bargaining. The size of a bargaining unit can affect bargaining power, and the banks are a good example of this: while branch bargaining units may have facilitated union organization, bargaining itself has been a frustrating and unsatisfactory exercise because of the vast disproportion in bargaining

power between the banks and the individual units.<sup>26</sup> Broader based bargaining units would equalize the power to some extent, allowing the union to invoke a more effective economic sanction. A separate part-time unit can also reduce the bargaining power of the employees therein, as their ability to exert pressure on the employer will often be less than that of the full-time unit. Since the vast majority of part-time workers are women,<sup>27</sup> the certification process thus reduces the bargaining power of this group.

Bargaining unit determination has important implications for the negotiation of terms of employment as well. One of the fundamental concerns of unions, in negotiating a collective agreement, is to reduce the employer's discretion over employment conditions. Thus, provisions are negotiated to prevent discipline or discharge without just cause, and disciplinary action is subject to the grievance and arbitration procedure. Similarly, seniority systems are established to govern entitlement to benefits, promotions, and layoffs, thus reducing the employer's unilateral power to award benefits and security at will. Normally, seniority will only accrue within the bargaining unit and may be limited to a department or a particular classification. An employee who transfers out of the bargaining unit or a seniority group may lose all her seniority so that she is at "square one" if she later transfers back. Similarly, a worker transferring from outside the bargaining unit, but from a job with the same employer, may have to start at the entry level as a probationary employee in the new unit without seniority. The more bargaining units an employer has, the more obstacles there are likely to be for an employee in one unit who wishes to seek a new job. Thus a woman office employee with several years of seniority may have to start all over in the plant if she seeks a better paying craft job, or she may face layoff in her office unit while more junior employees continue to work in the plant.<sup>28</sup>

There is also potential tension between full-time and part-time workers, whether or not they are in the same bargaining unit. Full-time workers often see part-timers as a threat—as a source of cheap labour, with lower wages and few fringe benefits. Thus it is in the interest of full-time workers to restrict the use of part-timers in order to protect full-time bargaining unit jobs.<sup>29</sup> This may be at the expense of employment opportunities for women, in or out of the bargaining unit, who feel that they can only work part-time because of family responsibilities.<sup>30</sup>

Not only the bargaining structure, but the very nature of collective bargaining affects its utility to promote equal opportunity and to remove occupational barriers. The setting of a bargaining agenda by a union is a political exercise which reflects a balancing of the interests within the bargaining unit. Action to promote equality will occur only if a negotiating committee feels it is important to develop provisions to aid target groups and worth the effort of selling them to the members of the bargaining unit. While provincial federations of labour have advocated equal opportunity for the target groups, through removal of barriers, equal pay for work of equal value, and affirmative action if necessary,<sup>31</sup> implementation of those initiatives within a bargaining unit will depend on such factors as the degree of representation of the target groups in the unit and the costs of such initiatives to other members. To the extent that an affirmative action program, for example, gives preference in promotion to a member of a

target group with significantly less seniority than a white male in the unit, there may well be opposition to the program.<sup>32</sup> Collective bargaining also requires constant tradeoffs, and wages tend to be the highest priority in bargaining.<sup>33</sup> Where an employer resists an expensive benefit for a target group unless the wage package reflects the added cost, the union may surrender that benefit for wages or some other financial benefit for another group.

All of this discussion assumes that equality issues are bargainable. In the public sector, this is not the case. Under the *Public Service Staff Relations Act*, for example, parties cannot bargain on the classification system (although this has important significance for equal pay claims) or the organization of the service, and promotions must be by "merit" under the *Public Service Employment Act*.<sup>34</sup>

While the bargaining climate may downplay the importance of equality measures, a union is not unconstrained in setting its bargaining agenda, for it is subject to a statutory duty of fair representation. The *Canada Labour Code*, like the legislation of most other jurisdictions, requires a trade union to represent all employees in the bargaining unit "fairly and without discrimination".<sup>35</sup> That section and its counterparts have not been interpreted in such a way as to prevent unions from making distinctions among interests in a bargaining unit, for the need to compromise competing interests is a recognized fact in collective bargaining. A leading American case, *Ford Motor Co. v. Huffman*,<sup>36</sup> is often cited in Canada. It upheld a union's decision to negotiate a seniority system that would favour veterans by crediting them with seniority for their period of military service during World War II. According to Burton J.:

*The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.*<sup>37</sup>

While there is deference to the union, labour boards have not been unaware of the potential for invidious distinctions among members in the negotiation of collective agreements. In *B.C. Distillery Co. Ltd.*, Chairman Weiler noted the importance of close scrutiny by the board when "job seniority" was at issue, because job seniority, based on length of service, determines an employee's rights to promotion and lay-off. Because of its importance to employees, union proposals affecting seniority should receive greater scrutiny than those concerning the distribution and size of the wage package. In the *Distillery* case, the issue was a "superseniority" clause for certain employees who had been active on the picket line during a strike, whereby those employees were moved to the top of the seniority list. The Board, despite its concern about such clauses, never finally determined whether the one in issue was valid.<sup>38</sup>

Because of the degree of deference shown by labour boards to negotiating teams, the duty of fair representation is really not a significant restraint on unions that either fail to address the interests of target groups or that negotiate special provisions to advance those interests. Overt discrimination against a group would be caught by the duty,<sup>39</sup> and the Board's concern about seniority in *B.C. Distillery* indicates



that provisions in a negotiated affirmative action program jeopardizing existing seniority systems might be open to close scrutiny. It can be inferred from the case that the Board would nevertheless accept as a justification for such a program the perceived need to advance the interests of disadvantaged groups. If the majority in the unit willingly ratified such a measure, it is most unlikely that a board would intervene to find a violation of the duty of fair representation.<sup>40</sup>

There are other drawbacks to and concerns about the use of collective bargaining, with a major problem being the point of impact: collective bargaining normally deals with an existing employment relationship, leaving it to the employer to make the initial hiring decisions (subject to collective agreement provisions governing the posting of vacancies within the bargaining unit prior to hiring outside). For target groups, it is important that change come about at the hiring stage, for in many workplaces it is not feasible to draw on the members of the target groups in the existing workforce for new training and promotion initiatives. Collective agreements could specify hiring criteria: that between York University and its faculty association, for example, requires the design of recruitment procedures to ensure that reasonable care is taken to seek out qualified female and Canadian candidates. The normal practice, however, is to leave hiring to the employer and to negotiate terms to cover promotions and the filling of vacancies within the bargaining unit.

Overall, collective bargaining is an important mechanism to be used to negotiate better working conditions and greater employment opportunities for target groups. Its efficacy will turn, in part, on the political strength of these groups in the unit, coupled with the degree of altruism in the remainder of the membership of the bargaining unit. The terms negotiated will also reflect both the bargaining climate and the employer's attitude: expanded benefits for women in the form of paid maternity leave or employer-subsidized daycare will be more attractive to the employer if other employees agree to accept less wages in return, but in recessionary times, with employers seeking takebacks from unions, new benefits or costly scheduling practices will be hard to achieve. Finally, there is an inevitable and ongoing tension between programs designed to facilitate employment opportunities for target groups and existing seniority rights, and members of a bargaining unit are unlikely to give up their rights based on seniority to aid target groups.<sup>41</sup> Thus, there are serious drawbacks in looking only to collective bargaining to promote equality within the organized workplace. For the unorganized and those not yet hired into a workplace, collective bargaining is of virtually no assistance. These groups must turn to government initiatives when employers do not voluntarily act to remove barriers to their employment or to facilitate their hiring and promotion.

#### III. GOVERNMENT INITIATIVES

There are various ways to promote employment opportunities for the target groups under study. Where there is overt discrimination against identifiable individuals, human rights codes and employment standards legislation provide remedies. The *Canadian Human Rights Act* applies to activities within federal legislative jurisdiction, prohibiting discrimination in employment on a series of grounds: race, national or ethnic origin, colour, religion, sex, age, marital status, family status, disability, and conviction for which a pardon has been

obtained.<sup>42</sup> Recently, the Act was amended to state that discrimination on the basis of pregnancy or child-birth is discrimination on the basis of sex<sup>43</sup>—a response to the Supreme Court of Canada decision in *Bliss v. A.-G. Can.*,<sup>44</sup> which will be discussed in more detail later in this paper.<sup>45</sup> Briefly, the decision stated, among other things, that discrimination on the basis of pregnancy was not sex discrimination under the *Canadian Bill of Rights*.<sup>46</sup> The *Canadian Human Rights Act* also requires the payment of equal pay for work of equal value to men and women employed in the same establishment.<sup>47</sup>

Provincial human rights legislation is similar to the federal, although the coverage may not be as wide. Alberta's *Individual's Rights Protection Act*, for example, does not preclude discrimination in employment on the basis of physical or mental handicap.<sup>48</sup> Provincial equal pay legislation is usually not of the "equal pay for work of equal value" type. Ontario's *Employment Standards Act* is typical, requiring "equal pay for equal work"—that is, for "substantially the same kind of work performed in the same establishment, the performance of which requires substantially the same skill, effort and responsibility and which is performed under similar working conditions".<sup>49</sup>

The difference in the scope of the legislation may be significant for purposes of this inquiry when one deals with federal Crown corporations or corporations wholly owned by the federal government, such as de Havilland Aircraft. The *Canadian Human Rights Act* extends only to matters coming within the legislative authority of the Parliament of Canada,<sup>50</sup> and this arguably may not extend to cover all Crown corporations. Labour relations matters have traditionally been held to fall within provincial legislative jurisdiction under s. 92(13) of the *Constitution Act, 1867* as "property and civil rights", with federal jurisdiction found where labour relations is an integral element of a subject within federal competence.<sup>51</sup> In the case of several Crown corporations, the business in which they are engaged is one traditionally within provincial legislative jurisdiction: de Havilland, for example, is engaged in manufacturing activity, while Petro-Canada conducts retail and refining activities. These business activities have traditionally been provincially regulated. Other Crown corporation activities are clearly outside provincial jurisdiction: Canadian National Railways, for example, is subject to federal regulation with regard to the labour relations of its railway operations, for the federal government has jurisdiction over inter-provincial railway transportation.<sup>52</sup>

Federal ownership is not determinative of the application of federal labour laws. CN's hotel operations, for example, are not subject to federal labour legislation, as they are not part of the railway undertaking.<sup>53</sup> In *Canada Labour Relations Board v. Canadian National Railway Co.*,<sup>54</sup> a dispute arose as to whether a union representing employees at Jasper Park Lodge should be certified under federal or provincial legislation. The predecessor of the *Canada Labour Code*, the *Industrial Relations and Disputes Investigation Act*, applied to "any corporation established to perform any function or duty on behalf of the Government of Canada", except to the extent that it was excluded by the Governor-in-Council.<sup>55</sup> The Supreme Court of Canada held that the words "on behalf of" in that section were a description of agency. The disclaimer of Crown agency in the *Canadian National Railways Act*,<sup>56</sup>

plus the inclusion of the CNR as a proprietary corporation in Schedule D of the *Financial Administration Act*,<sup>57</sup> indicated that the CNR and, therefore, its hotels, did not come within the federal labour legislation on the basis of ownership.<sup>58</sup>

Extrapolating from this, de Havilland would be subject to Ontario human rights legislation, as it is a federally incorporated company acquired through a share purchase and carrying on manufacturing activities. Its employees are currently certified under Ontario legislation. From the CNR case, one might infer that corporations that are stated to be agents of the Crown would be subject to federal human rights legislation, even if their sphere of activity is not explicitly within federal jurisdiction under the Constitution.<sup>59</sup> Petro-Canada is something of an anomaly, for it is described as an agent of the Crown,<sup>60</sup> yet it must comply with laws "applying generally to corporations engaged in businesses similar to those in which the Corporation is engaged".<sup>61</sup> This seems to indicate that Petro-Canada is subject to provincial labour laws, and, indeed, many of the collective agreements to which it is a party are under provincial legislation.<sup>62</sup>

Human rights legislation only provides a remedy for existing acts of discrimination, whether resulting from an intent to discriminate or, in some legislation, from the disparate impact of a facially neutral employment practice on a protected group.<sup>63</sup> Much more vigorous government action, beyond the enforcement of existing human rights laws, is felt by many to be necessary to improve employment opportunities for target groups. The first step that government could take is an end to discriminatory laws, which might arguably extend far beyond facially discriminatory laws to include those with disparate impact, such as employment standards laws guaranteeing benefits to full-time but not part-time workers. Secondly, government could act to remove barriers to employment, through measures such as legislated rights to universal paid maternity leave; accumulation of seniority and the preservation of benefits for those on maternity leave; preferential rights in employment for disabled employees on their return to work after an injury or illness; and elimination of safety rules that might prevent minority groups from working.<sup>64</sup> Special training programs aimed at these groups could also be established through government financing.

The government reports mentioned in the introduction to this paper would go further, for they stress the need for affirmative action programs within government and Crown corporations and extended to the private sector, at a minimum through contract compliance policies. The Parliamentary Committee on Employment Opportunities in the '80s is not especially clear in what it means by affirmative action: there is reference to the need for training programs, but no details about the affirmative action program's effect on hiring and promotion and whether target groups will be protected through quotas or preference despite lesser qualifications than other employees or applicants. In contrast, the Committee on the Disabled and Handicapped expressly stated that affirmative action programs should include special orientation, recruiting, training, and job advancement for disabled persons.<sup>65</sup>

Affirmative action programs have frequently been approved by the Saskatchewan Human Rights Commission. These have taken the form of goals established for the employment of target groups within a given time period. The

programs break down the workplace into various job classifications, such as managerial, clerical, and trades, and aim at achieving a situation where the percentage of employees in a classification is equal to the percentage of that group in the population in the relevant labour market.<sup>66</sup> Details of how this is to be done are not spelled out in the decisions that give approval to the programs.

Legislation to remove barriers or to promote equality through affirmative action must be scrutinized from a variety of perspectives: moral, economic, and legal. The following sections of this paper turn to the constitutional and labour relations constraints on such government action. The discussion of Charter of Rights restraints on government action is relevant not only to the question of the validity of new programs that might be adopted, but also to the validity of existing government legislation that is arguably discriminatory.

#### IV. CONSTITUTIONAL CONSTRAINTS ON GOVERNMENT ACTION

##### 1. Federalism

This discussion need not take up a great deal of space, for some of the content has been covered in the previous section. The federal government's legislative authority under the *Constitution Act, 1867* is limited to certain areas: for example, banking, broadcasting, aeronautics, interprovincial and international transportation (rail, trucking), navigation.<sup>67</sup> Labour relations in these areas is also federal, allowing the federal government to legislate employment standards or affirmative action for this sector. Otherwise, such legislation must come from the provinces, if the private sector is to be bound.

Obviously, the federal government can set standards for the federal public service, and it can also legislate with regard to the establishment and operation of Crown corporations, although those that are not agents of the federal Crown and not acting within section 91 jurisdiction will be subject to provincial labour laws.<sup>68</sup>

Should a valid provincial law conflict with a federal law, federal paramountcy is the rule, although the Supreme Court of Canada has adopted a narrow doctrine of paramountcy, finding a provincial law inoperative only if there is express conflict with a federal law. In *Multiple Access Ltd. v. McCutcheon*, the Court elaborated on this position stating that there is conflict only where compliance with one law leads to violation of another.<sup>69</sup> This might arise in the present context if a federal directive to a Crown corporation required affirmative action,<sup>70</sup> and such action constituted a violation of a provincial human rights code that would otherwise apply. In many cases, the Court avoids a finding of conflict by enjoining compliance with the stricter law.<sup>71</sup> Thus, if a provincial law provided for accumulation of seniority during maternity leave and a federal directive required only retention of accrued credits, one would comply with the stricter provincial law.

One way in which the federal government could extend an affirmative action program to the provincial private sector is through contract compliance, requiring government contractors to establish an affirmative action program or to meet certain labour standards. It is unlikely that federal contract compliance programs are subject to constitutional constraints under the *Constitution Act, 1867*, for they are an exercise of the federal spending power. While federal legislative powers are constrained by section 92 of the *Constitution*

Act, the Supreme Court has not overturned exercises of the spending power even if the federal funds are directed to an activity normally within provincial jurisdiction. Form, rather than substance, has guided the Court's deliberation.<sup>72</sup>

It is when the federal government wishes to act legislatively to address employment problems on a national basis that it faces constitutional obstacles, for primary legislative competence over labour relations is provincial. Similarly, the provinces have responsibility for education and training,<sup>73</sup> a fact that limits federal legislative initiatives in these areas and forces reliance on the spending power.

## 2. The Canadian Charter of Rights and Freedoms

Measures to remove barriers in employment and to promote equal opportunity will, in some cases, be vulnerable to challenge under the equality guarantee in section 15 of the *Canadian Charter of Rights and Freedoms*, which comes into force in April of 1985. This section will also be important if governments fail to act to promote equality, as some existing legislation will undoubtedly suffer attack.<sup>74</sup>

### a) Application of the Charter

The first question to address, in considering the effect of the Charter and section 15 in particular, is the application of the Charter. Equal employment initiatives may be legislated, but they may also result from formal directives by the Governor-in-Council or a Minister to Crown corporations,<sup>75</sup> from voluntary efforts by Crown corporations, or from contract compliance programs. Are all these types of action subject to Charter review?

To answer, one must start with section 32(1), which states:

*This Charter applies*

*(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories. . .*

Section 32(1)(b) extends the Charter to the provincial legislatures and governments.

This section would clearly cover legislative action by the federal Parliament, including the making of regulations.<sup>76</sup> It should also cover directives of the Cabinet authorized by legislation, for they are a form of governmental action. It has yet to be determined whether the section would cover contractual matters in the absence of legislation, applying to collective agreements that include allegedly discriminatory terms or to a contract compliance program, requiring affirmative action. It would seem that both should be subject to constitutional limitations, for the Charter is meant to restrict governmental action in the interest of certain fundamental rights of individuals. Those rights can be violated by exercises of the spending power or by contract terms, just as they can be infringed by direct legislative action. Moreover, the text to the Charter suggests that all government action is subject to scrutiny, in that sections 6(4) and 15(2) state that a "law, program or activity" aimed at assisting the unemployed in certain regions in the first section and disadvantaged groups in the second is not in violation of the mobility rights or equality guarantees, as the case may be. These words suggest that contractual activity should be governed by the Charter.<sup>77</sup>

More problematic is the issue whether the Charter would govern the employment practices of Crown corporations or corporations wholly owned by the government, when those corporations voluntarily adopt practices that appear to give special benefits to some groups and not others. Two cases to date have held that the Charter applies to provincial law societies when they exercise a statutorily conferred power to make regulations.<sup>78</sup> This "delegated legislation" function is not present in the case of Crown corporations, yet undoubtedly it will be argued that these bodies should be regarded as part of the federal government because they are owned and regulated by the government, albeit with differing degrees of governmental control and oversight. Courts may use a traditional Crown agency test to determine whether the Charter binds a particular corporation, focusing on the wording of the constituent statute or the degree of control by the Crown. The CBC, for example, is expressly stated to be a Crown agent by statute.<sup>79</sup> Air Canada, in contrast, is expressly not a Crown agent,<sup>80</sup> although the corporation's directors and president and chairman are Cabinet-appointed,<sup>81</sup> its by-laws must be approved by the Cabinet,<sup>82</sup> and it must comply with directions of a general nature given to it by the Governor-in-Council.<sup>83</sup> In interpreting the Charter, courts may be inclined to use the agency test, when a statute expressly uses the term. This criterion was significant to the Supreme Court in the *CNR* case discussed earlier,<sup>84</sup> and it is easy to apply. The courts may go even further and also use the common law test for agency—that is, government control—in order to capture government corporations closely controlled by the Crown, but expressly removed from an agency relationship.

Alternatively, the courts might use a governmental function test to decide if a particular corporation is bound by the Charter, asking whether the entity exercises some type of governmental or regulatory function or whether, instead, it engages in commercial functions that are not traditionally part of government. This approach uses an analogy to developing concepts of sovereign immunity in international law.<sup>85</sup> It is not an easy test to apply in Canada, with its long history of state capitalism, motivated by mixed objectives of policy and profit, which makes it difficult to distinguish "governmental" activity from commercial enterprise. The various corporations under study might end up with different positions under the Charter if this approach is adopted. De Havilland, a wholly-owned corporation established under the *Canada Business Corporations Act* and carrying on a manufacturing operation, would not likely be caught, while the CBC, an agent of the Crown, established by statute and wholly-owned by the government with a mandate to develop a national broadcasting system, might be subject to the Charter. Air Canada falls somewhere between: established and controlled by government through its board of directors, yet without agency status, it has many of the same functions as private commercial airlines like Canadian Pacific, which are not subject to the Charter.<sup>86</sup>

No one knows at this point how the courts will proceed. Professor Hogg suggests that the courts should draw on the case law dealing with Crown agents to determine the scope of section 32,<sup>87</sup> although he concedes that one could define government to exclude activities of a commercial, rather than a regulatory, nature.<sup>88</sup> At a minimum, courts interpreting section 32 will have to develop an approach to the term "government" that recognizes the complex and diverse ways in



which government engages in corporate activity. At this point, one can only suggest the possible lines of approach.

#### b) Section 15(1)

That brings us to the important substantive restraint in the Charter, Section 15. This may come in if government takes special protective measures to remove barriers to employment for target groups: paid maternity leave; mandatory employer-subsidized daycare facilities; prohibition of benefit plans that pay different amounts to men and women; or flexible work hours for certain groups. Alternatively, affirmative action programs may be ordered or adopted that give special preference in employment to target groups because they possess a particular characteristic.<sup>89</sup> These two types of action bring into consideration the two sections of Section 15. Section 15(1) is the equality guarantee, and it reads:

*Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

Section 15(2) exempts affirmative action programs from the right defined in Section 15(1):

*Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

Many of the initiatives mentioned above which might be taken to reduce barriers in employment will be open to challenge by those who do not receive the benefit of the government action. For example, maternity leave might be challenged by a male who seeks equivalent paternity leave to care for an infant.<sup>90</sup> Under the *Canadian Bill of Rights*, the deduction for childcare expenses in the *Income Tax Act* was challenged unsuccessfully by an ineligible man who argued that it violated the guarantee of equality before the law.<sup>91</sup>

The approach that courts will adopt to section 15(1) of the Charter can only be a subject of speculation at this time. Section 15(1) contains a number of guarantees of equality without discrimination: equality before the law, equality under the law, equal protection of the law, and equal benefit of the law. The apparently "catchall" list is a response to the jurisprudence of the Supreme Court of Canada in its interpretation of the equality guarantee in the *Canadian Bill of Rights*, which guaranteed "equality before the law and the protection of the law". A plurality of the Court in *Lavell* adopted a highly formal view of equality, requiring only equal application of the laws in the ordinary courts of the land.<sup>92</sup> By *Bliss*, the Court was distinguishing beneficial from punitive legislation, suggesting that the former would not be in violation of the Charter even if benefits varied for different groups.<sup>93</sup> Overall, the Court was extremely deferential to legislative classifications, looking only to whether groups were treated differently in order to achieve a "valid federal objective".<sup>94</sup> The majority of the Court seemed to treat this criterion as virtually synonymous with constitutional validity of the law under the distribution of powers.<sup>95</sup>

The wording of section 15(1) of the Charter is an attempt to obtain a more critical review of legislation by the courts. The provision will not be easy to interpret, however, for the interaction of sections 1 and 28 with section 15 (1) is unclear, as is the status of the "enumerated" grounds of discrimination. Section 1, the general limitation section, reads:

*The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

Section 28 states:

*Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.*

One reading of section 15(1) of the Charter is as an absolute guarantee of equality rights: there is to be no distinction between individuals and groups in the law. In practical terms, this is an impossible situation and could lead to great injustice,<sup>96</sup> so the focus must shift to section 1, which permits reasonable limits to the *prima facie* right to equal application of the law, if these limits are demonstrably justified in a free and democratic society. Decisions to date have held that the onus falls on the government to show the need for such limits on the guaranteed right,<sup>97</sup> although there is some uncertainty as to the cogency of the evidence that must be presented. Often, the courts have expressed the view that there is no longer a presumption of constitutionality and convincing evidence is needed to restrict a right.<sup>98</sup> Yet, in explaining the final outcome, the courts have shown a great deal of deference to the legislative determination as to the need for constraints.<sup>99</sup> This concern about the proper standard of review will be discussed in greater detail later in this paper.

This "absolutist" view can be seen as consistent with the structure of the Charter, which sets up many absolute guarantees, such as freedom of expression and association, and then subjects them to the general "reasonable limit" guarantee in section 1,<sup>100</sup> although it may be problematic when used for section 15(1). There is an alternative view of section 15(1) which incorporates reasonable limits within the section itself. This view rests on the premise that equality requires the like treatment of like individuals, but there is no denial of equality if those with different characteristics receive different treatment under the law; indeed, great injustice would occur with similar treatment for all. The important question which then must follow is which characteristic is relevant to a difference in treatment and, following from that, who makes the decision as to whether a characteristic is a relevant basis for distinction—the legislature or the courts? Governments must always use classifications in legislating, grouping people by characteristics in order to meet the objective of the legislation. Should their determination be upheld if there is a rational connection between the classification used by the legislation and the objective to be achieved?

At this point, the inquiry under section 1, if an absolutist position is adopted, becomes similar to the inquiry within section 15(1), if the "incorporation" view is applied: both must focus on the standard of review and the issue of onus, with the courts determining whether differential treatment is justified by possession of a characteristic relevant to the

objective of the legislation and whether the government has made a sufficient case for differential treatment. Whether one adopts an absolutist view, with ultimate resort to section 1, or the view that equality in section 15(1) is qualified, it is inevitable that American equal protection jurisprudence will be invoked as a guide. American courts interpreting the equal protection clause prior to the 1950s used a "reasonable classification" test.<sup>101</sup> In doing so, the courts looked mainly at the fit between the purpose of a law and the classification used to ensure that the classification was a reasonable means to meet the objective. Generally, laws were upheld on this basis, for the definition of the objective could be easily tailored to fit the classification used, and the courts were willing to accept arguments for over- and under-inclusiveness on the basis of administrative efficiency.

Over the years, the United States Supreme Court has moved beyond this "minimal scrutiny" standard to adopt a three-tiered approach to the scrutiny of legislation challenged under the equal protection clause. "Suspect classifications" are subject to "strict scrutiny", requiring a showing, by the government, of a compelling governmental interest that requires the classification and the lack of an alternative classification to meet that objective. Strict scrutiny tends to be fatal in fact to the legislation. The cases in which it is used are not altogether clear: certainly, race is highly suspect;<sup>102</sup> alien status has been said to be as well,<sup>103</sup> although the Court has upheld alienage classifications in several cases.<sup>104</sup> Strict scrutiny is also applied when a law burdens a "fundamental interest", such as the right to interstate travel or to vote.<sup>105</sup>

"Intermediate scrutiny" is used for sexual classifications.<sup>106</sup> Under this test, the government must show an important governmental objective and a substantial relationship between the classification and the achievement of that objective. This test is more rigorous than the "minimal scrutiny" or reasonable classification approach, which is the third test, but the result of intermediate scrutiny is not inevitably the striking down of the legislation.

The Supreme Court of Canada, under the *Canadian Bill of Rights*, adopted what could be called a minimal scrutiny approach, upholding federal legislation if it was aimed at achieving a valid federal objective.<sup>107</sup> The onus was on the challenger to the legislation to show invalidity, and this was a very heavy burden, for the majority in the Court generally did not scrutinize the legislation in a rigorous way. There was some sign of the development of a more careful scrutiny in the judgment of McIntyre J. in *MacKay v. The Queen*, a case dealing with the validity of a section in the *National Defence Act* providing for trial of a serviceman by court-martial for offences under the *Narcotics Control Act*. McIntyre J.'s language is reminiscent of the reasonable classification test in the United States, although it has the potential to be used to strike down legislation:

... as a minimum it would be necessary to inquire whether any inequality has been created for a valid federal constitutional objective, whether it has been created rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive to the provisions of the Canadian Bill of Rights, and whether it is a necessary departure from the general principle of universal

application of the law for the attainment of some necessary and desirable social objective.<sup>108</sup>

Although the U.S. has a long history of equal protection jurisprudence, the American tests are not readily transferable to the interpretation of the Canadian Charter. While section 15(1) has specified a list of characteristics that one might call "suspect" if used as a basis for differential legislative treatment, such as race, national or ethnic origin, colour, religion, sex, age, and mental or physical disability, it would be unwise for our courts to adopt a strict scrutiny approach similar to that in the United States, if the result is the inevitable striking down of much legislation. This is so for several reasons: first, such an approach would cause a tension between the equality guarantee and some other parts of the constitution. While section 15(1) prohibits discrimination on the basis of race, section 91(24) of the *Constitution Act, 1867* recognizes federal jurisdiction to legislate on behalf of Indians—that is, to use a racial classification. Similarly, sections 25 and 35 of the Charter guarantee aboriginal and treaty rights of the aboriginal peoples, while section 27 of the Charter provides that the document "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". All of these provisions suggest that some racial classifications should stand under the Charter, as might some laws using national or ethnic origin as a basis of classification.<sup>109</sup>

Another indication that the enumerated classes should not be suspect in the American sense arises from the inclusion of mental or physical disability within the list. There can be no doubt that many legislative restrictions on the basis of physical or mental disability are justified—for example, a prohibition on blind drivers. If some limits are reasonable under section 1 or within section 15(1) when mental or physical disability are used in legislation, Canadian courts will inevitably adopt a similar attitude to the other enumerated classes and find that some uses of these classifications are also justifiable. Sexual classification is, in my view, a special case because of section 28 and I will treat it separately.

A third concern about the wholesale adoption of U.S. case law is the different social and political ethos in Canada and the U.S., which might well lead to different results in the same fact situation. The U.S. cases express the values of a highly individualistic society, with a sad history of racism. The case law is correspondingly affected, virtually prohibiting racial classifications and emphasizing equality of opportunity without questioning the resulting equality in output—that is, whether government may take special measures to help certain groups or to equalize their position. Thus, the courts in the U.S. may not look to whether there is equality in fact from certain measures, as in the abortion funding case where the U.S. Supreme Court held that denial of federal funding for abortions did not violate the equal protection clause, despite the resultant inaccessibility to poor women, particularly blacks.<sup>110</sup> Canadians have a much more entrenched view of collective welfare than do Americans, and there is a strong tradition of governmental redistribution and welfare measures. One would hope this, plus the other factors outlined above, would influence Canadian courts to develop a Canadian jurisprudence in deciding whether differential treatment is justified.

While some use of the specified classifications in section 15 must be permissible, it is hoped that the courts, in deciding the scope of reasonable limits to the equality guarantee for the enumerated classes, will still be rigorous in their scrutiny, for all of the groups listed in section 15(1) have suffered from discrimination based on overt prejudice and stereotyping in the past, and the courts should be vigilant in searching for disabilities in legislation linked to possession of one of the enumerated characteristics. There is no hierarchy expressly established among the enumerated classes in the Charter, but it is logical to infer that governments will be able to prove the reasonableness of a limit more easily for some classes than for others. The categories easiest to contrast are race and physical or mental disability. Putting to one side the issue of special treatment for the native people, for they are in a unique constitutional position because of section 91(24) of the *Constitution Act*, race can only rarely be a relevant criterion for differential legislative treatment of individuals, particularly if race is seen as a disability in the scheme. In contrast, there are many circumstances in which mental and physical ability are obviously relevant to legislation in order to protect the safety of the disabled individual or others or to promote societal benefit, through the hiring of the most fit or competent. The courts will inevitably draw a distinction between these various classes when deciding whether a limit is reasonable.

Much more problematic would be a classification based on age, such as minimum age for drinking and voting or, at the other end of the spectrum, mandatory retirement. Whether such limits are reasonable depends on some difficult questions. Can we decide that possession of a characteristic generally corresponds to ability to do something, so as to warrant the same treatment for all members of a group? For example, are most 17-year-olds too immature to vote or drink, so that all can be barred from doing so? Are most 65-year-olds incapable of working, so that mandatory retirement is justified—without looking at the capacity of any individual? Secondly, can we weigh individual interests in equal treatment against the interests of the community as a whole? Again, to use the example of mandatory retirement, can we justify retirement of the aged, equipped with government pensions, so as to make way for young workers?

The answers to these questions turn on the judges' decision as to the concept of equality and their own view of judicial deference to legislative determinations. Dworkin argues that an individual has a right to be treated as an equal, with the same concern and respect as everyone else. Nevertheless, he finds that there are times when he or she may have to sacrifice a claim to be treated like everyone else because of the cost of doing so to the community as a whole or because of the inequity of equal treatment.<sup>111</sup> Others may advocate a more radical egalitarian view of the equality guarantee, prohibiting any consideration of community interests, such as the cost of full equality, for there is a danger in invoking community interests to override individual rights lest the individual always be sacrificed to the group's interest. Nevertheless, I suspect that Canadian judges will accept arguments that differential treatment can sometimes be justified to promote community goals.<sup>112</sup> In adopting such a view, they should be wary that classifications are not based on traditional stereotypes or prejudices, for individuals are then denied equal consideration.

Without concrete examples of legislation that might be subject to attack, it is impossible to go through a detailed analysis of the arguments to be made and the conclusions that could be drawn in a section 15(1) case. Before leaving the discussion of section 15(1), the impact of section 28 must be considered. Earlier, I suggested that there were two approaches to the interpretation of section 15—one stating that limits to the equality right were to be found only in section 1; the other stating that equality is a relative concept and so section 15(1) itself permits differential treatment of individuals. The distinction between these approaches may be significant because of section 28, the "equal rights amendment", which was quoted earlier, and an academic debate has arisen about its role in the Charter. Professor Gold, who argues that section 15(1) incorporates a reasonable limits test, has reached that position because of his concerns about the interaction of section 28 and the affirmative action provision in section 15(2) if another view is adopted. That subsection shelters affirmative action programs from a charge of violating section 15(1), expressly stating that a program or law aimed at protecting a disadvantaged group, including a group disadvantaged by sex, is constitutionally valid. Gold notes that section 28, which guarantees the rights and freedoms set out in the Charter equally to men and women, would prohibit an affirmative action program based on sex if section 15(1) is read as granting an absolute right to equality. This would occur because section 28 operates "notwithstanding" anything in the Charter (including section 1, presumably).<sup>113</sup> Therefore, it would prevent affirmative action programs for women. But, if section 15(1) allows for differential treatment of men and women in some cases, affirmative action for women would be possible without violating section 15(1). As section 28 only comes into play after the scope of section 15 rights is defined, there is no conflict between sections 15(2) and 28.

Professor Hogg avoids the potential problem of sections 15(2) and 28 by concluding that section 28 is applicable only to sections of the Charter other than the equality provision in section 15. He feels that the interaction of sections 28 and 15 would be redundant, for women are already guaranteed sexual equality by section 15(1).<sup>114</sup>

Hogg's conclusion is inconsistent with the concerns of the women who lobbied actively for the inclusion of section 28 because they wanted a strong guarantee of equality in the Charter. The brief of the Canadian Advisory Council on the Status of Women to the Special Joint Committee on the Constitution emphasized women's concerns about past interpretations of the equality guarantee in the *Canadian Bill of Rights*, with *Lavell* and *Bliss* the most controversial. The brief recommended (at a pre-section 28 stage) that sex, as well as race, colour, and national or ethnic origin, should never be a permissible characteristic for making distinctions in law. The recommendation arose because there was great fear about the effect of section 1 if specific protection for certain groups was not spelled out, and the courts resurrected the deferential attitude demonstrated under the *Canadian Bill of Rights*.<sup>115</sup> Women's groups later pushed for the inclusion of section 28 in the Charter to emphasize that sex is a suspect, if not prohibited, classification and that rights are guaranteed equally to men and women, whether in the application of section 15(1) or in any other area of the Charter. The word "notwithstanding" in section 28 is used apparently to signal



that section 28 is pre-eminent over section 1, when "reasonable limits" are considered. As well, it appears to limit the override clause, section 33, which allows legislatures to restrict certain "rights", including section 15.<sup>116</sup> If the equality right is guaranteed equally to men and women, a legislature could not, through section 33, impose a sexual classification which would otherwise violate the Charter.

Professor Tarnopolsky has recognized the concerns behind section 28, and he gives a much more effective interpretation to sections 28 and 15(2) than do Professors Hogg or Gold. He sees the purpose of section 28 as twofold: to prove that sex is inherently suspect if used as a classification and to prevent sections 1 and 33 from overriding the guarantee of sexual equality. In his view, section 15(2) is fully compatible with section 28 and would permit affirmative action for women, for section 15(2) "does not in itself provide for a right, but is merely an amplification of what the right includes".<sup>117</sup> Section 28 guarantees "rights" equally—but "equality rights", by definition in section 15(2), allow for affirmative action for disadvantaged groups, including women. This view of section 15 is not fully "absolutist", for it recognizes that affirmative action programs are allowed under section 15(2), even though they are a departure from absolute equality. However, Tarnopolsky seems to see any other departures as justified only if sections 1 and 28 so permit.<sup>118</sup>

Tarnopolsky's approach is preferable to those of Hogg and Gold because it recognizes the important equality concern behind section 28. As well, it is more compatible with the structure of the Charter, although it is not unproblematic—if the section 15(1) equality right departs from rigid egalitarianism to permit affirmative action programs, why not other differential treatment as well?

Gold tries to meet the charge that his view is incompatible with the structure in that it makes section 1 redundant by using section 1 to perform an onus shifting function. If a law uses a classification listed in section 15 (sex, race, age, etc.), the onus would shift to the defender of the legislation to justify it. If the law classifies on other grounds, the burden would remain on the challenger.<sup>119</sup> This use of section 1 seems highly artificial, for there is nothing in that section authorizing or suggesting a shift in the onus of proof in some cases but not in others. Section 1 seems to apply to all the rights and freedoms, which are generally set out in absolute, not qualified, terms. Section 28 then appears to exist as a trump which is invoked if a sexual classification is used.

What, then, will be the impact of section 28 on the equality jurisprudence? One reading of section 28 would prohibit any sexual classification, for section 28 appears to apply to section 1 and override it, guaranteeing full equality to men and women. If legislators wanted to treat women differently from men (for example, because of pregnancy), they could not do so. Neutral rules would have to be used: pregnancy would have to be treated like any other physical disability. To the extent maternity leave is also for nurturing purposes, such leave would have to be available to either parent. This is the way in which some American academics are trying to push the U.S. Supreme Court.<sup>120</sup>

I expect that the Canadian Supreme Court would be reluctant to adopt this approach; indeed, some women's groups might also be concerned about it, for an "androgynous"

approach may deny some important female roles and characteristics. There are some cases where sexual classifications may seem reasonable: privacy concerns in some employment settings, such as prisons; restrictions on the exposure of fertile women to workplace health hazards in order to protect reproductive capacity or a developing fetus; special provisions for maternity leave, recognizing that women are primary care givers.<sup>121</sup> One way around this dilemma is to revert to the view espoused earlier, allowing differential treatment of men and women within section 15(1)—but then what role for section 28?

I have suggested elsewhere an interpretation of section 28 that is not necessarily grammatically perfect and structurally conclusive, but that is aimed at interpreting section 28 so as to give it real effect, while at the same time acknowledging the view that some sexual classifications can be valid.<sup>122</sup> The thrust of section 1 of the Charter is that rights are not absolute—indeed, even without section 1, courts would have had to reach that conclusion, for an individual's rights must be limited, at times, so as not to infringe on the rights of others or (more controversially) to harm the community's interests significantly. Section 28, in protecting the rights "guaranteed" in the Charter, can be taken as accepting this view of the nature of rights. Nevertheless, its inclusion and its apparent avoidance of the section 33 override signals that sex is to be an extraordinarily suspect classification, whether in section 15 or the other sections, which requires compelling reasons for use—that is, it is more suspect than the other categories in section 15(1).

The weakness of this argument is that it is not grammatically pure, and it departs from the structure generally found in the Charter, which sets out absolute rights (unless expressly qualified) and then subjects them to section 1. Instead, I am advocating an implication of qualification within section 28. It may be useful to recall, in considering this argument, that section 28 was added well into the drafting process, and after the Joint Committee proceedings, when the initial structure of the Charter was well established. The concern of the women's lobby was the potential sweep of section 1 and, later, the danger of the override. That must suggest an intention that if sexual classifications can be used, then only for compelling reasons.

Would special measures for women and not for men, linked to child bearing and rearing, then survive Charter scrutiny? A preliminary question must first be addressed: would they be subject to strict scrutiny at all? The Supreme Court of Canada in *Bliss*<sup>123</sup> and the United States Supreme Court in *Geduldig v. Aiello*<sup>124</sup> both held that discrimination on the basis of pregnancy was not discrimination on the basis of sex, despite the disparate impact of such a classification on women. Title VII of the *Civil Rights Act* has since been amended to bar discrimination on the basis of pregnancy,<sup>125</sup> as has been the *Canadian Human Rights Act*.<sup>126</sup> The fact that legislation has been passed to state specifically that sex discrimination includes pregnancy discrimination may be used under the Charter to argue that omission of "pregnancy" as a suspect ground in section 15(1) leaves the *Bliss* holding intact. If discrimination on pregnancy is not sex discrimination, the courts may then adopt a less rigorous standard of review, holding such legislation valid if "reasonable". The tradition of such legislation, its importance to facilitating female

employment, and its provision for the traditional nurturing parent would then probably suffice to validate it.

Women's groups are understandably concerned about such a distinction between pregnancy discrimination and sex discrimination, for differential treatment on the basis of child-bearing capacity has been both a boon and a burden to women. Because sexuality and reproductive capacity are the major characteristics that distinguish men and women, the courts are wrong in treating classifications on these bases as non-sexual. A conclusion that a pregnancy classification is a sexual classification need not be fatal to the legislation, but the measure will require close scrutiny to determine whether the treatment is justified and whether other alternatives are available: for example, parental leave for the nurturing phase rather than maternity leave or occupational health standards at levels to protect the fetus as well as adults, so that women capable of bearing children can continue in the workplace. The courts have avoided such difficult questions under the *Canadian Bill of Rights*, but the Charter will require them to confront these issues.

### c) Section 15(2)

Section 15(2) will play an important role if governments institute affirmative action programs that give special advantages to members of a target group—e.g., by reserving places for them in training programs, by imposing quotas for their hiring and promotion, or by making membership in the target group a plus factor in selection for jobs or training. I am not speaking, thus, of "equal opportunity" programs, whereby the target groups are given special information services or support services to encourage them to apply for training or positions but are given no special advantages in the weighing of qualifications. While such services give a benefit to target groups not available to non-members, they do not invoke a charge that they constitute reverse discrimination against non-members, who despite equal or better qualifications are disadvantaged by their race or sex.

Reverse discrimination is a controversial moral problem which, in the United States, continues to be a grave constitutional problem as well. Section 15(2), by protecting affirmative action programs from an attack under section 15(1), tried to avoid the controversy in the U.S. over whether such programs deny equal protection of the law. There, affirmative action programs have been attacked as a violation of the equality guarantee. In the famous *Bakke* case,<sup>127</sup> an affirmative action program at the medical school of the University of California-Davis was attacked. A number of places in the entering class were reserved for minorities with the result that minority students were admitted who had lower grades than white applicants. The United States Supreme Court failed to reach a clear majority on the issue of the constitutionality of affirmative action programs. Mr. Justice Powell rejected the argument that benign discrimination does not violate the Fourteenth Amendment, for he felt that there was no principled way for the judiciary to determine the groups meriting special treatment.<sup>128</sup> He voiced concern that such programs would reinforce stereotypes and increase racial antagonism, as well as inequitably impose costs on innocent individuals deprived of educational opportunity. Racial classifications are traditionally subjected to strict scrutiny, requiring a compelling state interest to be justified and a necessity for a

racial classification in order to achieve the legislative purpose. As Powell J. could find no compelling reason to justify the program in this case, such as the need for more doctors to serve the disadvantaged, he held that the plan must fail.

Four judges (Brennan, White, Marshall, and Blackmun JJ.) held that a program should be subject to less strict scrutiny when dealing with a race-conscious remedy designed to redress the effects of past societal discrimination.<sup>129</sup> They would have upheld the program in order to overcome substantial and chronic minority underrepresentation in the profession, when such underrepresentation could reasonably be traced to past racial discrimination. These four also agreed with Powell J. that a state could consider race as a competitive factor in university admissions in the interest of achieving a more diverse student body. Such an objective was held to be a permissible one, but for Powell J., a quota would be wrong.<sup>130</sup> The remaining four judges never reached the constitutional issue, disposing of the case on the basis of Title VI of the *Civil Rights Act of 1964*, which in section 601 prohibits discrimination on account of race by any entity or program receiving federal assistance.

The uncertainty in American jurisprudence left by *Bakke* turned into outright confusion after the decision in the *Weber* case.<sup>131</sup> There, an employer and union had voluntarily negotiated an affirmative action program that reserved 50 per cent of the positions in an in-plant craft training program for blacks until the percentage of black workers in the plant equalled the percentage of black workers in the local labour force. A white worker, Weber, attacked the plan as a violation of the prohibition on racial discrimination in employment found in section 703 of Title VII of the *Civil Rights Act of 1964*, for he had more seniority than black employees selected for craft training. A majority of the Supreme Court (5 to 2) held that Title VII should not be read literally. A voluntary private affirmative action program would be valid here because it was designed to break down old patterns of racial segregation in the craft unions; it would open up employment opportunities for blacks in areas where they had not traditionally been employed; and it would not unnecessarily harm the interests of white workers, for it was a temporary measure that did not absolutely bar white advancement.<sup>132</sup>

A detailed analysis of these cases is unnecessary here, and a great deal of writing exists on the significance of the two cases.<sup>133</sup> The Canadian Charter in section 15(2) tries to avoid the controversial issue of whether affirmative action programs *per se* violate the equality guarantee by explicitly qualifying that guarantee, as set out in section 15(1), and by stating that equality rights are not denied if affirmative action programs are adopted or legislated. This is consistent with the practice under some Canadian human rights legislation permitting the human rights commission to approve affirmative action programs, which are then exempted from the strictures against employment discrimination found elsewhere in the statute,<sup>134</sup> or exempting programs that aim at reducing or eliminating disadvantages to specified groups.<sup>135</sup>

Some would no doubt argue that section 15(2) was an unnecessary addition to the Charter, for preferential programs for disadvantaged groups are not a violation of equality rights. In the United States, for example, many philosophers and constitutional lawyers have taken this position. It rests on two primary justifications: first, preference is justified if it

compensates those individuals who have been harmed by past discrimination, for it is a remedy to make them whole.<sup>136</sup> Those claiming recompense have a stronger claim than those claiming equal consideration. Secondly, preferential treatment for disadvantaged groups is justifiable in order to achieve a more equal society—one where race or sex or national origin ultimately becomes irrelevant.<sup>137</sup> This second justification is more controversial than the first, for it seems to sacrifice the "right" of white males to equal consideration of their qualifications and selection according to merit to the community's goal of greater equality, and a utilitarian argument such as this is problematic for those who believe justice prevents the sacrifice of rights to community goals. The response of the defenders of preferential treatment is to deny the existence of a right to equal consideration or to selection according to merit.<sup>138</sup>

A detailed analysis of the arguments for or against preferential treatment is beyond the scope of this paper. Section 15(2) of the Charter is an attempt to avoid the debate in the courts, but controversy about the interpretation of section 15(2) will nevertheless arise: what is the meaning of "disadvantaged individuals or groups", and what evidence is necessary to prove disadvantage? The determination of "disadvantage" could be controversial. For example, a program instituting quotas for the hiring of women and minorities in all classifications of a company might be challenged by a white male barred from a job who argues that women or minorities have not been discriminated against by that corporation in past hiring (e.g., because there were no or few qualified female and minority applicants for certain positions). Alternatively, a white male displaced by a less qualified woman in a job competition because of a quota might argue that she, personally, is not "disadvantaged"—that she has had all the educational opportunities that he has had or more and has not suffered from either direct or systemic discrimination. Would a program be saved by arguing that women or minorities as groups have traditionally been disadvantaged in society because of stereotyping in education and career plans, and, therefore, should now be aided, even if some individuals in the group have not suffered or if the employer adopting a program has not discriminated?

There is little to guide us in anticipating the interpretation of section 15(2). Commentators on section 15 have had little to say about this subsection and have not focused on this problem.<sup>139</sup> One Supreme Court of Canada case in the past has touched on affirmative action programs. In *Athabasca Tribal Council*, four of nine judges discussed the validity of an affirmative action program for native people in the construction and operation of a tar sands plant in northern Alberta.<sup>140</sup> A majority of the Alberta Court of Appeal had held that such a program would violate the prohibition on racial discrimination in employment found in Alberta's *Individual's Rights Protection Act*.<sup>141</sup> Details of the plan are sparse, but it included native recruitment centres, annual goals for training and employment of native people, establishment of training programs by Alsands and subcontractors to train natives, support centres, etc. Laycraft J.A. in the Court of Appeal noted that people living in the general vicinity of the plant suffered social, economic, and educational disadvantages when compared to other Albertans. Their unemployment rates could exceed 50 per cent compared to a provincial average of 5 per cent.<sup>142</sup> Ritchie J., with three other justices concurring,

held, in the Supreme Court of Canada, that such a program would be valid:

*In the present case what is involved is a proposal designed to improve the lot of native peoples with a view to enabling them to compete as nearly as possible on equal terms with other members of the community who are seeking employment in the tar sands plant.... The purpose of the plan as I understand it is not to displace non-Indians from their employment, but rather to advance the lot of the Indians so that they may be in a competitive position to obtain employment without regard to the handicaps which their race has inherited.*<sup>143</sup>

This passage is interesting in two respects. First, there does not seem to have been a great deal of evidence about the disadvantage facing native groups; rather, Ritchie J. seems to have taken judicial notice of their situation. This is not surprising, for their disadvantage is well known in Canada. For other groups, such as women or, more likely, visible minorities, a court might be less willing to draw conclusions of disadvantage and might require some evidence to show this existed. Secondly, the passage shows a great deal of sympathy for the plan, which Ritchie J. says is not designed to displace non-natives from employment. One might question whether that is a proper conclusion to draw, for hiring goals (although not quotas *per se*) were part of the program. Were there clearer plans to displace whites, one might wonder if the Court would have scrutinized the plan more closely.

Applying *Athabasca* to section 15(2) cases under the Charter, it might be argued that the determination as to whether a group or individual is disadvantaged should be left to political decision-makers, with the courts intervening only if the decision is unreasonable. Powell J. in *Bakke* indicated a judicial preference not to make such determinations:

*The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.*<sup>144</sup>

Canadian judges will undoubtedly feel the same reluctance to rank disadvantaged groups and to evaluate degrees of disadvantage, yet their failure to do so can result in unfair disadvantage to those excluded from jobs and training by the affirmative action program. For example, it is arguable that the progress of visible minorities in the workplace is largely a function of their immigrant status and inadequate educational background or linguistic skills, rather than overt discrimination. Can they then be called "disadvantaged" because of race?

Another important question a court will have to address, when section 15(2) is in issue, is how widely one defines the disadvantaged group. Can an affirmative action program for women, with targets or quotas for hiring and promotion at all levels of the enterprise, be justified on the basis that women, as a sex, have traditionally been employed in lower paying job ghettos, such as clerical and service work, and the hypothetical program is designed to move them into better-paying jobs in order to create a more equal workplace, to protect them from the dangers of unemployment caused by



technological change, and to provide role models for other women? The potential problem with such a program is its sweeping nature—the most qualified candidate for many positions may be a male, and one must be concerned about injustice to him, for he is denied access to a position on the basis of an immutable characteristic, his sex, despite his merit. This appears particularly problematic when we have a male who has educated himself despite a deprived background facing a young woman from a more privileged background who has suffered no apparent detriment. That is true of many young women in white collar and professional jobs who will benefit from these programs: their educational background has been as good as or better than that of many males, and they have suffered no apparent disadvantage, unlike their mothers' generation.

A program that encompasses all members of the group, despite the lack of personal disadvantage of some individuals, might be defended by an argument linking the overall objective of the program with the interests of the clearly disadvantaged members of the group. Even if an individual free of disadvantage is aided by the program, it can be argued that advancement of any member of the group is beneficial to all the others: they may derive vicarious satisfaction from the advancement of their counterparts and the individuals promoted or hired may provide role models for other members to follow. As well, their advancement into non-traditional jobs may break down stereotypes of what members of that group can or cannot do.<sup>145</sup>

These arguments of the link between ends and means are, of course, speculative and can be met by other arguments. One may question whether vicarious satisfaction is indeed given to others in the disadvantaged group by the advancement of some members and, even if so, whether that justifies a sweeping affirmative action program depriving the most meritorious candidates from job opportunities. The program may also reinforce stereotypes of incompetence rather than break them down, if less qualified candidates from target groups are advanced, and even if those advanced provide role models, the role models may not be very effective if they carry a stigma of incompetence.<sup>146</sup>

Another argument for a "wholesale" view of the disadvantaged group, sweeping in all members, might be made: visible minorities and women, for that matter, suffer from suspicion and stereotyping in our society, although individual cases of discrimination are difficult to prove. Therefore, we need special efforts to mix groups in the workplace to remove these negative attitudes and to move towards a more equal society.<sup>147</sup> The difficulty with this argument lies in the lack of close connection between the disadvantage (general societal attitudes) and the action taken to alleviate the problem (quotas in employment).<sup>148</sup> As well, one must be concerned by the inequity to those barred from jobs, although well qualified, by characteristics over which they have no control.<sup>149</sup>

The discussion of both visible minorities and women has touched on the connection between the disadvantage suffered by the group and the means that may be taken to ameliorate their condition. Identification of the disadvantaged is a potential issue in all affirmative action programs; so, too, is the question of where the disadvantage occurred. Consider the legality of a program that orders a quota for women in

each category of jobs in a workplace—executive, engineering, clerical, production—based on the percentage of women in the local labour force. The protest is made by the employer, "Women have never been more than one per cent of the applicants for engineering jobs, yet you tell us we must have forty per cent in our department. There aren't that many of them in the market." The concern is that while women as a group may have been disadvantaged in our society, the disadvantage does not exist at this stage of employment: rather, the disadvantage was earlier in life—in the educational experience and socialization about roles. Disadvantage for women has arisen in access to some forms of career training, such as apprenticeship, whether because of overt discrimination or societal pressure to avoid such a career pattern. A male employee, competing for a job with a qualified female craft worker, might argue that affirmative action is improper at the hiring stage, for the disadvantage to the female group that warrants redress is at the educational stage. Once women are trained, they should be at the same starting line as males, and no longer treated as a disadvantaged group. This would justify training tailored to the target group, but not job preference.<sup>150</sup>

One can expect some reluctance by Canadian courts to second-guess a legislative decision that a group is disadvantaged or that a particular measure will effectively alleviate that disadvantage,<sup>151</sup> although the scope for judicial activism exists under section 15(2). The courts may ground their reluctance to interfere on democratic process grounds: if a democratic body such as a legislature decides to disadvantage the dominant political group, white males, to advance the interest of those who traditionally have less power (women, natives, immigrants), courts should not overturn the decision. But the inherent controversy in these questions and the potential for inequity should, at a minimum, require some signal from the government as to why one group is disadvantaged and how this program is aimed at reducing that disadvantage.<sup>152</sup> While the tradition of judicial deference to legislatures will lead the courts to accept many legislative decisions that affirmative action is needed, the concern that such programs may cause reverse discrimination justifies some judicial oversight.

Before leaving the discussion of section 15(2), there is one final application issue that remains. It might be argued that legislation to remove some employment barriers, for example, through better maternity leave or daycare, is supportable on the basis that such measures fall within the affirmative action exemption in section 15(2) and, therefore, they need not be subjected to detailed scrutiny under section 15(1).<sup>153</sup> The rationale would be that these are measures designed to benefit a disadvantaged group—women in this case. It is to be hoped that the courts will be persuaded to give a more restrictive reading than this to section 15(2), for otherwise any measure aimed at aiding women or a racial group would arguably be immune from review (provided the court accepted the governmental conclusion that women or a race, in general, could be a disadvantaged group). That has potentially severe "reverse discrimination" implications for males or non-members of the particular group. As well, that view can reinforce harmful stereotypes, for example, by continuing to assign primary parenting responsibility to the female parent or by protecting women through the imposition of

barriers to equal opportunity.<sup>154</sup> To avoid such "perils of protection", the courts ought to restrict the scope of section 15(2) to what we think of now as the controversial type of affirmative action programs: special training, hiring, job creation, or promotion policies to which a target group has some degree of privileged access. General employment standards legislation applicable to all working women, as in the maternity leave or childcare deduction examples, would then fall for scrutiny under section 15(1), as would measures to remove barriers to physical access of the handicapped.

This approach would be consistent with both subsections of section 15. The affirmative action provision in section 15(2) is included to save affirmative action programs that could otherwise be attacked as reverse discrimination, because qualification or eligibility for some benefit or participation in some program turns on the possession of a characteristic, the use of which sections 15(1) and 1 might otherwise prohibit. A benefit like maternity leave for women is not discriminatory against men—at least to the extent that it protects the birthing process, for it recognizes a biological difference between the sexes. It needs no protection from section 15(1), for, as women are different from men in their ability to give birth, differential treatment of men and women that recognizes this is not a denial of equal protection.

#### V. LABOUR RELATIONS AND AFFIRMATIVE ACTION

Many of the measures that governments might take to promote equality will not be controversial within the labour movement—for example, better training programs for target groups, better maternity leave.<sup>155</sup> The major concern of the labour movement with regard to equality measures will be the impact on the employment security of existing members of the work force. Initial hiring, as I indicated earlier, has largely been left to management, subject to a common requirement that management must first post job vacancies for the consideration of the bargaining unit members and may hire outside only after the provisions of the collective agreement have been observed: for example, if no qualified candidates from the bargaining unit are found. If affirmative action programs are instituted, requiring quotas or even goals for hiring target groups,<sup>156</sup> there is no threat to existing jobs, and unions may well support the initiative.<sup>157</sup> If the program also requires quotas on promotions and maintenance of the racial and sexual mix of workers during layoffs, there is understandable concern that the interests of some members of the bargaining unit—particularly long service white males—will be harmed. These equality measures are regarded as a threat to the seniority system, which is central to labour relations in an organized setting.

One of the major objectives in organizing a workplace and seeking collective bargaining rights is to reduce the unlimited discretion of management to affect terms and conditions of employment. Clauses protecting employees against discipline or discharge without just cause are an early priority in bargaining, as are seniority clauses to protect benefits and job entitlement.<sup>158</sup> Seniority is important in many ways. What can be called "benefit seniority" ties entitlement to benefits—such as vacation, pension, and bidding for work schedules—to length of service. "Competitive status seniority" can give an employee a "leg up" in competitions for jobs, in layoffs, or in transfers. For example, in job postings, there are two classic types of entitlement clauses: sufficient

ability and competitive clauses.<sup>159</sup> With a sufficient ability clause, the senior applicant gets the job if he is qualified, while in the competitive type of clause, the senior employee succeeds if he is "relatively equal" to the other best candidate(s). "Relative equality" has been held to mean that there is no substantial margin between them.<sup>160</sup> There are, as well, variations on this theme, where seniority, skill, and ability are all factored into the decision.<sup>161</sup> Similarly, on layoffs, it is common to give greater security to a senior employee, retaining him over a junior employee, if he is qualified for the job. He may be also allowed to bump into a junior employee's job if qualified to do the work.

The seniority achieved is not necessarily synonymous with length of service in a company, for the scope of seniority rights is negotiable. Some collective agreements provide for plant-wide seniority, others for departmental or occupational/classification seniority.<sup>162</sup> It is usually in the employer's interest to narrow the scope of seniority rights in order to reduce the disruption from the exercise of bumping rights and to reduce the cost of training on promotions. Normally, seniority is acquired in the bargaining unit, and it is often lost if the employee transfers out of the unit, even if he later returns. An employee moving from one bargaining unit to another within the same corporation will frequently have to start at the bottom of the seniority list.<sup>163</sup>

When affirmative action programs are proposed, there is an obvious threat to seniority rights. No longer do promotions turn on skill and ability, coupled with seniority. Now, possession of a characteristic that some in the bargaining unit do not possess—race or sex—may determine promotion. More importantly, because of the impact on economic security, possession of that characteristic may determine lay-off as well: if a quota of the target group members must be retained by the employer, more junior employees in that group may be retained in employment while a senior employee is laid off. The fundamental principle that unions seek to negotiate of "last hired, first fired" is then violated, and employees whose seniority rights are not respected perceive a great injustice and an interference with rights vested in them by the collective agreement.<sup>164</sup>

There is, then, a tension between seniority systems and affirmative action for target groups within the workplace after hiring, especially in recessionary times. When target groups seek access to jobs that they have not traditionally filled, they may be prevented from doing so by the bargaining structure: a job competition may be open only to members of a bargaining unit to which they do not belong or entry to that new bargaining unit may require surrender of the security of seniority acquired in another unit or workplace. Once in the unit, their lesser seniority can be an obstacle in seeking further promotion. In recessionary times, with layoffs a common occurrence, the target groups may be the first laid off.<sup>165</sup>

What is the implication of affirmative action programs in the organized workplace when goals or quotas for target groups are required at each level in the workplace? The response of many will be that this is reverse discrimination against those excluded or now disadvantaged by race or sex and unfair in result because of the impact on seniority rights and the merit principle. Once again, a detailed examination of the ethical debate over affirmative action is beyond the scope of this paper, although, again, a brief overview of the

competing arguments is necessary. The most persuasive argument is that affirmative action is necessary to compensate those harmed by past discrimination: individuals discriminated against by an employer in the past should be given special consideration in order to compensate them for past harm. From this perspective, those who are detrimentally affected—those laid off before this new hire or bypassed for promotion because the person discriminated against is given constructive seniority—cannot really complain that they have been unfairly treated. Had discrimination not occurred, the discriminatee would have been hired first and earned greater seniority.<sup>166</sup> This is a relatively narrow view of affirmative action, linking it to direct discrimination.

Most advocates of affirmative action want to go much further than protecting the identifiable victims of past discrimination. They want to address systemic discrimination—the effects of employment practices and attitudes that have limited the access of target groups to the workplace and the pervasive discrimination against certain groups in society. Even if a native person cannot show she is a victim of direct discrimination, there is a history of societal discrimination against native people and a culture of poverty that needs attention. To help individuals break out of this culture and to break down stereotypes, affirmative action is advocated.<sup>167</sup> One can see this argument as instrumental, in the sense that it rests on the view the community will be better off if poverty is reduced and employment opportunities found for those chronically underemployed. It is also idealistic, in the sense that the program is designed to bring us closer to the goal of a just and equitable society. Affirmative action can also be seen as a response to the concern that discrimination is subtle and ongoing in our society and can only be reduced by quotas or targets.

There are, of course, competing concerns because of the distributional impact of such programs, especially in recessionary times. In hiring, the young white male gets bypassed even though much of the worst discrimination against target groups occurred in the past by another generation. A white male may be bypassed for promotion despite better qualifications than the member of the target group, or he may be laid off despite longer seniority. Each then bears the burden of discrimination caused by the society at large and, perhaps, by his employer. Some would say that no injustice occurs, for he bears some of the responsibility for past discrimination as a member of the dominant (male) class.<sup>168</sup> That statement is grossly unfair when applied on an individual level, for the male employee in the workplace or the individual citizen is assigned guilt for actions over which he had no real control. The burden of compensation for the collective guilt of society is assigned to individuals who have had a minimal role in the wrongdoing.<sup>169</sup>

Moreover, the "remedy" that affirmative action programs provide is often suspect in its incidence. The beneficiaries of quotas may well be those who have not been the most disadvantaged in their group—the young, well-educated woman is often the beneficiary of the program instead of the older generation of women who faced severe impediments to employment.

Controversy also surrounds affirmative action programs because they often sacrifice competence to the goal of a more diverse workplace. Selection based on the greatest

competence to do a job is an attractive distributional principle because it results in benefit to the community as a whole. Under this principle, an individual is denied employment because of criteria related to job performance, and not because of some unalterable personal characteristic unrelated to the job.<sup>170</sup> If target group members are given special preference for a job when they are less qualified than non-members, there is a cost to the community as well as to individual workers. This is particularly true if the target group member has not met even minimal qualifications.

This cost criticism is less telling in some contexts than in others. In some jobs, the need is for an adequate level of competence, and any number of people can be regarded as "competent". This is particularly true of entry level jobs with minimal or no skill requirements and training on the job. Hiring might well be expected to reflect the makeup of the applicant pool. On promotions, in unionized workplaces where jobs only require a threshold of competence, seniority has been used as a tiebreaker between job claimants. It could be argued that race or sex would be equally effective as a tiebreaker, in the interests of obtaining a more diverse workplace and/or to eliminate subtle discrimination. The problem, of course, is that some employees within the workplace are then barred from opportunity on the non-neutral basis of race or sex. Seniority is more attractive in that it is more obviously neutral—if you stay long enough in the unit, you get your turn; everyone ultimately has a chance.

If an employer wants not just competence, but the most competent, as in executive, professional or skilled jobs, the tension between affirmative action programs and merit is great. There may be cases where two candidates are relatively equal, and we need a tiebreaker such as sex, race, or seniority, but often, there will be a spectrum along which applicants are found. An affirmative action program that gives special bonus points for race or sex can be seen as harmful for the reasons already canvassed: to the community, to the best-qualified candidate, and perhaps to the target group as well, because the stereotype of incompetence associated with that group may be reinforced. Defenders of affirmative action avoid this argument by pointing out that merit is often not the sole criterion for jobs, and thus sex or race should be considered if a candidate has a certain minimal level of qualifications.<sup>171</sup>

The controversy over affirmative action and labour relations is an ongoing one in the United States. In *Weber*, discussed earlier,<sup>172</sup> the United States Supreme Court upheld an affirmative action program negotiated by an employer and union. There have been numerous cases dealing with the interaction of racial discrimination and seniority systems under the *Civil Rights Act of 1964*. Title VII prohibits discrimination in employment, but recognizes the importance of seniority to the labour movement by an express provision in section 703(h):

*... it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.*<sup>173</sup>



Many cases have dealt with this section, usually in the context of whether the courts can order changes in a seniority system because of a finding of past racial discrimination by the employer. In *Franks v. Bowman Transportation Co.*,<sup>174</sup> the Court found that the employer had engaged in discriminatory hiring, promotion, and discharge practices. A group of individuals who had been prejudiced by these practices sought and were awarded constructive seniority: that is, each was to be given the seniority he would have earned, had he been hired when he applied earlier. The result, the Court held, did not deprive white employees of seniority, for had there been no discrimination, the black employees would have earned a place on the seniority list.<sup>175</sup> Powell J., in dissent, disagreed, pointing out that innocent employees would be harmed by the award of such competitive seniority if layoffs should occur. Absent some showing of collusion by a particular employee, Powell J. would not award retroactive competitive seniority.<sup>176</sup>

Shortly thereafter the Court decided *International Brotherhood of Teamsters v. United States*.<sup>177</sup> Here, there was a direct attack on the seniority system. The employer had discriminated in hiring line drivers, employing blacks in less desirable jobs as servicemen or as local city drivers. Discrimination also occurred with regard to hiring and transfers. The seniority system was alleged to be discriminatory, because it perpetuated the effects of past discrimination in that a black employee who now sought a transfer to a line driver position would have to forfeit all his seniority. The Court nevertheless upheld the seniority system, even though it perpetuated the effects of prior discrimination: it was a *bona fide* seniority system protected by section 703(h), which applied to both whites and blacks.

The Court continues to hold that a seniority system can only be attacked under anti-discrimination legislation if it was adopted in order to discriminate. This is true even if the seniority system has ongoing discriminatory consequences.<sup>178</sup> To quote White J. in *American Tobacco Co.*:<sup>179</sup>

*Under s. 703(h), the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved.*

The Court has only recently dealt with layoff cases in which minorities who are laid off in accordance with a seniority list have claimed that there has been discrimination. In two cases, the issue was avoided. In *Guardians Association*<sup>180</sup> the Court held that individuals who had been denied employment because of the discriminatory impact of an entry-level examination were entitled only to injunctive relief under Title VI, the part of the *Civil Rights Act* that prohibits discrimination in any program receiving federal funds. The individuals, who claimed constructive seniority, were denied that form of relief because it was retroactive—a form of compensation for past actions. Only equitable relief to enforce future compliance was permissible absent a showing of intention to discriminate.<sup>181</sup>

In the *Boston Firefighters*<sup>182</sup> case, the Court of Appeal for the First Circuit had held that the City of Boston could be compelled to maintain the racial status quo achieved at the time layoffs had become necessary. The City had been increasing the number of minority recruits pursuant to a consent decree to remedy present and past racial discrimination,

and layoffs by seniority would destroy the advances made since the consent decree. Therefore, the Court of Appeal ordered that the number of blacks and Hispanics be maintained, even though the statutory seniority clause was in conflict with this order and the individuals protected were not identifiable victims of past discrimination.

An appeal to the U.S. Supreme Court was taken, but that Court held the case to be moot since Massachusetts had enacted a law giving the City of Boston new revenues and requiring reinstatement of all those laid off.<sup>183</sup> If the Court had been asked to rule on the case, it would have had to depart from past decisions, which had allowed interference with seniority systems only to remedy past acts of discrimination against identified individuals.

In the *Memphis Firefighters* case,<sup>184</sup> a black employee challenged layoffs by seniority. The City of Memphis, in response to a class action suit claiming a violation of Title VII in the fire department, had agreed to a consent decree to remedy hiring and promotion practices with respect to blacks. The ultimate goal was a proportion of blacks in each job classification proportional to the number of blacks in the county labour force. No award of seniority was made to any minority employee. When the City undertook layoffs for financial reasons, it did so on the basis of seniority and 15 of the 40 employees laid off would be black. An effort was then made to prevent the layoff of any blacks, but a majority of the Supreme Court rejected the argument. Once again, section 703(h) of the *Civil Rights Act* was invoked: the city was applying a *bona fide* seniority system and had no intention to discriminate against the minority; therefore, the layoffs were in order. A minority employee can only claim competitive seniority if he or she has been an actual victim of discrimination by the employer.<sup>185</sup>

The U.S. cases are not particularly helpful in Canada. The American Court has been concerned with the interpretation of a particular statute, the *Civil Rights Act*, and it has been badly divided in its holdings in the cases. One sees in these cases, not surprisingly, a real awareness of the tension between seniority rights of incumbent employees and the claims for advancement of minorities who have suffered discrimination in the past—either personally or collectively. It is interesting to note the Court's concern for the incumbent, for in all the cases except the *Boston* and *Memphis* cases, the Court dealt with the strongest type of claim for affirmative action and for a racially-prescribed remedy: that from an individual who has actually suffered discrimination because of the practices of a particular employer. These are not cases of affirmative action interfering with seniority rights to remedy general societal attitudes or to advance the interests of certain groups.

In Canada, the advocates of affirmative action have in mind both types of programs: those addressed to direct discrimination in the past and those aimed at systemic discrimination. Both raise equity issues, with the magnitude depending on the type of program. The program designed to remedy past discrimination by the employer and to compensate actual victims through hiring and constructive seniority does interfere with incumbents' seniority rights, to the extent that they are superseded on the seniority list, but, had the discrimination not occurred, the seniority list would have placed them behind the discriminatee. It is difficult to defend a claim

that they should be preferred, when their claim rests on overt discrimination—albeit, not by them personally.

Once the program goes beyond this, the problems become more complex. The least disruptive program to existing seniority rights would be one directing resources to pre-employment training and information programs, designed to put target groups at the same starting line as others in the workforce.<sup>186</sup> That may not be enough if there is concern about present but subtle discrimination in hiring. Then the question of quotas or goals becomes an issue.

Neither quotas nor goals at the entry level hiring stage interfere with the rights of incumbent employees, although the equity to those excluded is a serious question, as is the cost to society of excluding more competent applicants. Goals have the advantage of flexibility, provided they do not become quotas in practice, and they are useful to the extent that they are realistic in the numbers used. In the hiring of a large, *unskilled* workforce, one would expect to see a distribution of whites and minorities, males and females, at least roughly equivalent to the makeup of the applicant pool. Goals or quotas can patrol such hiring. Too often, goals or quotas are set by the percentage of women, minorities, and native people in the general labour force without asking whether these groups are trained for and interested in all categories of jobs—a fact evidenced, at least in part, by the frequency with which they apply for particular jobs.<sup>187</sup> It is in such a situation that concerns about the qualifications of those selected and the equity to those excluded become problematic.

Once we move beyond hiring to promotion, we run into more serious labour relations concerns. Seniority and competence have been the major criteria for advancement, and I believe they should remain so, although with some reservations. Close scrutiny of the qualifications that determine competence should be the norm, in order to ensure that the qualifications specified are necessary for the job and not a subtle barrier to equal opportunity.<sup>188</sup> There may be some limited cases where possession of a characteristic such as race or sex is also relevant to determining competence: for example, police community relations may be improved if the force includes minority members. Such cases should be limited and carefully scrutinized to avoid the danger of excluding target groups from jobs because of stereotypes and prejudices.

Otherwise competence and seniority should govern, for the community benefits and vested rights are recognized. In workplaces that use a threshold test of competence for eligibility, with seniority as a tiebreaker, quotas in promotions would be unjust to the senior employee who has remained in the workplace and forgone other employment opportunities in order to gain job security through seniority.<sup>189</sup> To ignore his claim for consideration in preference for a target group member is to make him bear the cost of society's faults and to ignore his reliance. The frustration and anger felt by those bypassed may well create hostility to the target groups.

Seniority coupled with threshold competence is only one method of promotion. Many collective agreements contemplate a competition between candidates and selection of the best, with seniority governing only where there is relative equality. The result of quotas in such a system will be selection of less competent employees. Neither the workplace nor

society at large is benefitted by this, and, again, hostility from other employees is a likely result.

Seniority systems are not, however, without their faults. To the extent seniority is calculated only by bargaining unit, departmental or classification service, many long-service employees may be deprived of consideration for promotion. For example, a woman with several years of clerical experience may move into a plant job and, under the collective agreement governing the plant, lose the benefit of her earlier service. Then, in promotions in that bargaining unit, she falls to the back of the line. The alternative is plantwide seniority, although there will be hostility to this from those in the bargaining unit who wish to protect the interests of those who have accumulated seniority rights under the former system.<sup>190</sup>

The final area of concern is layoffs. If women or natives or others are hired as a result of an affirmative action program (whether because of quotas or goals), they will be low on the seniority list. In unionized work settings, the rule is invariably "last hired, first fired". Bumping may occur, if the collective agreement permits, provided the more senior employee can perform the job of the junior employee. In times of recession, the result will be to threaten the advances toward diversification of the workforce if the seniority system is allowed to operate. This is especially true if the layoff is a lengthy one, for recall rights may expire.<sup>191</sup>

Many suggestions have been made to avoid this result: work sharing and shortened work hours are two.<sup>192</sup> Both proposals will be opposed by some members of the workforce, who see work sharing as poverty sharing. To the extent that unemployment insurance or supplementary unemployment benefits (SUB) protect income, the argument is weak. But this solution does not work after a certain point of layoff, where there is too little work to spread around among all employees.

More controversial is a suggestion that an employer be required to prove the economic necessity for the layoff and lack of feasible alternatives to a special government tribunal before the layoff can occur.<sup>193</sup> This suggestion is practically unrealistic, as well as politically impossible: the delay involved in a bureaucratic hearing to show necessity and the degree of government intrusion in the operation of business make the exercise unworkable.<sup>194</sup> Some businesses such as the fine paper and construction industries operate continually by a process of expansion and contraction; others must lay-off in times of reduced demand for their products. It would be a major shift in the operation of our economy to have government review each of these layoffs.

Other recommendations to protect target groups include changes in the seniority system: to broaden the seniority base on layoff or to provide superseniority for target group members.<sup>195</sup> Broadening the seniority base seems to be aimed at allowing employees to bump between classifications and departments within the bargaining unit. Some of the commentators, in suggesting that employees be allowed to bump plant-wide, seem to contemplate bumping across bargaining units. Employers with large operations will resist broad seniority rights on layoff, for the disruption will be significant. Unions may also resist the grant of bumping rights from one unit to another, particularly if different unions are

involved in the bargaining units, for their role is to protect the interests of their members.

Superseniority is even more controversial, for it interferes with the existing seniority rights of employees in the bargaining unit. So, too, does another recommendation of layoff of employees proportionate to the mix of groups (women, visible minorities, handicapped, white males) in the unit.<sup>106</sup> In each case, white males with greater seniority will be laid off while more junior members of the target groups remain. Again, the perception will be that vested rights have been ignored, and injustice done. This feeling will be particularly acute when the employees kept on are not themselves victims of actual discrimination. To avoid this result, in times of layoff, the long-term objective of a more diverse workforce will have to be sacrificed temporarily to recognize the vested interests of long-service employees.

## VI. CONCLUSION

The objective of promoting equal employment opportunities for and eliminating systemic discrimination against selected groups can be sought through various means: collective bargaining, legislative or voluntary efforts to remove barriers to employment, and legislated or voluntary programs of affirmative action. Collective bargaining is an effective but limited tool, for it focuses on the bargaining unit and protection of those in the unit once hired. The hiring stage is nor-

mally left to management, while many barriers to employment opportunity arise because of a proliferation of bargaining units.

Legislation to remove barriers, depending on its form, may result in challenges under the *Charter of Rights and Freedoms* equality provision in section 15(1). One can only speculate as to the judicial attitude in interpreting that section and the degree of deference to be shown toward legislative decisions. Affirmative action programs, despite the protection of section 15(2), may still be open to judicial scrutiny to determine whether the group to which they apply is indeed disadvantaged.

Any legislative action to remove barriers or to require affirmative action must take into account very complex and important ethical considerations and labour relations implications. An affirmative action program that gives special treatment to target groups because of a characteristic they possess, through a quota or bonus system, has both social costs and human costs. If the characteristic affects promotion and layoff, more competent and longer service workers are denied employment opportunities that they would otherwise expect to have. This is done to achieve a more equal society and to redistribute wealth, but the burden, to reach these goals, is unevenly distributed. In an expanding economy, the tensions that might result can be reduced, but in times of recession, tension between members of the workforce is a foreseeable result.



## NOTES

1. Canada. House of Commons. Special Committee on the Disabled and Handicapped. *Report* (1981), Chapter 2; Canada. House of Commons. Special Committee on Employment Opportunities for the '80s. *Report* (32nd Parli. 1980-81-82, Proceedings of Committee, Issue 42, 1981), Chapter 11.
2. The federal government announced a new plan in 1983 for women, native peoples, and the handicapped to be consistent with the merit principle and avoiding quotas or targets based on demographics.
3. Ontario Federation of Labour, "Statement on Women and Affirmative Action", November 22-25, 1982; Canadian Labour Congress, "Policy Paper on Women and Affirmative Action" (Document No. 25, 15th Constitutional Conference, 1984).
4. Committee on the Disabled, *supra*, note 1, p. 31.
5. Statistics Canada, *The Labour Force*, June 1984 (Cat. 71-001).
6. Ontario Women's Bureau. *Women in the Labour Force. "Fact and Fiction"*, 1981; W.D. Wood and P. Kumar, *The Current Industrial Relations Scene in Canada 1982* (Kingston: Queen's Industrial Relations Centre, 1982) pp. 407, 409-10, 449-51. The differential ranges from 6% to 29% in office occupations, 25% to 48% in maintenance trades, and 5% to 40% in service occupations.
7. Committee on Employment, *supra*, note 1, pp. 42:141 to 142.
8. See, for example, the collective agreements between de Havilland Ltd. and the United Automobile Workers, Locals 112 and 673 (Articles 4 and 6, respectively); Canadian Broadcasting Corporation and Canadian Wire Service Guild, Article 13.4. Any collective agreements referred to were filed with the Commission of Inquiry on Equality in Employment.
9. *Re Dhillon and Treasury Board* (1980), 80 CLLC para. 18,007 (P.S.S.R.B.—Norman).
10. See K.E. Swinton and K.P. Swan, "The Interaction Between Human Rights Legislation and Labour Law" in K.P. Swan and K.E. Swinton, eds. *Studies in Labour Law* (Toronto: Butterworths, 1983), p. 111 at pp. 121-122.
11. Under most collective agreements, the union will control access to arbitration, and a decision to proceed will depend on the union's view of the merits of the case as well as its importance to the employee and the bargaining unit, weighed against the cost of arbitration.
12. *Canada Labour Code*, R.S.C. 1970, c. L-1, ss. 59.2 to 59.5, as am. R.S.C. 1970 (2nd Supp.), c. 17, s. 16; S.C. 1974-75, c. 66, s. 23; S.C. 1977-78, c. 27, s. 19. The period of leave is essentially 17 weeks if an employee has completed 12 consecutive months of continuous employment with an employer. Her seniority is protected during leave, but it does not accrue.
13. *Unemployment Insurance Act*, S.C. 1970-71-72, c. 48, s. 30, as am. The maximum period for benefits is 15 weeks (s. 22(3)), following a two-week waiting period (s. 23).
14. *Id.*, s. 32; *Labour Standards Act*, R.S.S. 1978, c. L-1, s. 29.2, as am. S.S. 1979-80, c. 84, s. 8 (six weeks' leave for adoption).
15. There are numerous other examples of clauses tailored to the concerns of pregnant women: protection of benefits during maternity leave (AECL and PSAC, Local 70367); a policy of reassignment of pregnant workers using video-display terminals (de Havilland and UAW, Office and Clerical Workers); availability of sick leave for medical conditions related to pregnancy (CBC and Council of CUPE Broadcast Bargaining Units). Paternity leave may also be provided: e.g., three days' paid leave in the NABET-CBC agreement.
16. Wood and Kumar, *supra*, note 6, p. 202.
17. "All other employees" includes certain operating workers, sales employees, nursing and technical staff, firefighters, and police officers (*id.*).
18. *Id.*, pp. 202-203. See also E. Lennon, *Organizing the Unorganized: Unionization in the Chartered Banks of Canada* (1980), 18 Osgoode Hall L.J. 177 at p. 227, referring to the traditional lack of trade union interest in organizing "female job ghettos".
19. *Canada Labour Code*, R.S.C. 1970, c. L-1, s. 107(1).
20. *Ontario Labour Relations Act*, R.S.O. 1980, c. 228, s. 1(3).
21. *Canada Labour Code*, *supra*, note 19, ss. 107(1), 125.
22. *Id.*, s. 125(3), (4), (5).
23. *Canadian Imperial Bank of Commerce*, [1977] 2 Can. L.R.B.R. 99; 77 CLLC para. 16,089 (C.L.R.B.).
24. *Vermilion Bay Co-op Ltd.*, [1973] O.L.R.B.Rep. 179; *Inter-City Bandag (Ontario) Ltd.* (1980), 80 CLLC para. 16,044 (O.L.R.B.). The Canada Board rejects this: *Canadian Imperial Bank of Commerce, Victory Square Branch*, [1978] 1 Can. L.R.B.R. 132.
25. CBC, for example, deals with 22 different unions. The Canada Labour Relations Board is, however, reluctant to grant craft units: see *International Brotherhood of Electrical Workers, Local 2085 v. Atomic Energy of Canada Ltd.* (1977), 78 CLLC para. 16,128 (C.L.R.B.).
26. Lennon, *supra*, note 18, p. 216.
27. Wood and Kumar, *supra*, note 6, p. 51 state that 72% of part-time workers are women. About two-thirds of this group are married.
28. E. Finn, "Seniority, Promotions, Layoffs and Discrimination: A Union Perspective" in Jain and Carroll eds. *Race and Sex Equality in the Workplace* (Ottawa: Labour Canada, 1979), p. 129; J. Carson, "Affirmative Action vs. Union Security" in Canadian Industrial Relations Assoc., Proceedings of 19th Annual Meeting (1982), Vol. II, p. 369 at pp. 383-84.
29. See, for example, the collective agreement of Air Canada and the Canadian Air Line Employees' Association (Sales and Service Branch Employees). A Letter of Understanding with regard to part-time employment states that priority is to be given to full-time employees. Part-timers are limited both in the numbers to be hired at a base and in the hours to be worked. A full-time employee cannot be laid off at a base while a part-time employee is retained.
30. According to Statistics Canada, worker preference is the most common reason for part-time work, a reason given more frequently by women than men (Wood and Kumar, *supra*, note 6, p. 51).
31. *Id.*, p. 214, and *supra*, note 3.
32. Where there are few members of the target group in a bargaining unit, one can expect little attention to their special concerns. It is interesting to note, for example, in several AECL agreements, a provision for one day paid adoption or birth leave when the spouse or wife gives birth or adoption occurs. Maternity leave is not mentioned (e.g., Atomic Energy Allied Council and AECL). As this unit is a craft unit, which is traditionally male-dominated, the provision is not surprising.
33. M. Gunderson and K. Swinton, *Collective Bargaining and Asbestos* (Ontario Royal Commission on Asbestos, Study No. 1, 1982), pp. 5.5, 5.6.
34. *Public Service Staff Relations Act*, R.S.C. 1970, c. P-35, ss. 56(2), 70(3); *Public Service Employment Act*, R.S.C. 1970, c. P-32, s. 10.
35. *Canada Labour Code*, R.S.C. 1970, c. L-1, s. 136.1, as am. S.C. 1977-78, c. 27, s. 49; *Ontario Labour Relations Act*, R.S.O. 1980, c. 228, s. 68. Similarly, human rights legislation prohibits discrimination in a collective agreement: *Canadian Human Rights Act*, S.C. 1976-77, c. 33, s. 10 [hereafter CHRA]. There may also be a common law duty of fair representation: *Canadian Merchant Service Guild v. Gagnon* (1984), 84 CLLC para. 14,043 (S.C.C.).
36. (1953), 345 U.S. 330.
37. *Id.*, at p. 338.
38. *B.C. Distillery Co. Ltd.*, [1978] 1 Can. L.R.B.R. 375 (B.C.L.R.B.) at pp. 381-383.
39. See, for example, *Howard v. Northern Interior Woodworkers Assoc.*, 83 CLLC para. 16,038 (B.C.L.R.B.).
40. *Cyr v. Mine Mill Union, Local 598*, 83 CLLC para. 16,058 (O.L.R.B.)—validity of union policy giving special consideration to disabled workers.
41. Finn, *supra*, note 28, pp. 131-2.
42. *Canadian Human Rights Act*, S.C. 1976-77, c. 33, as am., ss. 3, 20.
43. *Id.*, s. 3(2), added by S.C. 1980-81-82-83, c. 143, s. 2.
44. (1978), 92 D.L.R. (3d) 417 (S.C.C.).
45. See text at note 123.
46. Bliss, *supra*, note 44, p. 422.
47. CHRA, s. 11.
48. R.S.A. 1980, c. I-2, s. 7, although the Act does prohibit discrimination on the basis of "physical characteristics".
49. *Employment Standards Act*, R.S.O. 1980, c. 137, s. 33. Only Quebec, among the provinces, provides for equal pay for work of equal value: *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s. 19.
50. CHRA, s. 2.

51. *Montcalm Construction Inc. v. Minimum Wage Commission* (1978), 93 D.L.R. (3d) 641 (S.C.C.) at pp. 652-653 per Beetz J.  
... primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence; thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one...
- See also *Northern Telecom Canada Ltd. v. Communication Workers of Canada* (1983), 83 C.L.L.C. para. 14,048 (S.C.C.).
52. *Constitution Act, 1867*, s. 92(10)(a). See also, *Re Canadian Pacific Ltd. and A.-G. Alta.* (1980), 108 D.L.R. (3d) 738 (Alta.C.A.)—*Individual's Rights Protection Act* has no application to employment practices of the railway.
53. Activities of railway companies fall within provincial jurisdiction if not integral to railway operations: *C.P.R. v. A.-G. B.C.*, [1950] A.C. 122 (P.C.); *Canada Labour Relations Board v. Canadian National Railway Co.* (1974), 45 D.L.R. (3d) 1 (S.C.C.).
54. *Supra*, note 53.
55. *Industrial Relations and Disputes Investigation Act*, R.S.C. 1952, c. 152, s. 54.
56. S.C. 1955, c. 29 (now R.S.C. 1970, c. C-10).
57. R.S.C. 1970, c. F-10.
58. *Supra*, note 53, pp. 7-8.
59. *Air Canada*, for example, is not an agent of the Crown (*Air Canada Act*, S.C. 1977-78, c. 5, s. 23), although it falls within federal jurisdiction over aeronautics.
60. *Petro-Canada Act*, S.C. 1974-75-76, c. 61, s. 14.
61. *Id.* s. 14(5).
62. For example, North York Pipeline Terminal, the Packaged Products Warehouse in Mississauga, and the Come-by-Chance Refinery.
63. For example, *Ontario Human Rights Code*, S.O. 1981, c. 53, s. 10. There is some dispute as to the need for an intention to discriminate in order to prove a violation of the federal Act, with the Federal Court of Appeal holding that intention is required: *Re Canadian National Railway Co. and Canadian Human Rights Commission* (1983), 147 D.L.R. (3d) 312 (F.C.A.)—leave to appeal to S.C.C. granted.
64. For example, the hard hat rule in *Bhinder*, *supra*, note 63, conflicted with the Sikh religion's requirement that males wear a turban.
65. *Supra*, note 1 at p. 31.
66. e.g. *Saskatchewan Power Corp.* (1981), 3 C.H.R.R. D/673; *Saskatchewan Oil and Gas Corp.* (1982), 3 C.H.R.R. D/932.
67. Sections 91(10), (15), (29), 92(10)(a).
68. *Canada Labour Relations Board v. C.N.R.*, *supra*, note 53.
69. (1982), 138 D.L.R. (3d) 1 (S.C.C.) at pp. 21, 23-24—"In principle there would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other." (pp. 23-24)
70. Several Crown corporations are subject, by statute, to policy directives by the Governor-in-Council (see, for example, *Petro-Canada Act*, S.C. 1974-75-76, c. 61, s. 7(2)).
71. *Ross v. Registrar of Motor Vehicles* (1974), 42 D.L.R. (3d) 68 (S.C.C.).
72. See G.V. LaForest, *The Allocation of Taxing Power Under the Canadian Constitution*, 2nd ed. (Toronto: Canadian Tax Foundation, 1981), p. 48. Some doubt may have been thrown on this position by a passage in Pigeon J.'s judgement in *Reference re Agricultural Products Marketing Act* (1978), 84 D.L.R. (3d) 257 (S.C.C.) at p. 323, but the decision in *Reference re Proposed Federal Tax on Exported Natural Gas* (1982), 136 D.L.R. (3d) 385 (S.C.C.), which held that provinces have wider powers as owners than as legislators, suggests, by analogy, that the federal spending power is broader than its legislative powers.
73. Section 93 of the *Constitution Act, 1867*.
74. For example, s. 37 of the *Canada Labour Code*, R.S.C. 1970, c. L-1 provides that the Minister of Labour can authorize payment of less than the minimum wage to a handicapped employee. This appears on its face to deny equality to the handicapped, contrary to s. 15(1).
75. See, for example, *Canada Mortgage and Housing Corporation Act*, R.S.C. 1970, c. C-16, as am., s. 5(5).
76. See, generally, on the scope of s. 32, K. Swinton, "Application of the Canadian Charter of Rights and Freedoms" in W. Tarnopolsky and G. Beaudoin, eds. *The Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982), p. 41.
77. Under the United States constitution, "state action" is subject to constitutional restraint, and funding, as well as legislative action, comes under Bill of Rights scrutiny.
78. *Malartic High Grade Gold Mines Ltd. v. The Queen in Right of Quebec* (1982), 142 D.L.R. (3d) 512 (Que.S.C.) at p. 525; *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439 (Alta.Q.B.) at p. 445—"A rule of the Law Society, purportedly adopted pursuant to statute, is a law of general application."
79. *Broadcasting Act*, R.S.C. 1970, c. B-11, s. 40(1). See also *Government Companies Operation Act*, R.S.C. 1970, c. G-7.
80. *Air Canada Act*, S.C. 1977-78, c. 5, s. 23.
81. *Id.* s. 7(4), (6).
82. *Id.* s. 7(8).
83. *Id.* s. 8.
84. *Supra*, note 53.
85. See Swinton, *supra*, note 76, pp. 58-59.
86. I do not believe the Charter applies directly to private action (*id.*, pp. 44-49), but others reject this view: L. Smith, *Charter Equality Rights* (1984), 18 U.B.C. L. Rev. 351 at pp. 354-63; D. Macdonald, *Legal Rights in the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982), pp. 157-8. The rationale lies in the nature of a constitution, a document designed to set the limits of governmental action. Private parties will nevertheless be affected by the Charter: statutes on which they might rely will be vulnerable to constitutional scrutiny, as will any actions they take as delegates of government.
87. P. Hogg, *Canada Act 1982 Annotated* (Toronto: Carswell, 1982), pp. 76-77.
88. *Id.*, p. 77.
89. I use "affirmative action" here not to include barrier removal and equal opportunity measures, as some groups do (e.g., C.L.C. *supra*, note 1; L. Hendisz et al., *Affirmative Action for Women in Canada* (Montreal Association of Women and the Law, 1982)). My focus in the following discussion of affirmative action is programs that give preferential treatment to target groups: a particular characteristic will either be a "tiebreaker" for jobs or it will give a distinct preference, because a certain number of jobs are reserved for the target group.
90. In the United States, pregnancy leave is non-discriminatory under the *Civil Rights Act* only to the extent it turns on disability and leave is available to disabled males: *California Federal Savings and Loan Assoc. v. Guerra* (1984), 34 FEP Cases 562 (D.C. Calif.).
91. *Ayala v. The Queen* (1979), 97 D.L.R. (3d) 660 (Fed Ct.).
92. *A.-G. Can. v. Lavell* (1974), 38 D.L.R. (3d) 481 (S.C.C.).
93. *Bliss*, *supra*, note 43, p. 423.
94. *R. v. Burnshine* (1974), 44 D.L.R. (3d) 585 (S.C.C.); *MacKay v. The Queen* (1980), 114 D.L.R. (3d) 393 (S.C.C.) per Ritchie J. for the majority.
95. *MacKay*, *supra*, note 94, p. 413, per Ritchie J.
96. For example, providing equal amounts of funding for medical care to all, regardless of health.
97. *Re Federal Republic of Germany and Rauca* (1983), 145 D.L.R. (3d) 638 (Ont.C.A.) at p. 654; *Law Society of Upper Canada v. Skapinker* (1984), 9 D.L.R. (4th) 161.
98. *Id.*, p. 658; *Quebec Association of Protestant School Boards v. A.-G. Quebec (No. 2)* (1982), 140 D.L.R. (3d) 33 (Que.S.C.) at p. 57 (appeal dismissed by Supreme Court of Canada without discussion of this point—unreported, August, 1984).
99. As the Ontario Court of Appeal stated in *R. v. Altseimer* (1982), 38 O.R. (2d) 783, the Charter was not intended to transform the legal system. See also *Rauca*, *supra*, note 97, pp. 658-60.
100. Some of the legal rights, in contrast, incorporate a "reasonable limits" criterion—e.g., s. 8 guarantees the right to be secure against "unreasonable" search or seizure.

101. The classic description of a court's role in interpreting an equality guarantee is in Tussman and TenBroek, *The Equal Protection of the Laws* (1948-49), 37 Calif. L. Rev. 341. See, also, for a general discussion of the U.S. jurisprudence, L. Tribe, *American Constitutional Law* (Mineola: Foundation Press, 1978), pp. 991-1136.
102. *Brown v. Board of Education* (1954), 347 U.S. 483.
103. *Graham v. Richardson* (1971), 403 U.S. 365.
104. *Ambach v. Norwick* (1979), 441 U.S. 68; *Foley v. Connelie* (1978), 435 U.S. 291.
105. *Shapiro v. Thompson* (1969), 394 U.S. 618; *Harper v. Virginia Board of Elections* (1966), 383 U.S. 663.
106. *Craig v. Boren* (1976), 429 U.S. 190.
107. *Burnshine*, *supra*, note 94; *MacKay* *supra*, note 94.
108. *MacKay* *supra*, note 94, p. 423 (emphasis added).
109. M. E. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" in E. Belobaba and E. Gertner, eds. *The New Constitution and the Charter of Rights* (1982), 4 S.C.L. Rev. 131 agrees at p. 149.
110. *Beal v. Doe* (1977), 432 U.S. 438; *Maher v. Roe* (1977), 432 U.S. 464; *Poelker v. Doe* (1977), 432 U.S. 519.
111. See R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard U. Press, 1977), p. 227; A.H. Goldman, *Justice and Reverse Discrimination* (Princeton: Princeton U. Press, 1979), p. 23.
112. The degree of deference that courts should show to a legislative determination is controversial: see Gold, *supra*, note 109. Useful American discussions are found in J.H. Ely, *Democracy and Distrust* (Cambridge: Harvard U. Press, 1980); P. Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship* (1981), 90 Yale L.J. 1063.
113. Gold, *supra*, note 109, pp. 151-2.
114. Hogg, *supra*, note 87, p. 51.
115. "Women, Human Rights and the Constitution"; Submission of the Canadian Advisory Council on the Status of Women (November 18, 1980), pp. 7, 13. For a description of the lobby effort, see C. Hosek, "Women and the Constitutional Process" in K. Banting and R. Simeon, eds. *And No One Cheered: Federalism, Democracy and the Constitution Act* (Agincourt: Methuen, 1983), p. 280.
116. Section 28 was added to the draft Charter on April 23, 1981. The override provision resulted from the Premiers' Accord on November 5, 1981.
117. W. Tarnopolsky, "The Equality Rights" in Tarnopolsky and Beaudoin, *supra*, note 76, p. 395 at p. 423.
118. *Id.*, p. 422—suggesting the reasonableness of limits is tested under s. 1.
119. Gold, *supra*, note 109, pp. 152-3.
120. W. Williams, *Reflections on Culture, Courts and Feminism* (1982), 7 Women's Rights L. Rep. 175.
121. I will discuss the question whether classifications based on pregnancy and reproductive capacity are sex-based *infra*. Here, I assume that they are.
122. K. Swinton, *Regulating Reproductive Hazards in the Workplace: Balancing Equality and Health* (1983), 33 U. of T. L.J. 45 at pp. 58-59.
123. *Bliss*, *supra*, note 44.
124. (1974), 417 U.S. 484.
125. 42 U.S.C. s 2000e.
126. *CHRA*, *supra*, note 42, s. 3(2).
127. *Regents of the University of California v. Bakke* (1978), 438 U.S. 265.
128. *Id.*, pp. 295-297.
129. *Id.*, p. 359.
130. *Id.*, p. 320.
131. *United Steelworkers of America, AFL-CIO-CLCU v. Weber* (1979), 443 U.S. 193.
132. *Id.*, at p. 208.
133. For example, R.J. Rabin, *Affirmative Action Programs Before and After Weber* (1980), 32nd NYU Annual Conf. on Lab. p. 205.
134. Ontario Human Rights Code, S.O. 1981, c. 53, s. 13.
135. *CHRA*, *supra*, note 42, s. 15.
136. See, for example, Goldman, *supra*, note 111, p. 67; R.K. Fullinwider, *The Reverse Discrimination Controversy: A Moral and Legal Analysis* (Flowman and Littlefield, 1980), p. 25.
137. Dworkin, *supra*, note 111; R. Wasserstrom, "Preferential Treatment" in R. Wasserstrom, *Philosophy and Social Issues* (1980), p. 51.
138. Dworkin, *supra*, note 111, pp. 227-28; Wasserstrom, *supra*, note 137; S. Wexler, *Special Preferences for Oppressed Minorities* (1972), 7 U.B.C. L. Rev. 72. But see Goldman, *supra*, note 111, p. 23.
139. The concern has been the interaction of ss. 15(2) and 28 (Gold, *supra*, note 109; Hogg, *supra*, note 87; Tarnopolsky, *supra*, note 117).
140. *Re Athabasca Tribal Council and Amoco Canada Petroleum Co. Ltd.* (1981), 124 D.L.R. (3d) 1 (S.C.C.) per Ritchie J. (Laskin C.J., Dickson and McIntyre JJ. concurring.)
141. *Id.* (1980), 112 D.L.R. (3d) 200 (Alta. C.A.).
142. *Id.*, at p. 200.
143. *Supra*, note 140 at p. 10.
144. *Bakke*, *supra*, note 127, p. 297.
145. Goldman, *supra*, note 111, pp. 79-90; Wasserstrom, *supra*, note 137; K. Greenawalt, *Discrimination and Reverse Discrimination* (New York: Knopf, 1983), pp. 63-64.
146. Greenawalt, *supra*, note 145, pp. 65-66; Goldman, *supra*, note 111, p. 79; Fullinwider, *supra*, note 136, p. 82.
147. Wasserstrom, *supra*, note 137.
148. This point is made by a number of commentators—e.g., Goldman, *supra*, note 111 at pp. 141-44.
149. Goldman, *supra*, note 111 at pp. 115-117; Fullinwider, *supra*, note 136, p. 40.
150. Goldman, *supra*, p. 132.
151. The reluctance to consider the efficacy of means chosen, once constitutional jurisdiction is established, is seen in such distribution of powers questions as *Re Anti-Inflation Act* (1976), 68 D.L.R. (3d) 452 (S.C.C.); and *Fort Frances Pulp and Paper Co. v. Man. Free Press*, [1923] A.C. 695 (P.C.).
152. See the dissenting judgement of Beetz J. in the *Anti-Inflation Act Reference*, *supra*, note 151.
153. M. Eberts, *Employment Standards and Affirmative Action* (unpublished).
154. We might then revert to the situation seen earlier in this century in a case such as *Muller v. Oregon* (1908), 208 U.S. 412, which upheld protective legislation providing for maximum hours for women workers. Such protective measures might be seen as indirectly discriminatory today because of the detrimental effect on female employment and should fall under rigorous Charter scrutiny.
155. See CLC and OFL, *supra*, note 3.
156. Goals can fast become quotas if managers must report progress on meeting those goals and advancement rests, at least in part, on achieving progress.
157. A problem can arise, however, in a hiring hall situation, where hiring is union-controlled.
158. C. Summers and M. Love, *Work Sharing as an Alternative to Layoffs by Seniority: Title VII Remedies in Recession* (1976), 124 U. of Pa. L. Rev. 893 at p. 902—"Seniority may be the most valuable capital asset of an employee of long service"; B. Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights* (1961-62), 75 Harv. L. Rev. 1532; Finn, *supra*, note 28, pp. 129-30.
159. *Re U.A.W. and Westeel Products Ltd.* (1960), 11 L.A.C. 199 (Laskin).
160. D. Brown & D. Beatty, *Canadian Labour Arbitration* (Toronto: Canada Law Book, 1977), p. 262.
161. *Re Island Telephone Co. Ltd. and International Brotherhood of Electrical Workers, Local 1030* (1983), 8 L.A.C. (3d) 132 (Christie).
162. Contrast the agreement of Air Canada and International Association of Machinists and Aerospace Workers (seniority by work category in the unit of maintenance, customer service, purchasing, and supply branches) with de Havilland and UAW, Local 112 (bargaining unit seniority for plant workers).
163. Most agreements provide for acquisition of seniority from date of entry to the bargaining unit (e.g., de Havilland; Air Canada and Canadian Air Line Flight Attendants Association—company employees from other branches



- hired as permanent flight attendants to be placed in seniority ahead of new hires in accordance with company service date).
164. Even if seniority rights are bargainable and, therefore, theoretically not immutable, it is rare for a union to agree to significant changes in the seniority system (accord, Summers and Love, *supra*, note 158 at p. 902).
165. The example of female workers in the general labour category at Steico is illustrative: hired to settle a human rights complaint in 1981, they were laid off less than two years later (see C. Sheppard, *Affirmative Action in Times of Recession: The Dilemma of Seniority-Based Layoffs* (1984), 42 U.T. Fac. L. Rev. 1, pp. 1-2).
166. R.K. Fullinwider, *supra*, note 136, p. 143; Goldman, *supra*, note 111, p. 67.
167. P. Taylor, "Reverse Discrimination and Compensatory Justice" in B. Gross, ed. *Reverse Discrimination* (New York: 1977), pp. 301-02.
168. C. MacKinnon, *Sexual Harassment of Working Women* (New Haven: Yale U. Press, 1978), p. 119.
169. Fullinwider, *supra*, note 136, pp. 33-40; Goldman, *supra*, note 111, pp. 102-108.
170. Goldman, *supra*, note 111, p. 23; Dworkin, *supra*, note 111, p. 225.
171. Wasserstrom, *supra*, note 137.
172. *Supra*, note 131.
173. 42 U.S.C.A.s 2000e-2(h).
174. (1976), 424 U.S. 747.
175. *Id.*, pp. 776, 778.
176. *Id.*, p. 788, in: 7. Rehnquist J. concurred. Burger C.J. in a separate opinion would also have refused competitive seniority relief in order to protect innocent employees (p. 781).
177. (1977), 431 U.S. 324.
178. *Pullman-Standard v. Swint* (1982), 102 S.Ct. 1781 at p. 1784.
179. *American Tobacco Co. v. Patterson* (1982), 102 S.Ct. 1534 at p. 1535. See also *United Air Lines v. Evans* (1977), 431 U.S. 553 at p. 558.
180. *Guardians Association v. Civil Service Commission of the City of New York* (1983), 103 S.Ct. 3221.
181. *Id.*, pp. 3230, 3234.
182. *Boston Chapter NAACP v. Beecher* (1982), 679 F. 2d 965 (CA 1).
183. *Boston Firefighters Union, Local 718 v. Boston Chapter NAACP* (1983), 103 S.Ct. 2076.
184. *Firefighters Local Union No. 1784 v. Stotts* (1984), 52 U.S.L.W. 4767.
185. *Id.*, p. 4771.
186. The federal government cannot legislate in this area, but it can use its spending power.
187. Some target groups would advocate a goal/quota based on something more than applications in order to force employer outreach programs to attract candidates. This is realistic only if there is a pool of qualified candidates to attract. For some skilled jobs, the pool may not exist.
188. For example, are height and weight requirements necessary for police?
189. Rabin, *supra*, note 133, p. 219.
190. L. Ritchie, "Affirmative Action vs. Union Security" in Proceedings of 19th Annual Meeting of Canadian Industrial Relations Association, Vol. II (1982), p. 402 at p. 403.
191. For example, the de Havilland and UAW agreement regarding plant employees provides recall rights for the period equal to seniority at the time of layoff.
192. For example, U.S. Commission on Civil Rights, *Last Hired: First Fired* (1977), pp. 51, 62; Summers and Love, *supra*, note 158 at p. 917.
193. Sheppard, *supra*, note 165, p. 20. Burke and Chase would prevent the layoff of any minorities who had been actual victims of past discrimination or others in their place. This "full payroll" remedy could be avoided if the employer could prove to a court that it would cause imminent financial collapse (I. Burke and O. Chase, *Resolving the Seniority/Minority Layoffs Conflict: An Employer Targeted Approach* (1978), 13 Harv. Civil Rts. L. Rev. 81 at p. 97). See also S.C. Ross, "Reconciling Plant Seniority with Affirmative Action and Anti-discrimination", 28th Annual NYU Conf. on Lab. (1975), p. 251; W. Wines, "Seniority, Recession and Affirmative Action: The Challenge for Collective Bargaining" (1982), 20 Am. Bus. L.J. 37.
194. The Ministry of Labour in Ontario reports 59 plant closures in the first nine months of 1983, putting 5,000 people out of work and layoffs of 9,143 workers. The layoffs reported only include 50 or more people. (*Globe and Mail*, November 17, 1983, p. 5.) The numbers of laid off employees are actually much higher. Between January 1, 1982, and October 30, 1982, there were at least 296 establishments with reduced operations, partial closures, or complete closures, affecting 35,969 workers. The number is underestimated because of reporting difficulties for plants with less than 50 employees affected (Ontario Ministry of Labour data).
195. Sheppard, *supra*, note 165.
196. U.S. Commission on Civil Rights, *supra*, note 192, pp. 64-65.

## GENDER, EQUALITY, AND THE CHARTER

Mary Jane Mossman

### Sommaire

L'étude tente d'expliquer le libellé de la Charte, notamment les articles 1, 15 et 28 eu égard à l'objectif de l'égalité des sexes. Pour ceux qui croient qu'il y a lieu de modifier les rôles de chaque sexe ainsi que la reconnaissance et l'application de ces rôles en vertu de la loi, la Charte prévoit les moyens de réaliser ces objectifs.

Le document examine la théorie de l'égalité sous l'angle féministe. Il parle de la nécessité de viser l'égalité des résultats plutôt que le traitement égal, autrement dit l'égalité véritable et non seulement celle des méthodes. Il aborde également les problèmes que pose l'utilisation du genre masculin ou d'un genre en particulier dans les lois.

L'étude propose que l'interprétation de l'article 15(1) soit faite avec un objectif en vue et explique de quelle façon cet article peut permettre l'égalité véritable. Parallèlement, l'auteur propose que l'article 28 soit interprété en fonction d'un objectif et que les programmes d'action positive mentionnés à l'article 15(2) soient perçus comme un moyen de réaliser l'objectif de l'égalité fondamentale. L'auteure étudie également le rôle de l'article 1 dans cette analyse et le besoin d'interpréter le libellé de la Charte à la lumière des conventions internationales. Dans son analyse, l'auteure examine aussi les décisions pertinentes rendues aux termes de la *Déclaration canadienne des droits* et de la Constitution américaine.

En conclusion, l'étude affirme qu'une interprétation de la Charte avec un objectif en vue est un des moyens de favoriser l'égalité fondamentale des sexes.

### Summary

This essay is an attempt to read the language of the *Canadian Charter of Rights and Freedoms*, and especially sections 1, 15, and 28, in light of the objective of gender equality. For those who believe that changes are needed in gender roles, and in the law's recognition and enforcement of gender roles, the Charter offers a new opportunity for achieving such objectives.

The essay examines a feminist approach to the theory of equality. It outlines the need to focus on equality of outcome rather than equal treatment or treatment as an equal—that is, substantive rather than procedural equality. It also explores the problems of gender-neutral as well as gender-specific laws.

The essay argues for a purposive interpretation of section 15(1) and explains the scope for using this section to achieve substantive equality. Similarly, it is suggested that section 28 should receive a purposive interpretation, and that the affirmative action programs specified in section 15(2) should be regarded as a means of achieving this substantive equality objective. The essay also explores the role of section 1 in this analysis and the need to use international conventions in interpreting the Charter's language. The analysis examines relevant decisions under the *Canadian Bill of Rights* and the American Constitution.

The essay concludes that a purposive interpretation of the Charter is appropriate as a means of attaining substantive equality for men and women.





# GENDER, EQUALITY, AND THE CHARTER

Mary Jane Mossman\*

## I. INTRODUCTION

In the preface of his recent book, *Equality*,<sup>1</sup> William Ryan reproduced a saying attributed to Pirke Avoth (Sayings of the Fathers):

*Rabbi Tarfon used to say: You are not required to complete the task; but neither are you free to desist from it.*

Such a statement might also be apt to characterize the attempt to use the language of the Charter to achieve gender equality. For those who believe that fundamental change is needed in gender roles, and in the law's recognition and enforcement of gender roles, the Charter offers both the potential for achieving such objectives and an opportunity not to be missed.

This essay is an effort to read the Charter, and especially sections 1, 15, and 28, in light of overall objectives of gender equality. That is, assuming that the objective is gender equality, what approach should be used in interpreting the language of the Charter consistently with this goal? While such a purposive legal interpretation is not necessarily demanded by the Charter, it is also not inconsistent with a theory of the Charter as an instrument with some potential for altering rights and responsibilities within the democratic institutions in Canada.<sup>2</sup>

## II. THE OBJECTIVE OF GENDER EQUALITY

What exactly is the objective of gender equality?

### 1. A Feminist Approach to Equality

This question is not without controversy even among those who profess a commitment to the overall goal. In a perceptive analysis of the decisions of the U.S. Supreme Court in the "pregnancy cases", Ann Scales<sup>3</sup> identified four models of gender equality and assessed their resultant impact on legal and institutional arrangements for women workers:

#### a. Liberal equality

According to the liberal view of gender equality, the law must eliminate all formal barriers preventing women from working in the marketplace, thereby creating a formal equalization of men and women. This view emphasizes equal opportunity for the individual, but does not focus on the particular historical features of the subjection of women as a group. Nor does it assist working women in accommodating society's dual expectations of career and children. As Scales suggests, maleness is the norm in determining the rights of the individual, and there is no effort to take into account the fact of women's exclusion from existing social institutions. According to the liberal approach, the opportunity to work must be available to women, but there is no need for institutional change to recognize the rights of individuals who happen to be women (for example, the need for pregnancy leave

for working women), and no need for affirmative action to overcome systemic discrimination (for example, in relation to particular types of work).

#### b. Assimilationist equality

In contrast to the liberal view of gender equality, the assimilationist view requires the elimination of sex as a relevant factor for legal or any other purpose.

*According to the assimilationist ideal, a non-sexist society would be one in which the sex of an individual would be the functional equivalent of the eye colour of individuals in our society today; no legal, institutional nor even significant personal distinctions would be made on the basis of sex.<sup>4</sup>*

The assimilationist view logically requires that even the unique child-bearing function of women be denied legal recognition. It is expected that scientific developments may make *in utero* pregnancy unnecessary in the foreseeable future; if this does not occur, it is suggested that pregnancy in women should then be treated like other disabilities in women and men, for which compensation is available. Thus, like the liberal view, the assimilationist view also accepts maleness as the paradigm and tries to achieve gender equality by eliminating female sex differences. This view proceeds from assumptions that differ from those of the liberal view, but the resultant use of maleness as the norm is the same.

#### c. Bivalent equality

In contrast to both the liberal and assimilationist approaches, the bivalent view of gender equality accepts that some differences cannot be discounted and specifically emphasizes sex differences. The bivalent approach thus would recognize a dual system of rights: "equal rights" and "special rights". With regard to an equal right, taking a person's individual qualities into account may constitute discrimination; however, with special rights, such individual differences must be taken into account affirmatively. Although the possibility of recognizing sex differences in law, particularly for purposes of providing protection for pregnancy, is obviously attractive, Scales rejects the bivalent approach.

*Without a rule limiting which differences between the sexes can be taken into account and a requirement that in all other circumstances men and women be treated as equals, its proponents have their feet precariously planted on the slippery slope of judicial stereotyping.<sup>5</sup>*

Thus, the bivalent approach represents for Scales a reincarnation of the attitudes of "protectionism" which so often operated in the past to exclude women from full participation in society.

#### d. Incorporationist equality

Scales' proposal is the adoption of an incorporationist approach. Such an approach accounts for sex differences in a strictly limited way; women would be recognized to have

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rights different from men only insofar as pregnancy and breastfeeding (the only aspects of childbearing/rearing "unique" to women) are concerned. The approach requires an examination of the opportunities of men and women and the legal rules creating them, which affect full participation in human activity. To the extent that opportunities differ, based on relative reproductive capabilities, there is unacceptable gender inequality and changes are required in legal and institutional arrangements. More significantly, Scales' incorporationist approach rejects the "male" concept of the individual and instead utilizes a "human" concept, thereby ensuring that both males and females will be entitled to rights and will share responsibilities. For Scales, it is also important to use 14th amendment (equal protection) analysis rather than 5th amendment (due process) analysis to achieve the goal because:

*The principle of equality has the added advantage, having first forced us to focus on the historical exclusion of women from the institution-building process, of directing our attention to the present manifestations of male dominance within institutions. The incorporationist ideal requires the legislatively-mandated and judicially-enforced restructuring of many institutions.<sup>6</sup>*

For Scales, therefore, the desirable approach to achieving gender equality requires major restructuring of society and its institutions.<sup>7</sup>

## 2. Equal Treatment, Treatment as an Equal, Equality of Outcome

The different approaches to gender equality illustrate the conceptual quagmire of the equality concept generally.<sup>8</sup> Since "equality" implies something other than "sameness", the concept requires the exercise of judgement in determining what criteria are relevant in deciding that two things should be "equal" and in deciding whether equality will be achieved by "process" or in "substance". In relation to gender equality, the first issue of determining relevant criteria is addressed by the rejection of "maleness" as the norm for granting equality to women. Scales' incorporationist approach requires a norm of "human-ness" which provides equality in fact to men and women, having regard to their different reproductive capacities.

The second issue also poses difficult conceptual problems. For example, in the gender equality context, it may be argued that men and women are entitled to equal treatment by the law. By focusing on equality of treatment, this approach seems process-oriented; so long as the legal process treats men and women equally, the objective of equal treatment will be met. Such a concept was used in *A.G. of Canada v. Lavell; Isaac et al v. Bedard*<sup>9</sup>, where the court decided that "equality before the law" meant a procedural guarantee of equal access in the administration of the law and not equality in relation to substantive rights under the law. The concept of equal treatment was further demonstrated in *Bliss v. A.G. of Canada*<sup>10</sup>, where the court held that discrimination on the basis of pregnancy did not constitute sex discrimination. Implicitly, the court in *Bliss* adopted a male norm for the determination of equal treatment; because pregnancy was not within the norm, recognition of it would have resulted in unequal (beneficial) treatment of women.

An alternative to equal treatment is treatment as an equal. This concept also tries to ensure procedural equality but does so using a more diffuse norm. In the context of gender equality, treatment as an equal seems to recognize the inherent worth and dignity of men and women and an entitlement to appropriate treatment accordingly. Nonetheless, the concept is still procedural in its orientation and focuses on "treatment" as opposed to outcome.

By contrast, equality of outcome emphasizes substantive equality, equality in fact. Moreover, equality of outcome recognizes the possibility, indeed the inevitability, of inequality of treatment in the achievement of equality of outcome. In the gender equality context, an equality of outcome objective requires the adoption of strategies to ensure that women are equally able to participate fully in society. Such an approach goes beyond formal equality and equality of opportunity to effective equality. It rejects "fair play" as an objective and adopts instead "fair shares".<sup>11</sup> It is implicit in the objective of equality of outcome that some inequality of treatment may occur in achieving the objective, but that the significant value for equality is substantive, not procedural.<sup>12</sup>

## 3. Designing Laws:

### Gender Neutrality/Gender Specificity

In the pursuit of gender equality, drafters of legislation must face the problem of implementing "equality" for men and women. Specifically, the problem occurs because men and women are not the same, for example, in terms of reproductive capacities, and therefore a law relating to employment may need to be gender specific in order to ensure full participation by women. Yet, gender-specific classifications draw attention to "uniqueness" and may actively (although not intentionally) promote inappropriate sex-role stereotyping in judicial decisions. On the other hand, gender-neutral laws may deny intended rights to women where the gender-neutral law is implicitly interpreted using a male norm.<sup>13</sup>

The choice adopted by the Charter in this context is gender neutrality; section 15 of the Charter guarantees rights to "every individual", and section 28 reinforces the guarantee of all rights and freedoms "equally to male and female persons". The challenge thereby created is to interpret these guarantees so that women can be entitled to "equality of outcome".

## III. A PURPOSEFUL INTERPRETATION OF THE CHARTER'S EQUALITY GUARANTEES

### 1. Section 15

The possibility that a purposive interpretation of section 15 was intended by Parliament has received some limited support. For example, one commentator has stated that:

*...the four equality clauses make it abundantly evident that the drafters intended to cover every conceivable operation of the law.... As a result, it is difficult to see what section 28 adds, unless one comprehends that section in the light of how courts, both in Canada and the United States, have interpreted equality clauses.<sup>14</sup>*

Such a comment suggests that the purpose of section 15 was to achieve more substantive equality than was available in the judicial interpretation of the "equality before the law" provisions of the *Canadian Bill of Rights*.<sup>15</sup> In the context of a

purposive gender equality interpretation of section 15, therefore, it is necessary to show that the language of the section is apt and consistent with an intent to achieve equality of outcome.

In this context, it can be argued that the use of the phrase "equality before the law" in section 15 was designed to ensure procedural equality in the administration of the law, as interpreted in relation to the same phrase in the Bill of Rights. By contrast, it can be argued that the phrase "equality under the law" was consciously adopted to achieve equality of substance in the law, providing relief in cases like *Lavell*<sup>16</sup>, where the content of the law differentiated between the rights of men and women in the same circumstances.

Similarly, it can be argued that the phrases "equal protection" and "equal benefit" in section 15 were also consciously inserted to ensure that judicial interpretation of equality rights would focus on substance as well as procedure. The "equal protection" phrase arguably reflects the American 14th amendment, while the "equal benefit" phrase seems directed at the result in *Bliss*.<sup>17</sup> In the result, it may be asserted that section 15 of the Charter is directed to the substance of equality in contrast to section 1(b) of the Bill of Rights, which was judicially confined to procedural equality. In this way, it may be asserted also that the language of the Charter focuses attention on equality of outcome (substantive equality) rather than equal treatment or even treatment as an equal (both of which are more procedurally based).

This conclusion is reinforced by a number of other considerations. In the first place, section 15 was drafted in the context of public hearings before a Joint Committee, and against the background of judicially established limitations on the interpretation of the *Canadian Bill of Rights*. On this basis, it seems reasonable to conclude that section 15 was intended to effect significant changes.<sup>18</sup> Second, the history of the women's movement and its well-orchestrated participation in the debate about section 15 is consistent also with a focus on substance in addition to procedure.<sup>19</sup> Finally, the focus on equality of outcome rather than only equal treatment is arguably more consistent with an analysis of section 15 of the Charter as an implementation provision of Canada's international obligations.<sup>20</sup>

If these arguments suggest the need for a "large and liberal" interpretation of section 15, however, there is still some uncertainty about the content of "equality" they achieve. If the focus must now be on equality of outcome rather than merely equality of process, it is then necessary to determine what is the standard or measure to be used. Even with equality of outcome as a stated objective, it is unlikely that women's goals can be achieved if the standard used is male-ness. Instead, equality of outcome must be interpreted using an incorporationist approach so that the standard used is not gender-based. Only in this way will section 15 "equality" assure women as well as men the right to full participation in society.

The adoption of an equality of outcome objective, coupled with an incorporationist approach, for example, requires recognition of the role of women as child-bearers, and the role of both men and women as child-rearers. As a gender-neutral law, section 15 therefore advances the rights of women to full participation in employment and compels recognition of the child-bearing role in that context. In the

context of such a section 15 analysis, *Bliss* becomes a denial of equality and clearly constitutes sex discrimination. It is suggested, however, that the recognition of special sex characteristics should be confined to child-bearing and breast-feeding; in the context of the U.S. debate, such limits seem equally appropriate for section 15.<sup>21</sup> The result, it is suggested, could be significant and systemic changes in the rights of women to full participation. As Scales has stated:

*The reforms endorsed herein are sweeping; admittedly, the implementation of those ideas would shake traditional ideas about family responsibilities and would undermine other artifacts of sex-role differentiation. Those arrangements which are most vulnerable, however, are insidious in that they restrict women and punish women who do not abide by them.... Genuine sexual justice cannot be achieved unless decisionmakers comprehend that the degraded status of women is and always has been a function of the reproductive division of labor. Instead of reinforcing the traditional arrangements which are premised on that historical circumstance, the law must seek to undo the harm....*<sup>22</sup>

## 2. Section 28

A purposive interpretation of section 28 requires that it also be given some significance. Its wording, so similar to the Equal Rights Amendment (ERA) in the United States, initially suggests a potential relationship between section 15 and American equal protection on one hand, and section 28 and the ERA on the other. Such an approach, however, must take account of the fact that the ERA was designed to operate where equal protection had failed to guarantee gender equality; the suggested purposive interpretation for section 15 (arguably the equivalent of American equal protection in this context) might leave less scope for operation for section 28 on this analysis.<sup>23</sup>

In contrast to this limited view of the scope of section 28 is the intensive effort on the part of those involved in the women's movement to have section 28 included in the Charter.<sup>24</sup> Moreover, in the context of the negotiations that resulted in the adoption of section 33 (the override power), it is evident that the fact that section 28 operates "notwithstanding anything in this Charter" creates a potency for section 28 that is absent from section 15. It is arguable that section 28 can operate in effect as an "overriding" statement of purpose that guarantees the equal rights of men and women—requested by the women's lobby, but not acceded to.<sup>25</sup> Thus, in the face of efforts to legislate inequality pursuant to section 33, section 28 stands as a bulwark against erosion.

The strength of section 28, however, depends on the interpretation of the equality guarantee. Just as section 15 requires a purposive interpretation of equality of outcome, so section 28 requires that its equality guarantee be interpreted in the context of outcome, not treatment and substantive and effective equality, not just equality of process and opportunity. Moreover, on the basis of the American analogy of the relation between equal protection analysis and the ERA, section 28 should be given an even broader scope than section 15 in terms of equality objectives.<sup>26</sup>

The wording of section 28 does not preclude such a broad interpretation, in that it extends Charter rights by way of guarantee equally to male and female persons. Moreover,



section 28 offers, more than section 15, an opportunity for concrete implementation of the equality of outcome objective. Because section 28 makes reference to the rights and freedoms guaranteed by the Charter, it offers equality in relation to other legal and political rights. If equality of outcome rather than equal treatment is the objective, section 28 might encourage substantial challenges to laws affecting pornography (freedom of expression), union practices (freedom of association), or sexual assault (security of the person). Section 28 is affirmatively worded so as to avoid the use of a standard of maleness in deciding whether rights have been unequally accorded to men and women, although it will still be necessary to be aware of the need for an incorporationist approach in interpreting the section.

Finally, section 28 has potential for greater impact than section 15, even where both are read broadly, because section 28 is arguably not subject to section 1 (the limitation clause).<sup>27</sup> On this interpretation, section 28 guarantees rights equally without regard to whether there are "reasonable limits prescribed by law" which may be "demonstrably justified in a free and democratic society".<sup>28</sup>

### 3. Section 15(2), Affirmative Action, and Section 28

Section 15(2) provides that the equality rights guaranteed by section 15(1) do not preclude any "law, activity or program" with the objective of ameliorating conditions of disadvantaged individuals. Such an "affirmative action" or "reverse discrimination" provision appears, superficially at least, inconsistent with the equality and non-discrimination rights guaranteed by section 15(1), and even more inconsistent with section 28 which must operate notwithstanding section 15(2).

However, an interpretation of section 15(1) that focuses on the objective of equality of outcome rather than treatment places section 15(2) in a different context. In this light, section 15(2) can be regarded as promoting equality of outcome through the amelioration of conditions of disadvantage. One commentator has suggested that section 15(2) is "evidently only an explanation of the substantive provision"<sup>29</sup> of section 15(1), and such a comment is entirely consistent with the notion that section 15(1) is intended to promote equality of outcome rather than treatment. Moreover, such an interpretation is also consistent with the equal guarantee of rights in section 28. According to this analysis, equality of outcome is a right guaranteed by section 15(1) and guaranteed equally to male and female persons by section 28. Section 15(2) is not a "right" for the purpose of section 28, but "merely an amplification of what the right includes".<sup>30</sup> On this basis, an affirmative action program for women, or for men, designed to ameliorate conditions of disadvantage is a means of accomplishing an equality of outcome objective guaranteed by both sections 15 and 28 as a right.

Such an interpretation is, moreover, consistent with the theory of affirmative action as a means of achieving a defined equality goal. It has been suggested, for example, that reverse discrimination should be regarded not as compensation for past disadvantage, but as a means of planning for fuller participation by all.

*...we should conceive of reverse discrimination as a process of mutual adjustment. The oppressor transfers to the oppressed the control he held over their destiny.<sup>31</sup>*

Such a concept is entirely consistent with an interpretation of section 15(1) as a guarantee of equality of outcome. It is also consistent with the decisions of the U.S. Supreme Court in *Bakke*<sup>32</sup> and *Weber*<sup>33</sup>, in that neither case denied the constitutional validity of affirmative action programs on the basis of the right to equal protection<sup>34</sup> under the 14th amendment. Furthermore, the concept of affirmative action has been historically entrenched in the Canadian Constitution through provisions protecting and promoting group rights.<sup>35</sup>

*Therefore, although the right to non-discrimination is essentially an individual right, in a country which recognizes that justice and equality of dignity involves the recognition of rights which one has as a member of a group, it should be no great extension of this principle to argue that the rights of individuals who are members of a disadvantaged group might best be realized by programs which are directed toward aiding those groups to reach the same "starting line" as the rest of the population.<sup>36</sup>*

### 4. Equality, Levels of Scrutiny, and Section 1

The relation between sections 15, 28, and 1 must also be addressed in terms of fundamental equality objectives. One approach would permit a court to treat section 15 "as if it provided for the universal application of the law".<sup>37</sup> Once inequality is established, the inquiry would shift to section 1 to determine whether there is a justification. As Prof. Gold states,<sup>38</sup> such an approach permits a flexible judicial inquiry and is consistent with the approach in *MacKay*<sup>39</sup> under the Bill of Rights and the intended operation of section 1. Although some arguments can be made to the contrary, it is suggested that this approach is desirable for the purpose of ensuring a continuing focus on the objective of equality of outcome.

Because "equal protection" is only one of the guarantees in section 15(1), it does not seem necessary to import into Charter analysis the levels of scrutiny doctrine from the U.S., and this conclusion is reinforced by the absence of an equivalent of section 1 in the American Bill of Rights. Further, although the existence of section 28 in the Charter might raise the level of scrutiny for sex inequality classifications from an intermediate to a strict standard, there are no positive advantages to such an analysis which are not already available under section 1.<sup>40</sup> Such an approach preserves the integrity of section 1, while at the same time requiring the government to make an affirmative effort to justify the law.<sup>41</sup>

In addition, such an approach confines the limits on equality rights to those that can be demonstrably justified by government pursuant to section 1. It prevents the creation of judicially defined limits in addition to those included by section 1. In addition, the primary focus on section 1 encourages the use of international legal obligations in the interpretation of "reasonable limits". It is not clear whether the U.S. levels of scrutiny doctrine would utilize international obligations to ensure that the Charter is interpreted consistently with such obligations.

*...the judicious use of international human rights law, in combination with comparative analysis of the jurisprudence of other culturally similar countries, can help to supplement and confirm domestic sources of inspiration that may range from pre-existing case law to basic concepts of political philosophy. The*

*result will be not only to ensure that Canada complies with its international obligations, but also to improve the quality of the interpretation of the Charter by our Courts.*<sup>42</sup>

It is thus possible that an interpretation of section 1, in the context of Canada's international obligations pursuant to the *Convention on the Elimination of all Forms of Discrimination Against Women*, would advance both the objective of equality of outcome under section 15(1) and affirmative action programs under section 15(2).

The rejection of the American levels of scrutiny doctrine in the interpretation of section 15(1) is desirable also in the context of determining limits for section 28. If only section 1 limits section 15, and if section 28 is not subject to section 1,<sup>43</sup> the result is that there can be no judicially determined limits on section 28. Clearly, from the perspective of efforts to achieve equality of outcome for women, such an approach is desirable, particularly taking into account the previous history of judicially created limits on section 1(b) of the *Canadian Bill of Rights*. In this context, it is also significant that the

U.S. Supreme Court would probably have elevated sex to a standard of strict scrutiny on the passing of the ERA.<sup>44</sup> Such a result would have made equal protection analysis in the U.S. quite similar to the suggested interpretation of section 1. Since it is arguable that Canada now has an ERA in section 28, this result seems entirely appropriate.

#### IV. CONCLUSION

The role of women in the constitutional debate which resulted in the *Canadian Charter of Rights and Freedoms* was a significant one. In keeping with these efforts, it is evident that Charter interpretation should accord to women the right of full participation in social, economic and political life in Canada. As Mary Eberts has stated:

*It is up to us to make sure that we are included in the constitutional review process, and that the perspectives and goals of women are taken seriously. We have a special, historical relationship to the constitution, as we had to fight so hard for so long to be included in even its minimal provisions. Let us not stop now.*<sup>45</sup>

## NOTES

1. William Ryan, *Equality* (Vintage Books: 1982).
2. This issue is a controversial one. However, a number of commentators, in expressing concern about the potential role of the Charter, have implicitly conceded that it may be interpreted purposefully. For example, see P. Russell, "The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts" (1982), 25 Can. Pub. Admin. 1 at 2; M. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982), 4 Sup. Ct. L.R. 131 at 134 and 161; and J. Whyte, "Reinventing Canada: The Meaning of Constitutional Change" (unpublished).
3. Ann Scales, "Towards A Feminist Jurisprudence" (1981), 56 Ind. L.R. 375. The approaches discussed by Scales have been analyzed elsewhere as well. For examples, see Alison Jagger, "On Sexual Equality" in Jane English, ed., *Sex Equality* (Prentice-Hall 1977); Wendy Williams, "The Equality Crisis: Some Reflections on Culture, Courts and Feminism" (1983), 7 Women's Rights L. Rep. 175; and Richard Wasserstrom, "Racism, Sexism and Preferential Treatment: An Approach to the Topics" (1977), 24 U.C.L.A. L. Rev. 581.
4. *Id.*, at 428.
5. *Id.*, at 432-433.
6. *Id.*, at 438. In particular, Scales identifies aspects of the present arrangements for work that she asserts result from the adoption of a male norm: the male who has a wife at home and who has abdicated most parental responsibilities. The incorporationist approach requires restructuring to make part-time work, benefits, and compensation available, for example.
7. This conclusion is reinforced by others. For example, Catherine Mackinnon has asserted that "maleness" has been accepted as the normative standard in society, and further that women exist only to the extent that they internalize the male image of their woman-ness. In this way, "sexuality is the linch-pin of gender inequality", and only a realignment of male dominance-female submissiveness (which permeates society) will result in gender equality. See C. Mackinnon "Feminism, Marxism, Method and the State: An Agenda for Theory" (1982) Signs 515.
8. A recent analysis has suggested that the equality concept is not useful for achieving "equality" objectives at all. See Peter Westen, "The Empty Idea of Equality" (1982), 95 Harv. L.R. 537.
9. (1973), 38 D.L.R. (3d) 481. See also a discussion of the *Bill of Rights* in B. Baines, "Women, Human Rights and the Constitution" in CACSW, *Women and the Constitution* (1981).
10. (1978), 23 N.R. 527.
11. These terms are used by William Ryan in *Equality*, *supra* note 1.
12. See Ryan, *ibid.*, Chaps. 2 and 3.
13. See Wendy Williams, *supra* note 3, which analyzes two decisions of the U.S. Supreme Court in this context and concludes that gender neutrality is more appropriate. See also *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981), and *Rostker v. Goldberg*, 453 U.S. 57 (1981).
14. W.S. Tarnopolsky, "The Equality Rights", in Tarnopolsky and Beaudoin, *Canadian Charter of Rights and Freedoms: Commentary* (Carswell: 1982) at 396.
15. See *supra* note 9 and note 10.
16. *Supra* note 9. See also Tarnopolsky, *supra* note 14 at 421.
17. *Supra*, note 14 at 422.
18. This conclusion is conceded by P. Russell, *supra* f.n. 2, at 26 where he laments the "judicialization of the resolution of equality issues" because "deciding questions of distributive justice is an essential responsibility of political man" (sic). Prof. Russell regrets that section 15 resulted from the government's need to co-opt vocal interest groups rather than from widespread public and parliamentary discussion. Notwithstanding these concerns, it is evident that Prof. Russell agrees that section 15 has effected a major change in decision-making about equality. In this context, Prof. Gold's analysis, *supra* f.n. 2, of the inherent limits on judicial decision-making may appear designed to encourage restraint on the part of the judiciary for much the same reasons; implicit in this analysis also, however, is that section 15 has effected substantial legal changes.
19. For example, see C. Hosek, "Women and Constitutional Process" in Banting and Simeon, *And No One Cheered* (Methuen: 1983), at 295 ff; and P. Kome, *The Taking of 28* (Women's Press: 1983).
20. Canada became a party in 1976 to the *International Covenant on Civil and Political Rights* and the *Optional Protocol* thereto; section 3 requires State Parties to "ensure the equal right of men and women" to the enjoyment of certain rights, and section 26 provides for equality before the law and equal protection; further, it provides that the law shall "guarantee to all persons equal and effective protection against discrimination" on any of a number of enumerated grounds, including sex. In addition, see the *Convention on the Elimination of all Forms of Discrimination Against Women* adopted by the UN General Assembly in 1979.
21. See Ann Scales and Wendy Williams, *supra* f.n.3. It follows from this definition that *Rostker v. Goldberg* and *Michael M. v. Superior Court of Sonoma County* should be differently decided using the proposed interpretation of section 15.
22. Scales, *supra* note 3, at 442-444.
23. This view (without the American analogy) seems to have been adopted by Prof. Hogg, *Canada Act 1982 Annotated* (Carswell: 1982) at 72, and by Tarnopolsky, *supra* note 14 at 396.
24. *Supra*, note 19.
25. See C. Hosek, *supra* note 19 at 287.
26. See *Frontiero v. Richardson*, 411 U.S. 677 (1973), where Mr. Justice Powell decided that sex would not be regarded as an inherently suspect category according to equal protection analysis, but conceded that it would need to be so treated by the court on the adoption of the ERA.
27. This interpretation is asserted to be "possible" by Prof. Hogg, *supra* note 23 at 72. It is also regarded as a "fair" interpretation by Prof. Gold, *supra* note 2 at 151.
28. See *post*.
29. Tarnopolsky, *supra* note 14 at 437.
30. *Ibid.* This interpretation is quite different from that offered by Prof. Gold, *supra* note 2 at 150-153.
31. I. Thalberg, "Reverse Discrimination and the Future" in Jane English, *Sex Equality* (Prentice Hall: 1977) at 162. The author is responding to L. Newton, "Reverse Discrimination as Unjustified", in Jane English, *ibid.* at 155.
32. *Regents of the University of California v. Bakke*, 98 S. Ct. 2733 (1978). See also Richard Posner, "The Bakke Case and the Future of Affirmative Action" (1979), 67 Cal. L.R. 171.
33. *United Steelworkers of America v. Weber*, 99 S. Ct. 2721 (1979).
34. For a full discussion, see Tarnopolsky, *supra*, f.n. 14 at 424-436. See also *Re Athabasca Tribal Council and Amoco Can. Petroleum Co.* (1981), 124 D.L.R. (3d) 1.
35. *B.N.A. Act*, sections 93 (religion) and 133 (language).
36. Tarnopolsky, *supra* note 14 at 433-434.
37. Gold, *supra* note 2 at 151.
38. *Ibid.*
39. [1980] 2 SCR 370.
40. Section 1 creates an obligation for the government to demonstrate that the reasonable limits prescribed by law are justified in a free and democratic society. See *Quebec Assoc. of Protestant School Boards et al. v. A.G. of Quebec et al.* (No. 2) (1983), 140 D.L.R. (3d) 33.
41. Prof. Gold's assertion concerning the practical limits on such an interpretation based on the interaction of sections 1, 15(2), and 28 have been addressed *supra* note 30 and accompanying text.
42. J. Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982), 4 Sup. Ct. L.R. 287 at 302.
43. *Supra*, note 27.
44. *Supra* note 26 and accompanying text.
45. M. Eberts, "Women and Constitutional Renewal" in CACSW, *Women and the Constitution* (1981) 3, at 25.



## EQUALITY, AFFIRMATIVE ACTION, AND THE CHARTER: RECONCILING "INCONSISTENT" SECTIONS

Jennifer K. Bankier

### Sommaire

L'égalité est un objectif important de la *Charte canadienne des droits et libertés* et nombre de ses articles s'inspirent d'ailleurs de ce principe. Ce thème général permet de concilier les articles dont le libellé semble contradictoire. Est retenue l'interprétation qui respecte le mieux l'objectif de la Constitution, à savoir favoriser l'égalité sociale. C'est à partir de cette norme que l'auteur intègre divers articles, notamment les articles 15(1) et (2) (égalité et promotion sociale), article 28 (égalité pour les deux sexes), article 27 (multiculturalisme), article 29 (écoles confessionnelles) et article 25 (droits des autochtones). L'étude porte également sur le rapport entre les articles 15 et 28 de la Charte, ainsi que sur l'article 1, la clause des «limites raisonnables».

### Summary

Equality is an important goal of the *Canadian Charter of Rights and Freedoms* that provides the philosophic basis for a large number of Charter sections. This common theme can provide a basis for reconciling these provisions in cases where they appear to conflict in language or substance. Such conflicts should be resolved in favour of the interpretation that best serves the underlying constitutional goal of increased social equality. The paper uses this standard as a basis for integrating a variety of Charter sections, including sections 15(1) and (2) (equality and affirmative action), section 28 (sexual equality), section 27 (multiculturalism), section 29 (denominational schools), and section 25 (aboriginal rights). It also examines the relationship between sections 15 and 28 of the Charter and section 1, the "reasonable limits" clause.



## EQUALITY, AFFIRMATIVE ACTION, AND THE CHARTER: RECONCILING "INCONSISTENT" SECTIONS

Jennifer K. Bankier\*

### I. INTRODUCTION

This paper will explore<sup>1</sup> the relationship between a number of sections of the *Canadian Charter of Rights and Freedoms*<sup>2</sup> that may appear, at first glance, to be inconsistent with each other. It defines a common set of policy goals that appear to underlie many of these provisions and that can be used to reconcile them.

### II. CONSTITUTIONAL INTERPRETATION: WORDS OR POLICY?

A first, critical question is whether the courts should approach the interpretation of the Charter in a literal-minded fashion that places primary emphasis on the technical meanings of the words used in each separate section, or whether they should adopt a broad, policy-oriented approach that focuses on the social goals that the Charter was meant to achieve.

In interpreting ordinary statutes, Canadian courts have tended to favour a "black-letter" strategy that places primary emphasis on the actual words used in statutes.<sup>3</sup> This approach is justified in the name of the "supremacy of Parliament", even in cases where it may serve to defeat the underlying policies of the statute.<sup>4</sup>

Such a policy may be tolerable in the case of ordinary statutes, since Parliament (or the provincial legislatures) can, in fact, correct any judicial interpretation in a relatively expeditious manner. An inflexible approach based on a theory of Parliamentary supremacy is clearly not appropriate, however, in a constitutional document such as the Charter.<sup>5</sup> The Charter is expressly designed to override Parliamentary supremacy in cases where legislation conflicts with the fundamental rights that the Charter is designed to protect. Moreover, it is much more difficult to override a judicial interpretation of a constitution that prefers "the letter" of the words used to the spirit of the underlying policy, since the consent of many governments must be obtained, instead of the consent of a single legislature, as in the case of an ordinary statute. Finally, the life of a constitution is much longer than that of an ordinary statute, so that courts must be free to serve its underlying policies by adapting their application of it to changing social circumstances.<sup>6</sup>

This choice between a "literal" and a "policy" orientation will be highly significant when the courts are asked to reconcile provisions of the Charter that may appear, on their face, to be in conflict, especially when several different sections all claim a predominant position for the interests of a particular group of people.<sup>7</sup> The courts could engage in the technical exercise of determining which set of words is stronger, or

they could attempt to identify a common policy or set of policies that underlie all the various sections. These policy considerations, in turn, could then be used to reconcile apparent conflicts among sections by identifying the interpretation that would best serve the common goals that gave rise to all the various sections.

The flexible "policy" approach is more likely to serve the best interests of all Canadians in the longer run, as well as preserving both the consistency and the credibility of the Charter. The next section of this paper will attempt to identify an appropriate policy that could form the basis for such an approach.

### III. EQUALITY, MAXIMIZATION OF POTENTIAL, AND THE ELIMINATION OF BARRIERS

By looking at the Charter as a whole, it is possible to identify a common thread that runs through many of its sections. This is an emphasis on equality as a means of allowing people to maximize their human potential in the many diverse ways of which the human race is capable. This emphasis is most obvious in the sections in which the word equality explicitly appears.<sup>8</sup> However, it also appears to provide part of the basis for many of the other Charter sections as well.<sup>9</sup>

If equality is a recurrent theme of many provisions of the Charter, it would seem that the achievement of an egalitarian society is a major purpose of this constitutional document. The next logical question, therefore, is what such an egalitarian society would be like.

A society could fairly be described as egalitarian if all of its members had an equal opportunity to pursue their objectives in life, without the imposition of arbitrary, unnecessary, or avoidable barriers.

It is readily apparent that we do not live in an egalitarian society at the present time. Substantial numbers of people in Canada face very serious obstacles to the full realization of their potential that are essentially arbitrary in nature.<sup>10</sup> The Charter's "equality" sections are not designed, therefore, as a reflection of an existing reality, but as tools designed to help Canada work towards a goal that has not yet been achieved.

Moreover, it is clear from a number of sections that the Charter's role, and that of governments operating under it, is not merely to restrict conduct that imposes inappropriate constraints upon others, but to design and implement affirmative remedies to help overcome existing barriers, at least if governments choose to do so.<sup>11</sup> This remedial role for government<sup>12</sup> is apparent not just in the general "affirmative action" provision of section 15(2), but in section 6(4), which explicitly authorizes programs designed to "ameliorate ... the conditions of individuals in [a] province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada".

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This explicit constitutional recognition that provincial and federal governments have an affirmative role to play in eliminating barriers to equality is particularly important because of a significant limitation to the constitutional remedies provided by the Charter.

It has long been recognized in the United States that the provisions of the U.S. Bill of Rights apply only to governmental action.<sup>13</sup> In other words, individuals can sue to assert constitutional rights in cases where the government is implicated in some manner in the violation of these rights, but they cannot use the constitution as a basis for relief against acts by private individuals. Courts have interpreted the concept of "governmental action" quite broadly, so that constitutional rights can be asserted against private bodies that act as agents of governments or that receive governmental funding (e.g., universities and private schools) to support a program in which discrimination is practised. Nevertheless, a broad range of harmful social activity remains outside the scope of the U.S. Constitution and can only be regulated through state or federal legislation. This is the reason that there are acts forbidding discrimination on the basis of sex or race in a variety of areas of "private" activity,<sup>14</sup> despite the fact that the U.S. Constitution has also been interpreted to preclude discrimination on the basis of sex or race.

Although the Canadian Charter does not state expressly that its provisions apply only to governmental action, it seems highly likely that the Canadian courts will come to a conclusion that it is so restricted. The authors of the Charter appear to have been well aware of "sore spots" under the American Constitution, since many of the more detailed Charter provisions (including those dealing with affirmative action) appear to be designed to expressly resolve constitutional controversies that have arisen in the United States. If the drafters of the Charter had wanted it to apply to activities of private individuals, it seems likely that this would have been stated explicitly in the "Application" section (s. 32), which clearly indicates that the Charter does bind the federal and provincial governments.<sup>15</sup>

Accordingly, it appears that inequalities arising from non-governmental activities of individuals or impersonal forces can only be redressed through legislative action. It is therefore highly important that this power of governments to affirmatively attack social inequities should not be hamstrung by those provisions of the Charter that restrict governmental activity in the name of equality.

#### IV. RECONCILIATION OF THE "EQUALITY" PROVISIONS OF THE CHARTER

In this section of the paper I will attempt to use the "equality" analysis set out above as a tool to reconcile alleged inconsistencies among various sections of the Charter. In some cases these problems arise because of conflicts of interests or values among various groups in Canadian society, which may be asserted through different sections of the Charter. In other cases they reflect language in specific sections of the Charter that attempts to give those sections priority over other parts of the Charter. My thesis is that "conflicts" of this sort should be resolved by adopting the interpretation that best serves the underlying constitutional goal of increased social equality, whenever the language of the various provisions can reasonably support such an approach.

#### A. "Discrimination" and "Affirmative Action": Section 15 and Section 28

The logical starting point in such an analysis is an examination and reconciliation of the general equality provisions of the Charter, which may be found in section 15. This section provides as follows:

##### *Equality Rights*

15. (1) *Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

(2) *Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

The obvious "conflict" here would be between subsection (1), which forbids "discrimination" on certain specified grounds (race, sex, etc.) and subsection (2), which permits affirmative action that draws distinctions on those same grounds. Some Canadians believe that affirmative action is itself a form of discrimination and would suggest, therefore, that subsection (2) is inconsistent with the prohibition of discrimination in subsection (1).

If section 15 stood alone, it might be possible to dispose of such arguments on technical grounds by saying that, as a general principle, specific "statutory" language will override more general words. The language of section 15(2) specifically states that subsection (1) does not preclude affirmative action programs, and that, accordingly, should be the end of the matter.

It would be unwise for supporters of affirmative action to rely exclusively on such technical arguments, however. There are other sections of the Charter that purport, on their face, to prevail over the rest of the Charter,<sup>16</sup> and that might be interpreted in a manner that would have them prevail over section 15. Accordingly, it is appropriate to explore the policy considerations that might serve to reconcile the policies of "non-discrimination" in section 15(1) and affirmative action in section 15(2), even in the absence of the express statement in section 15(2) that such programs are not precluded. It can then be determined whether a similar analysis might help to resolve apparent conflicts between section 15 and other sections.

In this respect, it is helpful to determine the probable interpretation of the "non-discrimination" provisions of section 15(1) if the express affirmative action clause in section 15(2) did not exist. In other words, would affirmative action programs be permissible in such a situation?

At the outset, it should be emphasized that all distinctions between individuals or groups are not prohibited by a "non-discrimination" clause. Discrimination takes place when improper distinctions are drawn between people whose position is objectively the same, according to the criteria that ordinarily regulate governmental policy in the particular area. Governments may properly distinguish between classes of individuals when real and relevant differences exist in their

characteristics and positions that affect legitimate governmental goals.<sup>17</sup>

The authors of the Charter could have followed the example of the American Bill of Rights<sup>18</sup> and simply drafted a general "equal protection" clause, leaving it to the courts in specific cases to decide whether the particular distinction drawn was "discriminatory" in the sense defined above. The explicit reference in section 15 to specified grounds of discrimination must, therefore, be of some significance.

The experience of American courts in interpreting the U.S. "equal protection" clause of the Bill of Rights is relevant here. Ordinarily, a plaintiff trying to claim the benefit of this clause has the burden of demonstrating that the distinction at issue does not bear a rational relationship to a legitimate state<sup>19</sup> interest.<sup>20</sup> This standard reflects the fact that many, if not most, distinctions drawn by legislation reflect a genuine difference in position.

Over time, American judges have identified certain distinctions that are normally the product of improper "discrimination" when they appear in legislation, i.e., in most cases such distinctions are the product of stereotyped thinking on the part of the legislator, rather than underlying social reality. In such cases, American courts will normally assume that discrimination exists unless evidence is provided to rebut the inference by showing appropriate grounds for the distinction in the specific fact situation.

The strength of the inference to be drawn and the burden of establishing that discrimination exists varies from one "category" to another, with the highest standard being imposed in cases of distinctions based on race, natural origin, or "alienage".<sup>21</sup> Legislation that distinguishes between individuals on these grounds is treated as being "suspect" or subject to "strict scrutiny". This means that the government bears the burden of establishing that it has a *compelling* interest that justifies the law in question, and that the distinctions in question are *necessary* to accomplish the purposes of the legislation even if the purpose is in fact compelling.<sup>22</sup>

In the case of sex discrimination, the U.S. courts have adopted an intermediate classification<sup>23</sup> that imposes upon defendant governments the burden of establishing that classifications based on gender serve *important* governmental objectives and are *substantially related* to the achievement of those objectives.<sup>24</sup> It is possible that some sort of "reverse onus" standard is gradually being applied to other distinctions as well (e.g., age, legitimacy vs illegitimacy), but this remains uncertain.<sup>25</sup>

For our purposes it is important to note that even under the more rigorous U.S. "equal protection" standards, i.e., those applied in cases of racial and sexual discrimination, the American courts have recognized the propriety of well-designed affirmative action plans that do not go beyond what is necessary to rectify past or present disadvantages that have been inflicted because of race or sex.<sup>26</sup>

We will now examine the alleged inconsistencies between subsections 15(1) and 15(2) in the light of the American experience.

As noted earlier, section 15(1) differs from the American "equal protection" clause because it expressly sets out a list of kinds of "discrimination" that are forbidden. These include race, national or ethnic origin, colour, religion, sex, age, and

mental or physical disability. It seems unlikely that the Charter's authors intended to provide victims of racial discrimination with any less protection in Canada than in the United States. Accordingly, it would be a reasonable inference that people in the other categories defined above are entitled, at a minimum, to insist that the federal or provincial governments bear the burden of establishing that distinctions based on any of the specified criteria serve a compelling "state" interest, and are necessary to the accomplishment of that compelling goal.<sup>27</sup> The American decisions cited above suggest that well-designed "remedial" affirmative action programs do meet this standard, at least in cases of racial and sexual inequality.

The justification normally given for programs of this sort is that they help achieve a greater degree of equality for disadvantaged groups. Equality is an important social goal, and, indeed, forms the basis for much of the Charter, so an argument that equality is a "compelling state interest" is likely to be persuasive. The remaining question is whether affirmative action programs designed to favour a specific subgroup within one of the section 15 categories constitute a "necessary" means of accomplishing this goal.

At this point, it is worth pausing to consider why opponents of affirmative action do not consider this strategy to be appropriate. Their position may reflect any one of a number of assumptions.

First, an opponent of affirmative action may assume that such measures are "unnecessary" because we already live in a society where all individuals "compete" for opportunities on an equal basis, without any on-going disabilities related to race, sex, etc. In such a situation any legislation that conferred benefits on the basis of such characteristics would, indeed, be inappropriate, since it would provide members of the favoured race, sex, ethnic group, or religion with an unfair advantage over people who would otherwise be their equals, and thus result in a net reduction in equality.

This argument is unpersuasive at the present time, since it is quite clear that we do not live in such a society, and constitutions must be interpreted within the context of the real world. In reality, blacks, women, and aboriginal peoples, for example, operate under real and serious disadvantages compared with white men. Legislation designed to help the members of such groups may do no more than place them in a position to compete on an equal basis, instead of giving them an advantage.

Another assumption that frequently underlines opposition to affirmative action is that the end (a neutral society where race, sex, etc., are irrelevant) also dictates the means to be used to achieve it (neutral techniques where race and sex are irrelevant). In other words, members of all racial groups, both sexes, all religions, etc. must be treated in the same manner, and any policy that favours people on the basis of their group status is inherently improper, even if neutral policies will be ineffective to achieve equality in the foreseeable future. This position is also unpersuasive since it allows an empty equality of form to prevail over the goal of equality in substance.

More sophisticated opponents of affirmative action may agree that individuals in some social groups may face more disadvantages than others, and that some legislative intervention is appropriate to redress such inequalities. However,

they may still oppose legislation directed toward specific groups because of assumptions about the nature of discrimination and the remedies that are likely to be effective in eliminating it.

Many people assume that acts of discrimination based on "irrelevant" criteria reflect inappropriate behaviour on the part of prejudiced and irrational individuals. In other words, it is assumed that acts of discrimination are isolated social phenomena, and that an effective remedy can be provided by forbidding these isolated acts and imposing appropriate penalties on the "bad" individuals when they occur. If this is true, there is no reason to expect that irrational prejudice will be directed primarily at any single race, sex, ethnic group, etc. Accordingly, if irrational prejudice is, indeed, the cause of most discrimination, there is no reason to expect any particular group to be more disadvantaged than any other. Accordingly, all such distinctions can be condemned as discriminatory, and there is no need to provide special assistance to any particular group.

It is true that some acts of discrimination are the product of irrational dislike. However, many others are the product of "social" inequalities of power that favour one group at the expense of another. Indeed, the "exploitation" of powerless groups may be quite rational for powerful (or beneficiary) groups, which may have a very strong incentive to resist the enforcement of legislation that will favour equality.<sup>28</sup> For example, racial inequalities that channel minorities and women into low-status, ill-paid jobs may favour white males by allowing them to hold a larger share of prestigious, well-paid jobs than would be the case in a truly equal society. They may also allow corporations to make higher profits by establishing a separate labour market where lower wages can be paid. The positions of the powerful and the powerless groups are not interchangeable in such a situation, and any policy based on the assumption that they are may reinforce inequality instead of eliminating it. In other words, discrimination is a social act, and social remedies are required to eliminate it.

The distinction between the "individualized" and the "social" views of discrimination is critical in determining the propriety of "affirmative action", since this is a "social" strategy designed to overcome the effects of inequality between social groups. For example, a typical affirmative action program is a scheme designed to ensure that employers whose workforce reflects social inequalities hire women, racial minorities, or other disadvantaged groups in numbers that adequately reflect their proportion in the general population. It reflects the assumption that there is no inherent difference in the distribution of talents among members of the advantaged and disadvantaged classes, and that persistent social inequalities are the product of widespread patterns of discrimination.

Supporters of the "individualized" view would argue that all schemes that distinguish between individuals on the basis of membership in a social group are inherently improper and inconsistent with the concept that individuals should be judged on their merits. For example, a policy that encouraged the employment of blacks and women would discriminate against white men, who might be excluded from positions that they would otherwise have occupied on the basis of race, despite the fact that they themselves may not

have engaged in overt acts of discrimination. Adherents to this view would also reiterate that even though the elimination of inequalities in employment may be, indeed, a compelling "state" interest, "affirmative action" programs are not "necessary" because employment discrimination can be eliminated over time through neutral legislation that forbids employment discrimination against members of all races and both sexes.

By contrast, those who adopt the "social" view of discrimination would make two arguments in favour of affirmative action. First, affirmative action programs that favour specified groups will only be introduced where the members of those groups are clearly operating under a disadvantage caused by the effects of past and present discrimination. In such a situation, the members of the privileged and powerless groups are not in the same position, and distinctions between them do not constitute discrimination. Moreover, affirmative action programs are designed merely to provide members of the disadvantaged groups with access to the number of jobs or the kind of occupations that they would have occupied if no discrimination had taken place.<sup>29</sup> In this respect, such programs might better be called remedial action, since they fill a function for groups that is equivalent to the role of damages, specific performance, and other remedies in ordinary law suits as a means of providing redress for victims of individual wrongs. No court would entertain the conclusion that such remedies for individual victims of harmful conduct constitute discrimination against people who have not been harmed, and a similar conclusion can be justified in the case of affirmative action.

Second, the adoption of such programs is, indeed, "necessary" if the goal of social equality is to be achieved within any reasonable time frame. "Individualized" remedies that require specific proof of acts of discrimination against particular qualified individuals are not likely to be effective in eliminating discrimination as a social phenomenon. To the extent that such remedies focus on acts of "intentional" discrimination<sup>30</sup> based on race, sex, etc., they may overlook more subtle disadvantages based on uncritical acceptance of stereotyped assumptions, or situations where differences in qualifications are real but the product of a group's disadvantaged position in other areas (e.g., education). There may also be serious proof problems in establishing the existence of intentional discrimination even when it is in fact present.<sup>31</sup>

On balance, the "social" view of discrimination that supports the conclusion that affirmative action is not discriminatory seems more persuasive than the "individualized" view. The "social" analysis is a better reflection of the present state of Canadian society where persistent oppression of members of disadvantaged groups is an on-going reality. It is also more likely to result in a net increase in equality throughout that society than a philosophic position that persists in exalting form and theory over substance.

Accordingly, affirmative action would be permissible under the general "discrimination" provisions of section 15(1) even if the express authorization of affirmative action in section 15(2) did not exist. The fact that the authors of the Charter chose to expressly sanction affirmative action should be viewed not as an indication that this remedy would be improper without such a clause, but as a means of removing



all possible doubt on the matter, at least within the context of section 15 itself.

The arguments set out above are also adequate to dispose of any contention that section 28 overrides the affirmative action provision of section 15(2). Section 28 provides as follows:

*28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.*

The political pressures from women's groups in favour of the adoption of this provision reflected concern with the legislative "override" power contained in section 33 of the Charter,<sup>32</sup> and the authors of at least one unofficial federal government document appear to agree that the effect of section 28 is to preclude the use of the override provision to authorize legislation that perpetrates sexual inequality.<sup>33</sup> Nevertheless, the language stating that section 28 applies "Notwithstanding anything in this Charter" seems sufficiently strong that male litigants may contend that it overrides those aspects of section 15(2) that would otherwise permit affirmative action in favour of women as the historically disadvantaged sex.

These arguments are not persuasive, however. In the first place, the goal of section 28 is clearly the accomplishment of sexual equality. Any interpretation of the section that would serve to hinder that goal in practice should be avoided if there is any possible interpretation of the Charter that would support this result. As the preceding analysis demonstrates, the elimination of affirmative action programs that would alleviate the historic disadvantages suffered by women would clearly interfere with the achievement of equality.

Fortunately, there is an interpretation of the relationship between section 28 and section 15 that would maintain the propriety of affirmative action. Men and women are equally guaranteed "the rights and freedoms referred to in [this Charter]". In other words, men and women are equally entitled to whatever rights are guaranteed under section 15, including a right to be free from discrimination on the basis of sex.

However, the preceding analysis has demonstrated that affirmative action designed to remedy disadvantages caused by membership in a particular sex is not discriminatory under section 15(1), even if section 15(2) is not taken into account. Accordingly, the most reasonable way to reconcile sections 15 and 28 is to hold that men and women both have a right to be protected from unjustified distinctions based on sex, and to have the benefit of affirmative action programs when they are in fact disadvantaged on account of their sex. The social fact that women will more often be able to establish that they are in fact disadvantaged and thus entitled to the benefit of affirmative action programs will reflect underlying social reality, and not any inequality in the application of the Charter to men and women.<sup>34</sup>

## **B. Conflict Among the Equalities: General Principles**

There is, however, a question about the interpretation of section 15 and other related provisions of the Charter that is not answered by the preceding analysis. Up until now it has been assumed that society can be divided neatly into "oppressors" and "oppressed", and that there is no overlap in the membership of the various categories.

Unfortunately, this assumption is unrealistic. The mere fact that members of a particular group are disadvantaged on the basis of some inappropriate characteristic does not mean that they are incapable of oppressing people who share some other, equally inappropriate, trait. For example, members of disadvantaged religious groups or ethnic minorities are quite capable of discriminating against women or other minorities.

Such a situation may not pose difficulties under the Charter if the "oppressor" group admits that its conduct is designed to achieve some material benefit. In such a situation discrimination by disadvantaged groups has no apparent social justification, and it can be regulated according to the same principles that govern misconduct by dominant groups.

The situation becomes more complex, however, if a disadvantaged group that is disadvantaging others in its turn attempts to justify its acts in the name of equality. This is most likely to happen in the name of subjective values, such as equality among different cultures or religions. For example, an inferior status for women is built into many cultures and religions, and an attempt to redress this sexual inequality through legislation against employment discrimination or affirmative action programs might be resisted on the ground that it contravenes those provisions of the Charter designed to protect religious freedom and cultural diversity. These arguments are not persuasive, however, in light of the common goal of social equality that underlies these various provisions.

In general, religious freedom and cultural diversity are good things because they provide an equal opportunity to individuals to assert values that are important to them, even when there is substantial disagreement about the values in question. In many cases there is no objective social justification for favouring one set of values over another, and individuals should be allowed an equal right to define their own lifestyle, without interference by others who do not share their values. It is this fact that justifies both prohibitions against discrimination on the basis of religion or culture (section 15) and provisions expressly encouraging the expression of various cultures (section 27) or religions (sections 2 and 29).

"Equality" and "freedom" are not unlimited rights, however. This would only be appropriate if equal rights were never used to harm other people. No rational society would extend the concept of religious or cultural freedom to permit the murder or physical injury of individuals outside the group, or members of the group who do not voluntarily submit to the practice in question.<sup>35</sup>

It is difficult to see why it should make any difference that the harm rationalized in the name of religion or culture is sexual or racial discrimination,<sup>36</sup> at least when the victims of such discrimination do not consent thereto.<sup>37</sup> In the absence of clear language that precludes any other interpretation, governmental action designed to remedy such discrimination should not be condemned under section 15 or other Charter provisions on the ground that it interferes with religious or cultural freedom, since it leads to a net gain in social equality. Similarly, oppressed groups should not be able to mitigate the effects of their own oppression by oppressing others in turn.

I will now consider briefly the feasibility of applying these principles in the context of a number of Charter provisions.

My primary focus will be on provisions that specifically attempt to give *primacy* to religious and cultural values over other provisions of the Charter.<sup>38</sup>

### C. Section 27 and Multiculturalism

The provisions of sections 15(1) and (2) that forbid discrimination on the basis of national or ethnic origin, and permit affirmative action to remedy disadvantages based on such status, are supplemented by the more positive provisions of section 27. This section provides as follows:

*27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.*

Under ordinary circumstances this provision will make a positive contribution to equality, since it will encourage the preservation of those cultural differences that represent legitimate and unoppressive differences in tastes and values. Under some circumstances, however, it could come in conflict with other provisions of the Charter, if some of the values of the multiple cultures would require continued inequality for women if they are in fact preserved.

An easy way out of this dilemma is provided by the sexual equality provisions of section 28, which apply *notwithstanding anything* in the Charter. This is much stronger than a direction that the Charter is to be *interpreted* in favour of cultural diversity, since interpretation requires a choice among possible meanings and cannot be used to impose a meaning upon words that they cannot reasonably bear.

Even in the absence of such a provision, section 27 should not be applied in a manner that perpetrates sexual discrimination, however, for the reasons given above. Such an interpretation is in fact consistent with the reference to a "multicultural heritage". A heritage is a positive benefit for a person or a country, and discriminatory practices that deny equality of opportunity to unwilling women or other oppressed groups cannot reasonably come within this language.

### D. Section 29 and Denominational Schools

A more difficult problem<sup>39</sup> is posed by section 29, which states that:

*Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.*

The statement that nothing in the Charter interferes with the rights relating to denominational schools is every bit as strong as section 28's statement that the right to sexual equality applies "notwithstanding anything" in the Charter. A defence of "sexist" practices in denominational schools under section 29 could not be overridden, therefore, merely by pointing to the language of section 28.

On the other hand, the very fact that the language in both sections is equally strong precludes the suggestion that denominational rights under section 29 should automatically override sexual equality under section 28. There is a need for a "tie-breaking" principle between the two sections, and a respectable argument can be made that the underlying principle of equality of opportunity justifies giving priority to section 28. (See the analysis in section b.) This is particularly true since denominational schools will ordinarily be receiving

governmental funds to support their operations and could reasonably be expected to conform to general social prohibitions against behaviour that interferes with the opportunity for women and other members of disadvantaged groups to maximize their human potential.

### E. Section 25 and Aboriginal Rights

This section relates to aboriginal rights and provides that:

*25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal people of Canada including*

*(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763, and*

*(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.*

The interesting question here is whether this provision can reasonably be construed to justify the preservation of the infamous provision that provides that native women lose their Indian status if they marry white men, while native men do not suffer an equivalent loss of status if they marry white women.<sup>40</sup>

At the outset, it should be noted that this provision merely states that the Charter "shall not be construed" to interfere with aboriginal rights. Again it can be argued that the stronger "notwithstanding anything in this Charter" language of section 28 would override this provision in any event.

Moreover, it should be noted that the express language of section 25 reflects less a desire for racial and cultural equality for aboriginal people<sup>41</sup> than a concern over their status as original occupants of most of Canada, a non-racial factor that happens to coincide with race. Accordingly, the section should really be interpreted in a manner that focuses on any advantages or disadvantages that arose out of their status as original inhabitants, instead of cultural values, such as sexual inequality, that could and do exist in many other racial or cultural groups. This is especially true if, as has been suggested, the discriminatory marriage provisions in the Indian Act are not in fact indigenous to aboriginal culture, but were imported by the white officials who drafted the statute.<sup>42</sup>

Finally, it is clear that all native people do not agree that sexually discriminatory provisions have the characteristic of "rights", and the opposition of many native women to this position is particularly apparent.<sup>43</sup> Given this lack of consensus, and the fact that aboriginal culture could be preserved equally effectively through a neutral provision that strips both native men and native women of their Indian status if they marry whites, or by one that allows both of them to retain it without extending Indian status to the spouse, section 25 should not be held to protect the sexually discriminatory provisions of the Indian Act from attack under sections 15 and 28.

### V. SECTION 1 AND REASONABLE LIMITS ON EQUALITY RIGHTS

A final question is the extent to which section 1 imposes limitations on equality rights with its statement that:

*1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

It is possible that the "notwithstanding anything in this Charter" language of section 28 is adequate to override the section 1 qualification in the case of sexually discriminatory legislation.<sup>44</sup> Section 28 will provide no assistance, however, in the case of the other equality rights guaranteed by section 15.

It seems likely that section 1 is a "reverse onus" provision that places the burden upon a government seeking to uphold legislation to demonstrate that the limitation in question is reasonable and demonstrably justified.<sup>45</sup> It is important to recall the circumstances under which the government will be required to discharge this burden in the case of section 15 equality rights.

It was earlier suggested that most or all of the specifically enumerated equality rights under section 15 will require "strict scrutiny". Under this standard, legislation that draws distinctions on the basis of one of the categories explicitly mentioned in section 15 could be justified only if it is associated with a "compelling state interest" and is "necessary" to protect that interest. A dispute over the application of section 1 to discriminatory legislation can arise only if the court has already held that there is in fact a violation of section 15 rights. In the case of the explicitly enumerated rights,

such a ruling is dependent on a finding that the interest protected by the legislation is not "compelling" or that the particular legislation is not "necessary" to achieve an end that is "compelling".

It seems unlikely that a court that has already held that discriminatory legislation is unnecessary or that it does not serve a compelling need would be prepared to hold that that same legislation is a "reasonable limitation" that is "demonstrably justified in a free and democratic society".

In practice the burden placed upon a government under section 1 is likely to be exactly the same as the standard applied under section 15, at least in the case of the protected classes explicitly enumerated under the latter section, and any review under section 1 is likely to be more a matter of form than of substance. It would seem sensible, therefore, for courts to expressly state that the standard under section 1 is the same as that under section 15, and to justify this position on the basis that section 15 already takes the legitimacy of goals other than equality into account.

## VI. CONCLUSION

Equality is an important goal of the *Canadian Charter of Rights and Freedoms* that provides the philosophic basis for a large number of Charter sections. This common theme can provide a basis for reconciling those provisions in cases where they appear to conflict in language or substance. This paper has demonstrated the utility of this strategy in a number of different contexts. It is to be hoped that Canadian courts will choose to adopt a similar, policy-oriented approach, in preference to a formalist strategy that focuses upon minor differences in language of the various sections.



## NOTES

1. The paper is primarily an "idea" analysis that sets out my own ideas on these topics, not a "research" piece that makes heavy use of primary and secondary sources other than the Charter.
  2. The Canadian Charter of Rights and Freedoms (hereafter referred to as "the Charter") is Part I (sections 1-34) of the Constitution Act, 1982, which is Schedule B of the Canada Act 1982, 1982, c.11 (U.K.). My discussion of the Charter will also draw upon a Canadian government publication, *The Charter of Rights and Freedoms: A Guide for Canadians* (Publications Canada, 1982), which contains the text of key sections of the Charter, accompanied by a detailed commentary. The cover of this booklet states as follows: "This publication is not a legal document. The notes in the booklet are for explanatory purposes only, and are not to be taken as legal interpretations of the provisions of the Charter". Nevertheless, these comments may provide an informal indication of how the federal government defined the purpose of the various sections.
  3. For a critical description of the development of this judicial policy, see J. A. Corry, "The Interpretation of Statutes", in E.A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1980), 203-234. See also "Linden Decries Judicial 'Nitpicking' Wants Legislation Enforced in Spirit", 3 Ontario Lawyers' Weekly, No. 6, June 8, 1984, p. 2, col. 3.
  4. Such a result might occur in cases where the drafter of the statute has made a technical error in selecting the language designed to achieve a particular result, or where something has been omitted from the statute, either by accident or because Parliament did not anticipate all the possible circumstances in which the statute might be applied. A policy-oriented interpretation of the statute would attempt to overcome these problems by construing "inappropriate" language in a manner designed to serve the policy of the statute even if such an interpretation of the literal words is unusual, or by filling the gap in the statute through a process of extrapolation. A "strict construction" approach of the kind traditionally favoured by Canadian courts would refuse to "stretch" the normal meaning of words or to fill gaps and justify this approach on the grounds that "legislation" of this sort is a function for Parliament. See Driedger, note 3 *supra*, 30-43, 76-79.
  5. The Supreme Court of Canada's first decision concerning the Charter, *Skapinker v. Law Society of Upper Canada* (1984), 53 N.R. 169, is troubling because so much of the Court's judgement displayed a "black letter" emphasis on such issues as whether an "and" appearing between clauses is conjunctive or disjunctive (*id.*, 183-84, 194-96), or whether headings may be used in the interpretation of the Charter (184-94), instead of a concern with the social policies that led to the adoption of the mobility rights contained in section 6 of the Charter.
- Nevertheless, there were some positive signs even in *Skapinker*. The Supreme Court explicitly recognized that "Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves". *Id.*, p. 180. The Court also quoted (*id.*, 182) with approval the portion of the decision of the U.S. Supreme Court in *McCulloch v. State of Maryland* (1819), 17 U.S. (4 Wheaton's) 316, 407, where Chief Justice Marshall stated that the nature of a constitution requires "that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves". There remains some hope, therefore, that the Supreme Court of Canada can be induced to adopt a policy-oriented approach to the interpretation of the Charter of Rights.
- In the more recent case of *Atty. Gen. of Quebec v. Quebec Association of Protestant School Boards*, Supreme Court of Canada, July 26, 1984 (unreported), the Supreme Court adopted a more policy-oriented approach that placed emphasis upon both the policy underlying section 23 of the Charter (linguistic rights) and the policies of the Quebec language legislation (*Bil 101*). It is to be hoped that the Supreme Court will continue this trend in later decisions.
6. For a review of the arguments in favour of interpreting constitutions more broadly than ordinary statutes, see D. Gibson, "Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations" in W.S. Tarnopolsky & G.-A. Beaudoin, *The Canadian Charter of Rights and Freedoms* (Carswell, 1982) 25. Gibson suggests that courts should "seek their guidance in the spirit of the Constitution, rather than from its inevitably imperfect language". *Id.*, 28. See also M. Manning, *Rights, Freedoms and the Courts* (Edmond-Montgomery Limited, 1983) 21-50.
  7. In addition to the general "equality" and affirmative action provisions contained in section 15 of the Charter, there are a number of provisions that purport to give priorities in the application of the Charter to various groups or social interests. Section 28 claims that rights to sexual equality prevail "notwithstanding anything in this Charter". Section 29 protects certain aspects of religious freedom by declaring that "nothing in this Charter" abrogates rights to denominational schools. Section 25 declares that the guarantee of "certain rights and freedoms" in the Charter "shall not be construed to abrogate or derogate" from the rights of aboriginal peoples. Section 27 provides that the Charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". Finally, section 1 of the Charter purports to guarantee the rights and freedoms contained therein "subject only to such reasonable limits ... as can be demonstrably justified in a free and democratic society".
  8. The word "equality" is used explicitly in section 15 (general equality provision), section 28 (sexual equality), and section 16 (official languages).
  9. A desire that all individuals have an equal and effective right to pursue material, social, or philosophic goals appears to underlie a broad range of sections. This is commonly suggested by the use of the word "everyone", as well as by the specific goals that the sections are designed to serve. For example, section 2 reflects the desire that "everyone" should have an equal right to pursue objectives they believe in through religion, freedom of thought, communications media, peaceful assembly, and freedom of association. In the case of religion, section 2 is reinforced by section 29, protecting existing rights to denominational schools. Section 3 provides equal democratic rights to "every citizen of Canada" with respect to election of legislatures. Section 6 is designed to equalize the position of long-term residents of a province and people who migrate there from other parts of Canada with respect to the pursuit of a livelihood, subject to a right to create programs designed to eliminate unequal conditions that put certain residents of a province at a disadvantage compared to other parts of Canada. Section 7 gives "everyone" an equal right to the life, liberty, and security of the person that permit them to pursue their goals, except if deprived of this right in accordance with due process of law. Section 27 is designed to encourage the preservation, enhancement, and equality of the many disparate cultures that reflect the lifestyles and values of Canadians.
- The importance of equality as a constitutional value pervading many constitutional provisions has been recognized in the United States:
- [T]he notion that equal justice under law may serve as indirect guardian of virtually all constitutional values is evidenced by more than a maxim carved in marble on the United States Supreme Court. ... [N]o single clause or provision is the exclusive fount of doctrine in this area, and ... principles of equal treatment have emerged in ways fairly independent of particular constitutional phrases.
- L.H. Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press, 1978) 991-92.
10. These barriers may be the product of the unfortunate human tendency to feel hostility toward people with different characteristics or values, even when the differences in question are not harmful to others. Alternatively, they may reflect a tendency for powerful individuals or groups to create, maintain, or use their power through the oppression and exploitation of less powerful individuals or groups. Finally, barriers may arise through impersonal social or natural forces that operate in an unjust or arbitrary manner. Economic inequalities such as regional or individual unemployment are an example of impersonal social barriers, since they may restrict access to services such as education or adequate housing which are essential to the maximization of intellectual or physical potential. Many physical or mental handicaps are an example of the second kind of "natural" barrier.
  11. It seems unlikely that section 15(2) of the Charter imposes a general obligation on a government to act affirmatively to remove social inequalities that result from impersonal forces or the conduct of private individuals, as long as the government's own legislation does not contain discriminatory provisions or have a discriminatory impact that could constitute "governmental action". For example, a government could not be forced to implement an affirmative action plan to eliminate racial or sexual inequalities in private business if it did not choose to do so. But see P. Bender, "The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison" (1983), 28 McGill Law J. 811, 822-826 for a general discussion of "negative" and "affirmative" rights under the Charter. Bender suggests that the reference in section 7 of the Charter to rights of "life, liberty, and security of the person" might require governmental public assistance programs "providing the food, shelter and medical care necessary to sustain life, health and a minimally adequate quality of life". *Id.*, 825-26. Such an interpretation of section 7 would be of some help in addressing inequality in Canada, but would not cover some important problems, such as inequality in employment. Bender does not discuss the question of affirmative rights under section 15.
  12. It should be noted that the remedial provisions in the Canadian Charter in fact go beyond the traditional concept of affirmative action. Normally, affirmative action is thought of as a remedy for acts of discrimination by other people, based upon social stereotypes (e.g., racial or sexual prejudice). By contrast, section 6(4) would appear to expressly authorize programs designed to deal with inequalities that are the product of certain

kinds of impersonal market forces that produce regional disparities in unemployment, such as those that exist between the Maritimes and other parts of Canada.

Similarly, it seems likely that the reference in section 15(2) to the "amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of ... mental or physical disability" might be extended to cover programs designed to help handicapped people overcome not only unjustified social prejudice directed against them because of their handicaps, but real obstacles imposed by the handicap itself (for example, by the provision of special equipment to the physically impaired, special education for the mentally impaired, etc.).

The fact that the Charter's affirmative action provisions go beyond traditional concepts of affirmative action would tend to support the conclusion that the Charter's provisions should be construed, wherever possible, to serve the goal of eliminating barriers to equality.

13. For a general review of the scope of the American "state action" doctrine and discussion of the extent to which the provisions of the Canadian Charter will bind private activity, see K. Swinton, "Application of the Canadian Charter of Rights and Freedoms (Ss. 30, 31, 32)", in Tarnopolsky & Beaudoin, *supra* note 6, 41, 44-59. See also Tribe, *supra* note 9, 1147-1174.
14. See, for example, Civil Rights Act, 1964, 42 U.S.C. 2000, s. 601 (Title VI), ss. 701-718 (Title VII); Fair Labor Standards Act, 1938, 92 U.S.C.A., s. 206(d) (Equal Pay Act); Civil Rights Act of 1870, 42 U.S.C. ss. 1981-1985.
15. In contrast, there has been controversy in the United States about the extent to which various provisions of the Bill of Rights bind the States. See J.E. Nowak, R.D. Rotunda, J.N. Young, *Constitutional Law* (St. Paul: West Publishing, 1978) 376-378.
16. See section 28 (sex discrimination), section 25 (aboriginal peoples), section 27 (multiculturalism), and section 29 (denominational schools).
17. The reference to "legitimate" governmental goals is designed to make clear that a government could not adopt a piece of legislation designed solely to place some group at a social disadvantage because of a negative attitude on the part of the legislators toward characteristics that do not adversely affect other members of society (e.g., race, sex, etc.). It might be argued that the specified characteristic of race, sex, etc. would be relevant to the goal of penalizing members of the specified group, so that the position of the affected individuals is not in fact the same as other members of society in the context of that policy. In such a case, however, the legislative goal itself would be inconsistent with the section 15(1)'s underlying purpose of removing arbitrary barriers to equality. On the requirement for legitimacy in governmental goals, see Tribe, *supra* note 9, 995.
18. U.S. Const., amend. XIV(1), provides that "No state shall ... deny to any person within its jurisdiction the equal protection of the laws".
19. The words "state interest" here refer to the U.S. federal government, as well as to the governments of the 50 states. The equal protection provisions of the fourteenth amendment of the U.S. Constitution do not technically bind the federal government, but an equivalent equality protection has been "read into" the fifth amendment due process clause which does apply to federal legislation. See Tribe, *supra* note 9, 992.
20. For a detailed examination of the rational relationship standard, see Tribe, *supra* note 9, 994-1000. For a general review of the American tripartite standard of equal protection review, see W.S. Tarnopolsky, "Equality Rights in the Canadian Charter of Rights and Freedoms" (1983), 6 Can. Bar Rev. 242, 253-255.
21. Nowak, Rotunda, & Young, *supra* note 15, 525.
22. Nowak, Rotunda, & Young, *supra* note 15, 524-5, 556-601. For a detailed examination of the "strict scrutiny" of "suspect" classifications, see Tribe, *supra* note 9, 1000-1002, 1012-1056.
23. *Craig v. Boren* (1976), 429 U.S. 190. See Nowak, Rotunda, & Young, *supra* note 15, 525-27, 607-619; Tribe, *supra* note 9, 1063-1074.
24. The unadopted U.S. Equal Rights Amendment was a response to this difference in the standards to be applied in establishing discrimination on the grounds of race and discrimination based on sex. See Nowak, Rotunda, & Young, *supra* note 15, 618-19; Tribe, *supra* note 9, 1074-1077.
25. Nowak, Rotunda, & Young, *supra* note 15, 525-27, 601-607. See also Tribe, *supra* note 9, 1057-1060, 1077-1082.
26. The famous *Bakke* case rejected a specific affirmative action scheme, and not all forms of affirmative action. See *University of California v. Bakke* (1978) S. Ct. 2733. Compare and contrast *United Steelworkers v. Weber* (1979), 443 U.S. 193 and *Fullilove v. Klutznick* (1979), 448 U.S. 448, upholding affirmative action programs designed to remedy past racial discrimination. See also Tribe, *supra* note 9, 1043-1052. In the area of sex

discrimination, see *Kahn v. Shevin* (1974), 416 U.S. 351; *Califano v. Webster*, (1977) 430 U.S. 313. See also Tribe, *supra* note 9, 1066-1070, emphasizing the need to avoid confusing genuine affirmative action and stereotyped assumptions about women's capacities and roles.

27. Compare Tarnopolsky, *supra* note 20, 254-255. Tarnopolsky agrees generally that the listed grounds must be considered "inherently suspect", but suggests that an "intermediate scrutiny" approach might be applied to grounds such as age, mental and physical disability that are "clearly subject to bona fide qualifications or requirements". Such a qualification may not be necessary, however. To the extent that there really are clear qualifications on the ability of aged, or mentally and physically disabled people, it should be possible to demonstrate a "compelling state interest" and the "necessity" of limitations on equality rights even under a strict scrutiny standard. The maintenance of a strict level of scrutiny with a heavy burden resting upon proponents of the "discriminatory" legislation would at least ensure that the purported disabilities are in fact "clear" and not the product of stereotyped assumptions about the abilities of physical and mentally disabled people.

28. This is not to suggest that all members of the beneficiary group are consciously setting out to exploit members of the disadvantaged one. In fact, it is more appropriate to place the "beneficiaries" of discrimination into categories that resemble the tripartite scheme of tort liability.

"Intentional" discrimination takes place where the person doing the discriminatory act does so out of hostility toward the disadvantaged group, or with a conscious desire to take the economic or other benefits that the act of discrimination confers.

"Negligent" discrimination takes place when the actor would pay lip service to the concept of equality, but acts unreasonably as a result of uncritical acceptance of social stereotypes, past practice, or failure to understand the historical disadvantages under which women, minorities, or other "powerless" groups operate.

Finally, an individual who is a member of a privileged group may be a beneficiary of discrimination that favours that group even when (s)he is affirmatively opposed to this phenomenon and has done no affirmative acts to perpetrate it. For example, a white male who desires to work in a "high class" job would benefit from the social discrimination that excludes women and minorities from such positions, because of the reduced competition for such positions. Because of the absence of individual fault, this sort of situation may be analogized to "strict liability" in tort.

29. The argument that such programs discriminate against the individual members of dominant groups who would otherwise have held such positions is not persuasive because of the "strict liability" phenomenon described *supra*, note 28.

An affirmative action program would be ordered only if members of the privileged group held a share of the available positions that is disproportionate to their share of the general population. If one accepts the hypothesis that women and minorities are not inherently inferior to white men, for example, such imbalance must be the product of either intentional or negligent discrimination on the part of the people doing the hiring, or of other social inequities that have produced an artificial inequality with respect to the qualifications for the position. For an empirical study of the causes of sexual inequality in employment, see M.A. Denton & A.A. Hunter, *Equality in the Workplace—Economic Sectors and Gender Discrimination in Canada: A Critique and Test of Block and Walker ... and Some New Evidence* (Labour Canada, Women's Bureau, Discussion Paper, Series A: No. 6, 1984).

In such a situation, an affirmative action program would either encourage the hiring of additional members of the disadvantaged group until their numbers matched their population share, or provide special training programs to rectify the inequalities in qualifications that were the product of social discrimination. It is true that some individual members of the privileged group (white men?) would be worse off in the sense that fewer of them would be hired than if the affirmative action program would not exist. On the other hand, if the affirmative action program is properly designed, this reduction in jobs for white men should only correspond to the number of extra jobs that white men occupy because they are "strict liability" beneficiaries of past discrimination. An adherent to the "social" view of discrimination would regard such a result as appropriate and desirable, since it would tend to ensure true equality of opportunity for all members of the population in the longer run.

30. There is controversy over the standard for proof of discrimination against groups protected by human rights legislation. Three tests have been suggested: a) evil motive or animus; b) differential treatment even in the absence of an evil intent; c) unequal consequences or effects resulting from the application of an apparently neutral standard. See W.S. Tarnopolsky, *Discrimination and the Law in Canada* (De Boo, 1982), 86-122. The adoption of the third standard which focuses on the actual consequences of employment or other practices in maintaining inequality, even

when the behaviour in question is apparently neutral, would significantly advance the cause of equality in Canada.

31. Members of powerless groups may be reluctant to come forward in situations where they face reprisals. They may also lack the economic resources to hire legal representation, or the skills necessary to effectively assert their case on their own. Finally, many of the decisions to be made are based on "subjective" criteria so that it is relatively easy to rationalize away individual complaints without ever articulating the real, discriminatory reason for an adverse decision. The ineffectiveness of individual remedies is demonstrated by the fact that neutral, "individualized" discrimination statutes have been in place in most provinces for many years, yet widespread patterns of social inequality still persist. For a detailed examination of Canadian human rights legislation, see Tarnopolsky, *supra* note 30, *passim*.
32. For a discussion of the purpose of Section 28, see W.S. Tarnopolsky, "The Equality Rights", in Tarnopolsky & Beaudoin, *supra* note 6, 395, 436-37. Tarnopolsky suggests that section 28 reflected a concern that legislatures might exempt laws discriminating against women from the Charter under section 33, or, alternatively, that courts might construe sexually discriminatory laws as being reasonable limits that can be demonstrably justified in a free and democratic society under section 1 of the Charter. He suggests that the purpose of section 28 was to prevent such applications of the "non obstante" and "limitations" clauses.
33. The comments on section 28 in the Canadian government's publication, *The Charter of Rights and Freedoms: A Guide for Canadians*, *supra* note 2, 30 indicate that the section "was added at the request of women's groups to provide reassurance that their rights will be protected. This is one guarantee that cannot be overridden by a legislature of Parliament".
34. For an alternative interpretation designed to integrate sections 28, 15(1), and 15(2) of the Charter, see Tarnopolsky, *supra* note 32, 436-437.
35. The question of whether consenting individuals have a right to endure physical harm in the name of their culture or religion lies outside the scope of this paper.
36. For more detailed analysis on this point, see Bankier, "Letter to the Editor: The Lavell Case: Sexism and the Limits of Intercultural Tolerance" (1974), 22 Chitty's L. J. 108.
37. If all women or racial minorities within a particular religion in fact agree with sexual and racial inequalities, the matter is academic, since presumably no complaint will be laid under the Charter. If some women or minorities consent, and others disagree within the framework of the group, the presence of "partial consent" should not preclude specific individuals who do not agree to being disadvantaged in the name of religion or culture from seeking constitutional or statutory remedies, however.
38. In cases where Charter provisions do not purport to give religious and cultural values any priority over other provisions of the Charter, the principle of encouraging equality and discouraging distinctions that are objectively unjustified can easily be used to break a tie between competing provisions. This argument would apply to conflicts within section 15 between religious and "ethnic" equality and sexual and racial equality, and to arguments about the relationship between section 2 (freedom of religion) and section 15. The analysis in the text applies to sections where the Charter does confer a "special status" on religious or cultural freedoms in cases of apparent conflict.
39. It is unclear whether there are in fact any oppressive practices within the well-established Protestant and Catholic schools that have traditionally been protected under the Canadian constitution. For the sake of the analysis, I am assuming that the existence of sexist employment practices could be established. The practices of such schools may raise more complex issues relating to marital status, but these do not fall within the categories expressly enumerated in the Charter.
40. See the Indian Act, R.S.C. 1970, c. I-6, s. 12(1)(b). Compare section 11(1)(f) which confers Indian status upon white women who marry Indian men.
41. However, the notes to section 25 in the *Charter of Rights and Freedoms: A Guide for Canadians*, *supra* note 2, 28, refer to the fact that the representatives of native organizations "argued forcefully for recognition that would help their people preserve their culture and identity, their customs, tradition and languages". These cultural concerns are not stated clearly in the Charter itself, however, and it is questionable that discriminatory practices should be equated to the section's references to "rights or freedoms".  
  
For a general discussion of the scope of section 25 of the Charter, see K.M. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada (Ss. 25, 35 and 37)", in Tarnopolsky & Beaudoin, *supra* note 6, 467, 471-476.
42. Some native tribes had matrilineal traditions. See Native Women's Association of Canada, "Statement by Native Women's Association of Canada on Native Women's Rights", in A. Doerr and M. Carrier, eds., *Women and the Constitution in Canada*, (Canadian Advisory Council on the Status of Women, 1981), pp. 66-67, and K. Jamieson, *Indian Women and the Law in Canada: Citizens Minus* (Ottawa: Advisory Council on the Status of Women, 1978) 9-14.
43. See Native Women's Association of Canada, *supra* note 42, 65-70 and Jamieson, *supra* note 42, 79-92.
44. For support for the proposition that section 28 overrides section 1, see *supra* note 32.
45. In support of the proposition that the onus is upon a government seeking to uphold legislation under section 1 that would otherwise be invalid under other provisions of the Charter, see W.E. Conklin, "Interpreting and Applying the Limitations Clause: An Analysis of Section 1" (1982) 4 Sup. Ct. L. Rev. 75, 82; Manning, *supra* note 6, 143-49.  
  
In *Quebec Association of Protestant School Boards v. Procureur general du Quebec*, [1982] C.S. 673; (1980) 140 D.L.R. (3d) 33, the trial court held that the burden of proving the Quebec language legislation was entitled to the benefit of section 1 was upon the province, and found that this legislation was not in fact a "reasonable" limitation because it was disproportionate to the objective sought and unnecessarily exceeded what was reasonable. [1982] C.S., 674. The decision of the Supreme Court of Canada in *Atty.-Gen. of Quebec v. Quebec Association of Protestant School Boards*, Supreme Court of Canada, July 26, 1984 (unreported), 8 quoted the passage of the trial judgement discussing the onus under section 1, but ultimately invalidated the legislation on other grounds without expressing an opinion on the issue of onus under section 1.



## ISSUES UNDER THE CHARTER

Patricia Hughes

### Sommaire

L'étude traite des deux questions suivantes:

1. Les sociétés d'État sont-elles assujetties à la Charte?

*Conclusion:* une société d'État peut être assujettie à la Charte dans la mesure où elle a beaucoup de points en communs avec une entreprise du secteur privé.

2. Les programmes d'action positive pourraient-ils justifier un recours en justice en vertu de l'article 15(1)?

*Conclusion:* l'article 15(2) a pour objet de prévenir les griefs fondés sur une accusation de discrimination découlant d'un programme d'action positive.

### Résumé de l'étude:

1. Les sociétés d'État sont-elles soumises à la Charte ?

*Analyse de l'article 24(1):* L'allusion à un «tribunal compétent» n'étend pas les pouvoirs des tribunaux, ni à l'égard de la nature de la plainte, ni pour ce qui est de la solution proposée.

L'obtention de dommages intérêts par suite du comportement d'un fonctionnaire dépend si le jugement de la Cour Suprême du Canada dans l'affaire *Bhadauria*, à savoir qu'il n'y a pas de délit de discrimination, s'applique ou non à la Charte. Le document analyse la reconnaissance du délit constitutionnel de discrimination aux États-Unis.

*Analyse de l'article 52(1):* Il s'applique automatiquement dès qu'une cour juge qu'une loi est incompatible avec la Charte. Aussi, une loi votée afin d'établir un programme d'action positive pourrait être rescindée ou du moins rendue inopérante si elle était remise en cause aux termes de l'article 15(1).

*La Charte protège-t-elle les particuliers?* Elle ne les protège pas. Par conséquent, si les sociétés d'État ne sont pas considérées en vertu de l'article 32(1) comme faisant partie du gouvernement ou d'un domaine relevant du Parlement, elles ne seront pas assujetties à la Charte. À cet égard, le document étudie la mesure dans laquelle les doctrines de «state action» et «state function» du droit constitutionnel des États-Unis s'appliquent au Canada. La conclusion est qu'elles s'appliquent en partie; toutefois, les principes laissent à entendre qu'une société d'État peut être assujettie à la Charte selon son degré de responsabilité envers le Parlement, son autonomie budgétaire, la façon dont les employés sont nommés, notamment le président de la société, et la nature de ses opérations. Plus une société ressemble à une entreprise privée, moins grandes sont les chances qu'elle soit soumise à la Charte.

### Summary

The paper discusses two issues:

1. Whether crown corporations are subject to the Charter

*Conclusion:* a crown corporation may be subject to the Charter depending on the extent to which its specific characteristics resemble those of a private corporation.

2. Whether affirmative action programs would provide a basis for a claim under section 15(1)

*Conclusion:* section 15(2) is intended to prevent challenges based on a claim of discrimination arising out of an affirmative action program.

### Summary of Discussion:

1. Whether crown corporations are subject to the Charter

*Consideration of section 24(1):* the reference to "a court of competent jurisdiction" does not extend the jurisdiction of the courts, either in regard to the nature of the claim nor the remedy.

Damages as a remedy against a government official depends on whether the Supreme Court of Canada's ruling in *Bhadauria* that there is no tort of discrimination applies to the Charter. The paper considers the application of the constitutional tort of discrimination in the United States.

*Consideration of section 52(1):* it applies automatically as soon as a court finds a law inconsistent with the Charter; therefore, a law enacted to establish an affirmative action program would fall if it were the subject of a successful challenge under section 15(1), at least to the extent of the inconsistency.

*Whether Charter covers private individuals:* it does not; therefore, if crown corporations are not encompassed by section 32(1) as government or a matter within the authority of Parliament, they will not be subject to the Charter. In this regard, the paper assesses the relevance of the United States' constitutional law doctrines of "state action" and "state function" to Canada. It concludes that the application is limited; however, the principles generally suggest that a crown corporation may be subject to the Charter depending on the degree of accountability to Parliament, budgetary independence, the method of appointing employees, particularly the head of the corporation, and its function: the more it resembles a private corporation, the less likely it is to be subject to the Charter.

2. Whether affirmative action programs would provide a basis for a claim under section 15(1)

2. *Les programmes d'action positive pourraient-ils justifier un recours en justice en vertu de l'article 15(1)?*

*Dispositions de l'article 15(2):*

a) Le gouvernement peut y avoir recours pour sa défense lors d'un grief présenté en vertu de l'article 15(1). Il appartiendra au gouvernement de prouver que le programme respecte les normes établies par les tribunaux. Si l'article 1 s'applique à l'article 15(2), le programme devra être prescrit par la loi, mais l'article 1 ne s'appliquera probablement pas, car il vise seulement les droits et l'article 15(2) n'en garantit aucun.

b) À un plaignant qui demande aux tribunaux d'ordonner l'adoption d'un programme d'action positive en réparation de la violation d'un droit garanti par l'article 15(1), il incombe au plaignant de prouver que le programme respecte les normes établies par les tribunaux.

*Normes établies par les tribunaux:* L'étude de la jurisprudence aux États-Unis, des programmes approuvés en vertu du *Code des droits de la personne de la Saskatchewan* et de la décision de la Cour Suprême du Canada dans l'affaire *Athabasca Tribal Council and Amoco Canada Petroleum Co. Ltd.* laissent à entendre que les facteurs suivants seront pris en considération par les tribunaux lorsqu'ils tentent de déterminer si un programme est visé par l'article 15(2): portée, durée, conséquence sur les autres groupes, spécificité par rapport au groupe visé, lieu, objectifs et chances de succès.

*Availability of section 15(2):*

a) to government as a defence to challenges under section 15(1); the onus will fall on government to show the program meets whatever standards are laid down by the courts; if section 1 applies to section 15(2), the program will have to be prescribed by law but section 1 will probably not apply because it applies only to rights and section 15(2) does not grant a right.

b) to a successful plaintiff who requests the court to order an affirmative action program as a remedy for an infringement of section 15(1) rights; the onus will be on the plaintiff to show the proposed program meets court-determined standards.

*Court-determined standards:* consideration of U.S. jurisprudence, programs approved under the *Saskatchewan Human Rights Code*, and the Supreme Court of Canada's judgement in *Re Athabasca Tribal Council and Amoco Canada Petroleum Co. Ltd.* suggests following factors will be among those considered by the courts in determining whether a program falls within section 15(2): extensiveness, duration, effect on other groups, specificity in relation to the target group, locale and goals, and the likelihood of success.

## ISSUES UNDER THE CHARTER

Patricia Hughes\*

This paper<sup>1</sup> deals with two issues that may arise under the *Canadian Charter of Rights and Freedoms*:

1. Does the Charter allow for actions against private individuals? and
2. Could an individual bring an action under section 15(1) claiming discrimination as a result of an affirmative action program?

The discussion assumes section 15 of the Charter is in force, although it will not, of course, actually be in force until April 17, 1985.

### I. RIGHT OF ACTION AGAINST PRIVATE INDIVIDUALS

#### A. A Consideration of Section 24(1)

Section 24(1) of the Charter is the remedy section under which an individual may bring an action for a breach of the Charter. The section is vague and provides little guidance to the plaintiff on how or where to bring an action:

*24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.*

#### 1. A Comparison of Sections 24(1) and 52(1)

Before assessing section 24(1) in more detail, brief mention should be made of section 52(1).

*52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.*

Section 52 applies to the whole Constitution, which includes the B.N.A. Act, the various acts admitting the provinces into Canada, and certain other acts. Section 24, on the other hand, applies only to the Charter. An individual could seek a remedy under section 24 (for damages, for example) or a declaration under section 52 that a law contravened a specific section of the Charter, or both.

Deschênes C.J.S.C. found a declaration to be within the scope of section 24(1), not only section 52 (*Quebec Association of Protestant School Boards v. Attorney General of Quebec* (No. 2) (1983), 140 D.L.R. (3d) 33 at 39 and 142). Indeed, at least one commentator has queried whether "Section 52 provides the remedy for declaring a law inoperative by reason of a Charter infringement, or whether Section 24 is self-contained and exclusive as to all remedies for Charter infringements" (Ewaschuk, 55). Ewaschuk concludes (at 67) that since section 52 applies generally to the Constitution and section 24 is a specific Charter provision, section 24 "therefore should be viewed as encompassing all appropriate remedies, including striking down, for Charter violations".

Section 52 appears to take effect automatically once a law is found to contravene the Constitution, including the Charter, and the law, or inconsistent portion of it, then has no force or effect.<sup>2</sup> The courts have far more discretion under section 24, having been given the power to give whatever remedy it considers "appropriate and just in the circumstances"; nevertheless, the automatic impact of section 52 suggests that a court that found a law in contravention of the Charter could not grant a "stay of execution" to allow the government to substitute other legislation, even though under certain circumstances it would be reasonable to do so (for example, to allow for an easing of the economic burden the required changes might impose).

Section 24 seems to provide a remedy only after an actual infringement (as indicated by the phrase "have been infringed or denied") but it has been argued that it should be interpreted more broadly than that. Professor Gibson has suggested that in light of the legislative history of section 24, the apparent limitation to infringements that have already occurred resulted from a "drafting accident", and he concludes that the section will not be interpreted literally (Gibson, 499). Similarly, on the surface, it seems that only someone whose own rights have been infringed may bring an action under section 24(1) (Ewaschuk, 55) but again, it has been argued that there may be cases where third parties may bring an action (Gibson).

The Supreme Court of Canada, in a series of cases determined before the Charter came into force, has gradually extended the concept of standing as far as constitutional or Bill of Rights cases are concerned. In *Attorney General of Nova Scotia v. McNeil*, [1976] 2 S.C.R. 265, *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, and *Borowski v. Minister of Justice* (1982) 39 B.R. 331 (S.C.C.), the Supreme Court appeared to grant the plaintiffs standing because there was no better plaintiff.

Although Thorson was not directly affected by the *Official Languages Act*, he was allowed standing to challenge it because there was no one else to do so, in the Court's view; McNeil was not subject to penalties under the *Theatres and Amusements Act* but was granted standing because theatre owners, who were subject to penalties, were not likely to come forward; and the majority of the court eliminated doctors, pregnant women, husbands, and fetuses as realistic or possible plaintiffs in order to give Borowski standing to challenge the exculpatory sections of the abortion provision in the Criminal Code, section 251. The *Borowski* case, in particular, has been cited as support for the view that standing may be granted to third parties, such as to act on behalf of the prisoners in jail (Gibson, 498; but cf. Ewaschuk, who cautions that the pre-Charter cases should not be applied too broadly to Charter cases).

On this view, section 24 seems to give standing as of right when one's own rights have been infringed or denied (in which case one would have standing without section 24) and

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may give third parties standing at the discretion of the court, a view based on the assumption that standing under the Charter will be at least as liberal as under non- or quasi-constitutional documents.

## 2. "Competent Jurisdiction" and "Appropriate and Just" Remedy

Section 24 gives no guidance as to the appropriate forum in which to make one's complaint or bring one's action. Most likely "court of competent jurisdiction" would include tribunals, including human rights boards or tribunals (Richard, M-1; but see Ewaschuk, 69, who argues that administrative tribunals are probably excluded "unless statutorily constituted 'courts of record'"). The French wording supports the inclusion of tribunals.

Among the commentators there is disagreement about what "such remedy as the court considers appropriate and just in the circumstances" means. Some commentators have taken the view that the courts might enjoy new jurisdiction arising out of the Charter (Gibson, 502 and 503); the better view seems to be, however, that courts will not have their powers or jurisdiction extended by the Charter (Richards, M-14ff., although he wonders whether entirely new equitable remedies might be fashioned by the superior courts with the creativity of the American Courts acting as "precedent"). The jurisprudence to date would seem to reject the view that the courts have had their powers enlarged.

In *Re Regina and Brooks* (1982), 1 C.C.C. (3d) 506 (Ont. H.C.J.), Eberle J. stated at 509 that it cannot be said that by the words "a court of competent jurisdiction",

*Parliament intended to give all jurisdiction in all matters to all courts.... It seems to me that in giving a person a right to apply to a court of competent jurisdiction, as Section 24 does, the section refers to and points to the court or courts of competent jurisdiction with respect to the matter that is sought to be enforced under Section 24.*

For example, for a review of an interim release, under the Criminal Code, jurisdiction is given to a county or district court or Superior Court and thus a Charter action in relation to such a review should be brought in those courts.

O'Driscoll J. expressed the same view more strongly in *Re Siegal and the Queen* (1982), 1 C.C.C. (3d) 253 (Ont. H.C.J.), where he said that "The Charter does not create nor purport to create unmitigated chaos in the present day criminal trial process" (266). He refused an application for a pre-trial ruling on the exclusion of evidence under section 24(2) because he would have had no jurisdiction to make rulings prior to the Charter since he was the judge at neither the preliminary hearing nor at trial.

A challenge to a municipal by-law prohibiting nudity in the performance of burlesque dancing (on the ground that it contravened the guarantee of freedom of expression) was found to be essentially an application for judicial review within the meaning of section 2(1) of the *Judicial Review Procedure Act* and under section 6(1) of that Act must be made to the Divisional Court: *Koumondouros v. Municipality of Metropolitan Toronto* (1982) 37 O.R. 2nd. 656 (H.C.J.).<sup>3</sup>

The British Columbia Court of Appeal refused to consider the appointment of counsel in an appeal to the Supreme Court of Canada, because as a statutory court the Court of Appeal had no inherent jurisdiction to deal with a case not now before it: *Regina v. Lyons* (No.2) (1982), 141 D.L.R. (3d) 376 (Seaton J.A. in Chambers).

In *Regina v. M* (1982), 70 C.C.C. (2d) 123 (Provincial Court) (Family Division), Bean Provincial Court J., despite an obvious frustration at the limited remedy available to him, refused to extend the court's remedial jurisdiction in the case of a juvenile delinquent who was arbitrarily detained. The court had no jurisdiction to find contempt, to issue an injunction, or to award damages, yet it was not sufficient to proceed with the charge and allow the juvenile to seek a remedy in another forum. His Honour therefore released the juvenile, "the only remedy I can consider that is appropriate and just", though in another case, the risk to the community may require that the juvenile be detained (127).

*Regina v. M* is only one indication of the problems that may arise from either not granting certain extended powers to courts or by not setting out a more specific remedial section. Quite often a plaintiff might be forced to seek remedies in different forums: judicial review in the Divisional Court and damages in the Supreme Court, for example. Richards considers the difficulties involved in our present system and suggests a standardized procedure (Richards, M-3).

Insofar as we are concerned with employment discrimination, the lack of new remedies means that it is unlikely that a court would have the power to grant reinstatement or to provide a remedy for lost job opportunity; both situations are dealt with under human rights legislation, of course, and the plaintiff may well have to turn to that legislation for help.

## 3. Tort of Discrimination

A final point that should be raised in this regard arises out of the Supreme Court's decision in the *Board of Governors of the Seneca College of Applied Arts and Technology v. Bhaduria* [1981] 2 S.C.R. 181, rev'g (1979) 27 O.R. (2d) 142 (C.A.) that there is no distinct tort of discrimination (and thus a plaintiff cannot obtain damages outside a statutory right to do so). The Court relied heavily in its judgement on the comprehensiveness of the Ontario *Human Rights Code*, the applicable legislation. The Charter is far from comprehensive in its approach to remedies. It is, however, a constitutional document and it does not so much create rights as recognize them (although it does not "freeze" them as of April, 1982). If there is no "constitutional tort" inherent in Section 24 remedies, it may not be possible to obtain damages for an infringement of rights by public officials, although in many cases a mere declaration may be a pyrrhic victory for the actual applicant.

In the United States, s. 1983 of the *Civil Rights Act* sets out a constitutional tort of discrimination: it provides that anyone who under colour of state right deprives a person of rights, privileges, and immunities guaranteed under the Constitution shall be liable to that person. The Supreme Court has stated that this was "intended to [create] a species of tort liability in favor of persons who are deprived of such rights, privileges or immunities": *Carey v. Piphus* 435 U.S. 247 (1978) at 253. In that case, the Court held that the importance of the denial of due process was such that nominal damages should be

awarded, even if there is no actual damage proved, but does not extend to presumed damages. In other words, the Court in *Carey* was unwilling to equate automatically deprivation of a constitutional right with significant personal injury. It has been suggested that it might be preferable to view a constitutional wrong as a wrong done to society as a whole (Whitman, 44).

Before transplanting the American experience as whole cloth into our own Charter context, it is well to remember that the right under the *Civil Rights Act* is a federal remedy for wrongs for which there is also a state tort remedy. Thus much of the discussion around the "constitutional tort" issue is concerned with the relationship between federal and state remedies.

Although passed in 1871, s. 1983 of the *Civil Rights Act* was not the subject of significant judicial consideration until the Supreme Court decision of *Monroe v. Pape* 365 U.S. 167 in 1961. Since then the number of cases has mushroomed; in 1979 there were 13,168 cases plus 11,195 due process suits brought by prisoners (Whitman, 6). There has been an attempt to restrict the application of s. 1983 in the face of this great number of cases. In *Paul v. Davis* 424 U.S. 693 (1976), Paul's picture had been distributed as an active shoplifter, although the charges against him were dismissed. His s. 1983 application was also dismissed by the Supreme Court because his right of action was properly one in injury to reputation, just as it would have been if a private individual had spread similar misrepresentations about him. Similarly, in *Ingraham v. Wright* 430 U.S. 651 (1977), the Court stated that students who had received corporal punishment without notice or a hearing had adequate remedies in common law and did not need to resort to their constitutional remedy under s. 1983.

Whitman contends that the major problem with s. 1983 as perceived by the courts is the profusion of damage awards and she considers whether or not damage awards are always a relevant remedy for constitutional infringements. She suggests a distinction should be made between a deliberate decision that threatens a protected interest and that involves a prior hearing requirement and an accidental deprivation (Whitman, 33). Damages, she concludes, should be reserved when punitive remedy is appropriate (because the infringement was deliberate, malicious, completely unnecessary and so on).

Indeed, the basis of tort liability — individual responsibility — is simply not applicable in many constitutional infringement cases. The fault is more likely to lie with the institution than the particular named official, and with some exceptions, damages are not, in Whitman's opinion, an adequate response to systemic problems. Damages are more appropriate when the official is personally to blame or when the impugned act is more than a mistake or a reaction to institutional pressures (Whitman, 65). Under the Charter, this principle would mean that damages would not be available for injury arising from an unconstitutional law but would be for injury arising from the actions of a bureaucrat not acting in accordance with (and therefore protected by) even an unconstitutional law.

Without further discussion on this peripheral point, Whitman's perception of the purpose of the Constitution and the

relationship between that purpose and denial or infringement of constitutional rights is noted:

*It may be more appropriate to think of the Constitution as creating a right to live in a society that seeks to minimize certain defined injuries through systemic safeguards, rather than as creating rights to be completely free from injury. Compensation for the inevitable victims may be appropriate but it is not clear that the tort device of personal liability is an appropriate means for distributing funds in this setting (Whitman, 60).*

## B. Application of Charter to Crown Corporations

### 1. Section 32(1)

With this background, we can now address the major question of whether the Charter applies to actions between individuals. On its face, section 32(1) limits the Charter's application to government:

32(1) *This Charter applies*

(a) *to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and*

(b) *to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.*

This wording, unlike "This Act binds the Crown", implies that it is meant to state an exclusive jurisdiction, not merely that the Charter applies to government as well as private persons. It has been suggested that "the underlying purpose of the Charter is to limit governmental abuse of power rather than private conduct" (Ewaschuk, 56).

Even if we accept that the Charter applies only to government, we still must decide what government is; our answer will clearly widen or narrow the purview of the Charter. It may be that "government" is restricted narrowly to matters decided by Parliament, including only legislation and regulations and the like. Such an interpretation would severely limit the Charter's impact and would certainly raise doubts about whether the Charter applies to any or all crown corporations. On the other hand, a broader reading of "all matters within the authority of Parliament" may encompass crown corporations; as will be discussed below, section 32 could include government contracts, administrative decisions, etc. The phrase may be construed to mean anything that is in Parliament's power to decide and the word "government" could be interpreted to include administration and agents, not merely the executive branch.

### 2. The American Approach

In the American case law, "government" has been interpreted very broadly by invoking the "state action" and "public function" doctrines. Application of this doctrine to the Charter may put private conduct under the rubric of "government" for constitutional purposes: an employer who receives government funding for job creation; a private park open to the public; a private airline performing what is essentially a

public service — all these could conceivably be subject to the Charter. The private employer benefits from government; the power over parks generally is one of the "matters within the authority of the legislature of each province"; and since the airline is subject to government regulation, it arguably becomes a matter within the authority of Parliament.

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), a private restaurateur was a lessee of the Authority. The Supreme Court found the restaurant subject to the Fourteenth Amendment prohibiting the state from denying any person "within its jurisdiction the equal protection of the laws". The Court held the relationship between the Authority and the restaurant was such that the former had made itself a party to the discrimination and, indeed, "has elected to place its power, property and prestige behind the admitted discrimination".

But in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), the court found that a privately owned electrical monopoly, regulated by the state, was not subject to constitutional guarantees (specifically, due process did not apply when it cut off service). The Court, per Rehnquist J., considered several factors that had in some combination served to provide the necessary nexus between private activity and government for the state action theory to come into play — and discarded them all. Assuming Metropolitan Edison Co. had a monopoly status granted by the state, there was an insufficient connection between the termination of service and the grant of monopoly status. The provision of the utility is not an obligation of the state being carried out here by a private entity which is clothed thereby with a public aura (353).

Marshall J., in his dissent, considered, on the contrary, that "utility service is traditionally identified with the State through universal public regulation or ownership to a degree sufficient to render it a 'public function' " and, although agreeing with the majority that more than a "public interest" was required to establish the connection, found that more than the public interest is involved when it is of such importance that the State "invariably either provides the service itself or permits private companies to act as state surrogates in providing it...." (372). Such companies will then have to behave "in many ways like a government body".

The majority also held that although the termination procedure was allowed by the State (it was not questioned during hearings on the tariff), it was not approved or, more importantly, ordered by the State (357). The regulation in issue, the Court went on, neither fosters the termination practice nor makes the State a "partner or joint venturer in the enterprise" (358, test cited from *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972)). Douglas J. took a far different view, believing that Metropolitan Edison was exploiting its monopoly and that the State was allowing that exploitation; the state's "permissiveness or neutrality...is at war" with its supervisory function.

A park that had been a bequest to the City of Macon, Georgia, and was to be used only by white people was found by the Supreme Court to be subject to the Fourteenth Amendment because it was public and its trustees, although private individuals, had thereby become agents of the State (*Evans v. Newton*, 382 U.S. 296 (1966)). Douglas J. for the Court stated that:

*Conduct that is formally "private" may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action.... That is to say, when private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the state and subject to its constitutional limitations (299).*

The park was believed by the majority to be maintained by the municipality. In addition, its function is "municipal in nature", comparable to a fire or police department.

Since he found that the record did not show a continued involvement of the city in the operation of the park, White J. based his decision that the Fourteenth Amendment applied on the terms of the state legislation that supported the bequest; it allowed discrimination only on the ground of race to constitute a condition of a gift of a park:

*...such a statute would depart from a policy of strict neutrality in matters of private discrimination by enlisting the state's assistance only in aid of racial discrimination and would so involve the state in the private choice as to convert the infected private discrimination into state action subject to the Fourteenth Amendment (306).*

In his dissent, Harlan J. was critical of the Court's dependence on the "public function" theory which, he stated, had been applied only in *Marsh v. Alabama*, 326 U.S. 501 (1946), which decided that a company-owned town could not suppress free speech and even then received only limited support by the members of the Court. He was also concerned about how extensively the doctrine could be applied (specifically to private schools, which the majority had assumed to be clearly exempt from constitutional protections).

Marsh had distributed religious literature on the streets of the company-owned town against the company's regulations. Her conviction for criminal trespass was upheld by the Court of Appeal. Black J. for the Supreme Court stated the public function approach:

*The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.... Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operate primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation (506).*

The dissenting justices did not hide their dismay at what they perceived as a radical extension of the right of the State to regulate such private entities as ferries and bridges; they expressed doubt that "the Court means to imply that the property of these utilities may be utilized, against the companies' wishes, for religious exercises of the kind in question" (514). Clearly they saw regulation of rates, labour practices, and so on as very different than the imposition of certain constitutional obligations. Ironically, Marshall J. later



expressed concern that the failure to impose the constitutional obligations of due process on Metropolitan Edison could be employed (against the Court's intentions) to support the utility's right to discriminate against blacks or welfare recipients (374).

A variance of "state action" had in fact been applied in *Lombard v. Louisiana*, 373 U.S. 267 (1963). Blacks had been refused service at the "white" part of a lunch counter. The city's officials had told owners blacks should be served; the Court treated this pressure by city officials as if it were a city ordinance. This interpretation allowed the Court to extend the state action theory beyond its application in *Peterson v. City of Greenville*, 373 U.S. 244 (1963), where there was an ordinance requiring segregation at lunch counters. Convictions for trespass of blacks who had a sit-in at lunch counters were not allowed to stand because through such convictions the judiciary had enforced the ordinance of the City of Greenville, the agency of the state (248). Douglas J. in a concurring judgement in *Lombard* stated that a business that serves the public cannot seek the assistance of the police, courts, or legislature to enforce segregation. Here the actions of the police constituted state action; so did the judiciary in convicting the blacks for trespass.

In all these cases, there is a connection with government; the question is whether the "nexus" is sufficiently close to treat the organization in issue as government for the purpose of the Charter. As mentioned, in the United States, the "states action" and "public function" doctrines have served to make "the actions of seemingly private actors...inherently governmental" (Tribe, 1163).

### 3. The Relevance to the Charter of the U.S. Approach

Certainly, even if crown corporations are not strictly government for the purposes of section 32(1), they are closely allied with government.

One political scientist points out that "a larger number of employees are engaged in activity which is not visibly 'governmental', such as the work of crown corporations..." (Hockin, 123), than in government proper. Crown corporations are quasi-independent bodies with a different status than government departments. They are not subject to the budgetary and ministerial control that a department is, and they probably determine their own hiring policies rather than be subject to the Public Service Commission. A crown corporation has to justify its expenditures but Parliament will be less rigorous in its examination of estimates than it would be for a department; on the other hand, many crown corporations are audited by the Auditor-General which does reduce independence.

Crown corporations may be departmental corporations, agencies, or proprietary corporations. The first, as would be expected, are most like departments, subject to greater financial control, and their employees are often appointed by the Public Service Commission. The Atomic Energy of Canada Limited is an example of an agency corporation; its employees "are all appointed by the management of the corporation itself, and the salaries and conditions of work are also determined in a manner similar to private industry" (Van Loon and Whittington, 399). There is some financial control but they are separate legal entities: "By making them legally directly responsible for their activities, the government can

also afford to grant them a great deal of independence from financial and political control" (*ibid.*, 400). Proprietary corporations (such as Air Canada and the CBC) are expected to operate independently financially but are often able to obtain parliamentary appropriations. Employees are appointed by management. Still, the federal government does appoint the head of corporations and has some input in terms of funding.

Justice Douglas in *Lombard* enumerated several forms the nexus between the state or government and private activity may take in the American context: control ("as in the case of a state agency"); financial support; lease relationship; licensing for other than income-producing purposes and surveillance of a public business. Some of these are relevant in the crown corporation context.

Professor Swinton would argue for a narrow reading of section 32(1). She cautions that the "individual right to discriminate or to choose not to associate can be regarded as a form of privacy right, and should not be forgotten in the interpretation of the Charter". Human rights legislation has been designed specifically to balance competing claims to privacy and equal treatment. She would not apply the Charter when ostensible government entities are really more private in nature than they are governmental, and she specifically gives Petro-Canada gas station employees as an example of "government" employees who should not enjoy access to the Charter (Swinton, 53). She would exclude the CBC, although it is legally a crown agent, and would leave its regulations to the CRTC and the Canadian Human Rights Commission, as with other national broadcasters. The CRTC would be subject to the Charter because it has "extensive regulatory authority over individuals, exercising power which might easily have been left to a department".

The American experience differs, says Professor Swinton, in that the lack of human rights legislation in that country during the development of constitutional doctrine and practice left a gap that the "states action" and "public function" doctrines were available or necessary to fill; since civil rights legislation has been introduced and developed in the United States, constitutional challenges have been less effective against private persons. With no such gap here, the Charter does not need to apply to private actors or to all activities that are not strictly a "matter within the authority of Parliament" and that may, in any case, be governed by human rights legislation.

Nevertheless, most crown corporations are so clearly identified in the public mind with the government that it might appear to the public that the government is a party to the denial of rights to deny the protection of the Charter to their employees; such a view would raise suspicion at least that the government is willing to be implicated in discriminatory practices. It has been held in the United States that "while legitimate public belief is scarcely enough to determine that the acts of an avowedly private institution are state action, it is a factor to be weighed in the scales..." (*Grafton v. Brooklyn Law School*, 478 F.2d 1137 (1972)).

Marshall J. pointed out in *Metropolitan Edison* that the American Courts have applied different standards in their state action analysis when different constitutional claims are presented (373).

### C. Conclusion

In summary, then, it is likely that the Charter is not intended to apply to private individuals. The more significant question here is whether the crown corporations are essentially public or private entities.

The American cases discussed above involved obviously private actors that are in some respect public. Crown corporations, at first blush, are government bodies that possess some private characteristics. It can be argued, therefore, that the factors considered in the American cases are even more relevant when applied to crown corporations. At least some of the crown corporations under examination by this Commission are, if not explicitly government actors within the meaning of section 32(1), so closely aligned with the government, through appointment of the chief executive officer, determination of budget, parliamentary accountability, public perception or function, that they should be considered government actors. If that is the case, they would then be susceptible to legislation dealing with hiring practices, and failure to abide by such legislation (or regulations, if more appropriate) would leave them open to an action under the Charter. Given the variety of crown corporations, however, each should be assessed in terms of its function, its independence from parliamentary scrutiny, its relationship to the private sphere, its mandating legislation, and, perhaps particularly, the way in which employees are hired and so on.

If the American cases have any persuasive value (and this will certainly vary from court to court and case to case),<sup>4</sup> we need to assess the role government plays in relation to each crown corporation. Is government putting its power and prestige behind the activities of the corporation (*Burton v. Wilmington Parking Authority*); is the corporation carrying out what has been recognized as an essential public activity or a desirable activity that could in reality be accomplished only by resources available to government (*Jackson v. Metropolitan Edison Co.*; *Evans v. Newton*); is the corporation intended primarily for the benefit of the public, thereby incurring some degree of constitutional obligation (*Marsh v. Alabama*; *Lombard v. Louisiana*)?

In considering the American cases, we again should recall that the entities in the cases were private; certain activities or relation to government, however, it was held, might cloak them with a public duty of observing constitutional guarantees. Crown corporations, on the other hand, are public bodies that have developed private characteristics: should one of those private characteristics be non-vulnerability to constitutional guarantees? Yet we also have to remember that, even if the Charter does not apply to any or all of the named crown corporations, they are subject to federal or provincial labour and human rights legislation and, as will be indicated in the next section, the latter provides for special programs for disadvantaged groups. Indeed, it may be that since affirmative action is not a constitutional right, the only practical effect of the non-applicability of the Charter, if such is the outcome, will be to foreclose one avenue of protest by those who believe themselves ill-treated by the existence of special programs.

### II. THE EFFECT OF SECTION 15(2)

For the purposes of the following discussion only, it is assumed that the Charter applies to crown corporations.

Subsection 15(2) states that:

*15(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

#### A. Examples of Affirmative Action

The aim of special programs is not to discriminate against anyone but to discriminate in favour of persons for the purpose of overcoming past or present disadvantage: they are designed to ensure that individuals who have suffered from discriminatory or exclusionary treatment are given a proper opportunity to gain benefits available to others. A special program might consist of recruitment information and advertisements for employment with the CBC directed particularly at persons who are disabled. A proposal to train and hire women as aircraft mechanics at Air Canada would also constitute such a program. A law requiring Petro-Canada when exploring in Canada's north to undertake studies of the effect of its exploration and to direct a certain percentage of its profits to the resettlement of displaced native and Inuit groups could also be defended as ameliorative action. And a program instituted at any crown corporation for visible minorities to learn English or French would serve the same purpose. The most effective programs require a statement of goals and measurement of results.

#### B. A Brief Introduction to Section 15(2)

Section 15(2) clearly allows "affirmative action" for disadvantaged groups. It would seem to preclude actions by individuals in the majority group that they have been discriminated against because they failed to obtain employment as a consequence of a special program rather than to give anyone a right to affirmative action. It is in itself no basis for an action under section 24(1) for any failure to establish a program or for a demand for one but it may be that the courts could order an affirmative action program as a section 24 remedy.

Note that subsection 15(2) does not actually use the term "affirmative action" but rather speaks of a law, program or activity designed to improve the conditions of disadvantaged persons; this may prove to be broader than affirmative action but would include it. The law must have as its object the betterment of conditions of disadvantaged persons; the court may therefore require that a program must have been expressly designed to respond to the particular needs of the group. Put another way, the court may be reluctant to allow governments to use section 15(2) as a defence to discrimination in order to avoid the section 1 onus. (This assumes that section 15(2) is not subject to section 1. If it is subject to section 1, it must be "prescribed by law"; however, since section 15(2) does not guarantee a right and section 1 applies to rights, probably section 1 does not apply to section 15(2).)

#### C. The American Experience

It is to be noted that while section 15(2) refers to laws, programs, or activities that are intended to ameliorate the conditions of disadvantaged groups, it does not state whether

quotas, by which there would be actual exclusion of other persons, would be included; the broad wording would presumably allow for such programs. Yet it would probably be valid in any given case to ask whether a quota system is necessary to achieve the goal or whether something less discriminatory would suffice: would overbroad programs offend the Charter's guarantee of equality?

In *Regents of the University of California v. Bakke*, 98 S. Ct. 2733 (1978), the University of California Medical School at Davis instituted a program designed to increase the number of minority doctors. Sixteen of 100 places were reserved for minority candidates who were rated on the same criteria as other candidates but did not have to meet the 2.5 grade point average cut-off applicable to the others. Bakke was a white male who had applied twice to Davis; on each occasion his scores were either close to or better than the average of the non-minority candidates who were accepted. When he was not accepted by Davis the second time, he brought an action claiming he had been discriminated against on the ground of race.

The Court held that Bakke should be admitted but the members differed on whether Davis's affirmative action program was legal. Justice Powell held that remedies for discrimination must follow violations (but that remedies properly ordered could include affirmative action) (2753) and that voluntary programs such as Davis's could not be instituted. "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake", he said (2757). He went on that Bakke was not responsible for whatever harm the beneficiaries of the special admissions program were thought to have suffered and thus it was not appropriate that Bakke suffer in return.

But in fact Powell J. was not opposed to more subtle affirmative action, merely to blatant quotas. He approved the Harvard and Princeton programs in which race was considered along with a wide variety of other factors so that all candidates were compared with each other and race was not "insulated" (2762). Although Powell J. joined the four judges who believed a program might be valid, he thought that the Davis approach was not necessary or was overbroad and therefore joined with four judges who held the program was invalid as offending the Civil Rights Act.

Four judges held, however, that affirmative action was allowed as voluntary remedial action because the importance of overcoming the effects of past discrimination allowed the Davis program to survive strict scrutiny as not offending the Equal Protection Clause.

The whole issue of voluntary affirmative action programs was addressed again by the Supreme Court of the United States in *United Steelworkers of America v. Weber*, 443 US 193 (1979). The program was established as a result of negotiations between the company, Kaiser, and the union to redress racial imbalance in Kaiser's employment practices. Blacks constituted 39 per cent of the local workforce but less than two per cent of the Kaiser workforce. Weber, a white applicant, was rejected for employment even though his qualifications were higher than those of the highest qualified black accepted for employment.

The Supreme Court upheld the program. Without attempting to establish "in detail the line of demarcation between permissible and impermissible affirmative action programs",

five members of the Court found this plan acceptable because it was designed "to break down old patterns of racial segregation and hierarchy"; it did not "unnecessarily trammel the interests of the white employees" by requiring their dismissal and replacement by blacks; half the trainees would be white; and the plan was temporary, "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance" (208).

The dissent was based on the view that Title VII of the *Civil Rights Act* did not allow discrimination against anyone. Rehnquist J., dissenting, stated that a quota was destructive of the notion of equality and that "no action disadvantaging a person because of his colour is affirmative" (254). Section 15(2) of the Charter should serve to reject this argument in the Canadian context.

The Weber guidelines were followed in *La Riviere v. EEOC*, 29 E.P.D. #32,802 (1982) (USCA 9th Cir.) to allow the California Highway Patrol to set up a voluntary two-year affirmative action program to determine whether to utilize female highway patrol officers.

Another issue discussed in the American cases is whether the disadvantaged group must be specifically disadvantaged in relation to the institution establishing the program or whether a generally disadvantaged condition will justify a program. Some American cases have held that the latter will not do.

In *Hogan v. Mississippi University for Women*, 102 S.Ct. 3331 (1982), Hogan was refused entrance to the nursing school because he was a man. The Supreme Court rejected the university's submissions that an all-female school compensated for the disadvantages endured by women because, said the Court, women have not suffered disadvantages in relation to nursing.

Similarly, in *Jurgens v. Thomas*, 30 E.P.D. #33,090 (USCA 5th Cir.), it was held that there could be no affirmative action where there had been no discrimination. Thus even if there had been a general discrimination in government against a particular group, there could be no affirmative action in a specific agency where no discrimination had occurred (in this case, the Equal Employment Opportunities Commission which had hired members of minority groups).

#### D. Under Human Rights Legislation

Professor Tarnopolsky (as he then was) points out that we have some history of "affirmative action" in Canada in the sense that "from the very beginning, we have recognized that in certain instances justice to individuals can be achieved by making special provision for groups". Educational, religious, and certain language rights were recognized in section 93 and section 133 of the *British North America Act* (now the *Constitution Act*) and are continued under the Charter, for example (Tarnopolsky, 433). In addition, he points out, "the recruitment of Francophone Canadians into the federal public service" has been "the greatest affirmative action program of all". And of course human rights legislation, provincial and federal, allows for different forms of affirmative action.

Section 15(1) of the *Canadian Human Rights Act* provides that it is not a discriminatory practice for "a person to adopt or carry out a special program, plan or arrangement



designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to" any of the enumerated grounds. A Tribunal may order an affirmative action program under section 41(2).<sup>5</sup> The provision under the *Saskatchewan Human Rights Code* (section 47(1)) is almost identical, although the Saskatchewan Commission must approve the program while the Canadian Commission does not (a brief review of programs approved under the Saskatchewan provision appears below).

The Manitoba Commission may approve a "special plan or program by the crown, any agency thereof, or any person designed to promote the socio-economic welfare and equality in status of a disadvantaged class of persons defined by" the enumerated categories (*Manitoba Human Rights Act*, section 9). The Commission may place conditions on the plan.

It should be noted that the Manitoba Act is worded positively ("promote the socio-economic welfare and equality") while the Canadian and Saskatchewan legislation is phrased in a negative way (prevent, eliminate, or reduce disadvantages); both are designed to redress inequities but the Manitoba wording seems less tied to specific and current disadvantages. Section 13(1) of the New Brunswick Act also uses the positive wording, as do section 19 of both the Nova Scotia and Prince Edward Island Acts, all of which require plans to have the respective Commission's approval.

The Ontario Code combines both the positive and negative wording in section 13(1):

*A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.*

The Commission may approve the program, with modifications, unless it is implemented by the Crown or agency of the Crown. The Code also provides under section 13(3) that "A person aggrieved by the making of an order under subsection (2) may request the Commission to reconsider its order...."

Newfoundland has a unique exemption in its Act to allow preferential treatment of Newfoundland workers and equipment; this provision is presumably protected by subsection 6(4) of the Charter, which permits a law or program designed to improve conditions for "socially or economically disadvantaged" individuals in a province with an employment rate lower than the national average.

The Saskatchewan programs are subject to detailed guidelines currently in the form of proposed regulations. The guidelines require a program to provide for the three target groups: persons of Indian ancestry, women, and the disabled. In some cases, the Commission will approve a program directed at only one group (such as in *Application by Saskatchewan Pipe Fitting Industry Joint Training Board* (1981), 2 C.H.R.R. D/452, which was intended to train persons of Indian ancestry as pipefitters) or at a particular segment of a target group (for example, the *S.U.N.T.E.P.* application (1980), 1 C.H.R.R. D/131, concerned a program

to train Métis and non-Status Indians as teachers); other programs are directed toward "protected groups" who are enumerated under the Saskatchewan Code (the Canada Employment and Immigration Commission applied for approval of a proposal designed to give preference to members of the three target groups and to persons between the ages of 15 and 24: (1981), 2 C.H.R.R. D/483; the approval was not given because of the short-term employment involved, but the Commission granted an exemption from the Code).

Applicants under the Saskatchewan scheme are required to show the proportion of the target groups in the relevant area (for example, the proportion of native teachers and students in the school system), the degree of under-representation, and the way in which the proposal will overcome the under-representation. The Commission monitors the program. It may also impose conditions: for example, arrange for recruitment of disabled persons into the program and for appropriate job accommodation.

Under the Saskatchewan provisions, the programs must be specific, supported by statistics showing the need for them. It is possible that the Courts will impose such specificity on a program or law if it is to be protected under subsection 15(2). The assertion of goals permits measurement of results.

The Supreme Court of Canada has considered affirmative action in *Re Athabasca Tribal Council and Amoco Canada Petroleum Co. Ltd.* (1981), 124 D.L.R. (3d) 1 (SCC), on appeal from (1980), 112 D.L.R. (3d) 200 (Alta. CA). During hearings on the Alsands project before the Energy Resources Conservation Board, the Athabasca Tribal Council requested that the project should have terms imposed for the benefit of disadvantaged native groups. Mr. Justice Ritchie explained that "it is clear that... [the] main objective [of the program] was to afford the Indians, insofar as conditions would allow, an equal opportunity with other inhabitants to participate in the tar sands plant undertaking"; in brief, it was an affirmative action program. Laycraft J.A. at 202 defined affirmative action programs as:

*Terms and conditions imposed for the benefit of groups suffering from economic and social disadvantages, usually as a result of past discrimination, and designed to assist them to achieve equality with other segments of the population....*

He held that such a program was not permitted under the *Alberta Individual Rights Protection Act*; it would be reverse discrimination, offending section 6 of the Act. Furthermore, section 7 of the Act, which prohibits discrimination in advertising, application forms, and oral inquiries, would make it impossible to put such a plan into practice.

Morrow J.A. had dissented, finding affirmative action would not be discrimination within the meaning of the Act for it would be a "travesty of justice" to tell Indians and Métis they have an equal right and opportunity to compete with "hordes of trained and skilled workers who can be expected to come into the area" for jobs on the project (222). His definition of affirmative action included specific reference to "special apprenticeship opportunities or job preparation". With such programs, the Alsands group would be protecting

the local population from the effects of this enormous project; affirmative action could be justified, in *Morrow J.A.*'s view, on the same principle as the Supreme Court has upheld laws applying to one class of persons under the Bill of Rights: because they had a valid federal objective.

The Supreme Court was unanimous in finding that imposing such a plan was outside the Board's jurisdiction. Nevertheless, *Ritchie J.* (Laskin C.J.C., Dickson and McIntyre J.J. concurring) went on to consider whether the plan would offend Alberta's *I.R.P.A.* It would not because it would not "discriminate against" other inhabitants:

*The purpose of the plan...is not to displace non-Indians [sic] from their employment, but rather to advance the lot of the Indians so that they may be in a competitive position to obtain employment without regard to the handicaps which their race has inherited.*

It should be noted that *Ritchie J.* stated that he had found "no material assistance" in the American cases cited to the Court (*Bakke* and *Weber*) because they dealt with different situations than that facing the Athabasca Indians.

*Lamer J.* (Martland, Beetz, Estey, and Chouinard J.J. concurring) did not pronounce on whether affirmative action was allowed under the *I.R.P.A.* Since the commencement of the action, the Alberta legislation had been amended to include provision for affirmative action in section 11.1 (now section 13) through regulations exempting persons from the provisions of the Act and authorizing programs; this power can be delegated to the Human Rights Commission.

## E. Conclusion

Affirmative action programs are to be allowed under the Charter (a necessary conclusion since they are not precluded by guarantees of equality); however, they may have to meet standards. The courts will have to consider how extensive a program can be, how long it can last, whether there must have been disadvantages suffered by the group in the very specific department, agency, or whatever in which the program is established, what protections, if any, should be ensured for members of other "non-disadvantaged" groups, how to reconcile possibly conflicting claims by different disadvantaged groups, whether quotas are overbroad, ever or always, and similar questions. These issues will arise in two circumstances: when someone brings an action under section 24(1) claiming discrimination because of an overly extensive or inappropriate affirmative action program or law or under section 52(1) (or section 24(1)) for a declaration that the governing legislation providing for the program is inconsistent with section 15(1); and when a member of a disadvantaged group in whose favour the Court has held in a section 15 action seeks an affirmative action program as part of the remedy. When government seeks to employ section 15(2) as a defence to a challenge to legislation or practice under section 15(1), the onus will be on government to show that the program or law meets the standards set by the Court. If a successful plaintiff seeks a special program as a remedy, the plaintiff will have the onus of showing that the proposed program meets the standards set down by the Court. In either case, it would be wise to present a properly structured and carefully tailored program that can realistically expect to achieve its goal of bettering conditions for the disadvantaged members of our society.

## NOTES

1. The research for this paper was completed in the autumn of 1983; the case law is applicable to that period unless otherwise specified.
2. This view has been confirmed by the Supreme Court of Canada in *Hunter, et al. v. Southam Inc.* (September 17, 1984).
3. This case was subsequently heard by the Divisional Court which found the bylaw did not come within the scope of s.2(b) of the Charter: (1984), 45 O.R. (2d) 426.

4. Since this paper was completed, the Supreme Court of Canada has warned that "American decisions can be transplanted to the Canadian context only with the greatest caution": *Southam, supra*, at 28.
5. Shortly before final preparation of this paper for publication, the Canadian Human Rights Commission ordered CN to hire one woman for every four employees hired until they had 13 per cent women in their blue-collar force. The order has been appealed.

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PART III

ECONOMIC AND SOCIAL ISSUES



## LES FEMMES ET L'ÉCONOMIE

Diane Bellemare, Ginette Dussault, et Lise Poulin-Simon

### Sommaire

Cet essai constitue un effort de synthèse des forces économiques et sociales qui jouent et ont joué un rôle dominant dans le façonnement de la situation économique des femmes d'aujourd'hui. C'est d'abord à travers un bref survol historique de l'avènement du régime salarial et de son impact sur l'organisation économique de la famille que la première partie de ce texte aborde la question de la situation économique de la femme. La deuxième section étudie l'influence de la pénurie d'emploi et des mécanismes de rationnement qu'elle génère sur la condition féminine contemporaine. Une discussion du principal mécanisme de rationnement du point de vue des femmes, soit la ségrégation des emplois, constitue l'essentiel de la troisième partie. La quatrième s'attarde sur les prévisions économiques actuelles concernant le marché du travail et leurs conséquences pour les femmes: les taux élevés de chômage prévus laissent entrevoir une détérioration possible de la situation économique des femmes. Pour contrecarrer cette tendance, une politique de plein emploi à l'intérieur de laquelle s'inscrivent des programmes d'accès à l'égalité s'imposent: ces notions de politique économique font l'objet des deux dernières parties du texte.

### Summary

This essay is an attempt to summarize the economic and social forces that play or have played a dominant role in shaping the economic situation of women today. The first part of the paper deals with the question of the economic situation of women through a brief historical overview of the advent of the wage system and its impact on the economic organization of the family. The second section looks at the impact of shortage of employment and the rationing mechanisms that it creates which affect the status of women today. The essence of the third part is a discussion of the main rationing mechanism from the point of view of women, which is job segregation. The fourth part deals with current economic forecasts concerning the labour market and their effects on women; the high rate of unemployment forecast may lead to a possible deterioration in the economic situation of women. To counteract this trend, a policy of full employment, which includes programs of access to equality, is necessary. These economic policy ideas are covered in the last two parts of the paper.



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## LES FEMMES ET L'ÉCONOMIE

Diane Bellemare, Ginette Dussault, et Lise Poulin-Simon\*

### 1. Contexte historique

L'économie d'une société se caractérise par les moyens que cette société retient pour produire et distribuer les biens et services qui répondent aux besoins de ses membres. Chaque société développe un certain nombre d'institutions pour remplir ces fonctions. Ces institutions seront différentes selon qu'il s'agit d'une société primitive, pré-industrielle ou industrielle. Mais dans chacune de ces sociétés, la situation des femmes, comme d'ailleurs des autres membres de la société, sera largement tributaire de ces institutions qui seront généralement stables car leur fonctionnement est le plus souvent en harmonie avec les valeurs sociales dominantes de l'époque.

A travers les âges, on retrouve deux institutions importantes qui tout en s'adaptant continuellement, survivent aux changements. Il s'agit de la famille et de l'État. Avec l'ère industrielle, on a vu une autre institution prendre une place dominante: le marché, et plus particulièrement le marché du travail. Pour comprendre l'impact actuel de l'économie sur la situation des femmes, il faut faire brièvement l'analyse de la transformation de l'institution économique qu'est la famille en parallèle avec le développement du marché du travail. La brièveté de cette analyse nous oblige à des simplifications qui, évidemment, ne rendent pas compte de la complexité des relations en cause.

Notre point de départ est la famille plus ou moins autarcique qu'on retrouve dans les sociétés agricoles pré-industrielles. Dans ce type de familles, tous les membres contribuent à la production de ce qui constitue le niveau de vie de la famille. La consommation et la production sont intimement liées et les règles internes à la famille établissent la part de la production communautaire que chacun reçoit.

Avec le temps pour pouvoir profiter de techniques plus efficaces, certaines productions sortent de la famille et s'organisent sur une plus large échelle. Cette spécialisation de la production se fait simultanément avec le développement d'une économie de plus en plus monétaire et entraîne une élévation des niveaux de vie.

Graduellement, de plus en plus d'activités de production sont organisées par le marché. Ce changement a de multiples conséquences sur la famille. En fait, les nouveaux lieux de production, qui deviendront les usines qu'on connaît, ont besoin de main-d'œuvre. Ils attirent cette main-d'œuvre en offrant un revenu monétaire, le salaire, qui permet aux familles d'augmenter leur niveau de vie. Il y a, à cette époque, un va-et-vient entre les activités de production salariées et les activités de production familiales. A cette époque, le concept

de plein emploi ne fait pas de sens puisque la famille peut encore, à la rigueur, répondre aux besoins essentiels de ses membres en l'absence de revenus de salaire. La dépendance à l'égard du marché du travail n'est pas très grande parce que le niveau de vie dépend peu des revenus monétaires.

C'est avec le développement du salariat sur une large échelle et la spécialisation du travail à l'échelle nationale que surgit la dépendance à l'égard du salaire et donc de l'emploi.

Cette évolution du salariat fait sentir son influence sur la famille de trois manières. Premièrement, *le développement du salariat renforce la division des rôles économiques sur la base du sexe à l'intérieur de la famille*. C'est l'un des aspects le plus fondamental de la transformation de la famille suite à l'émergence de la nouvelle institution que constitue le marché du travail. En effet, tout au long du processus d'industrialisation, la famille conserve des activités de production absolument essentielles comme l'alimentation et les soins aux enfants et autres activités de nature domestique mais il faut maintenant décider qui est responsable des activités économiques hors de la famille et qui est responsable des activités économiques à l'intérieur de la famille. La spécificité biologique des femmes dans la reproduction joue sûrement un rôle déterminant dans la réponse que la société donne à cette question. Les mères assument la production domestique tandis que les célibataires des deux sexes et les hommes en général assument la production marchande. Deux phénomènes jouent donc pour expliquer pourquoi les mères restent au foyer: premièrement, le marché n'offre pas de substituts efficaces aux productions familiales et donc les deux adultes ne peuvent pas simultanément choisir d'exercer leurs activités économiques en dehors de la famille et deuxièmement, en corollaire, le système de production n'offre pas suffisamment d'emplois pour absorber sur une base continue, tous les adultes aptes et désireux de travailler.

La deuxième influence se fait sentir par la *dépendance de plus en plus grande de la famille aux revenus monétaires*. Cette dépendance se développe parallèlement à la spécialisation du travail et l'élévation du niveau de vie. Le temps et l'énergie des travailleurs et des travailleuses, le cas échéant, sont consacrés à cette production spécialisée, éloignant de plus en plus la famille de l'autarcie initiale. Le marché du travail remplit donc deux fonctions distinctes: il réalise la production marchande et distribue du même coup les revenus monétaires nécessaires pour s'approprier cette production.

Cela entraîne une conséquence bien particulière pour les femmes: elles deviennent dépendantes du revenu monétaire de leur conjoint puisque c'est ce dernier qui a la responsabilité des activités de production hors famille. Cette situation crée l'image du père, chef de famille et pourvoyeur. Elle se concrétise sur le marché du travail dans une politique salariale qui développe le concept de salaire familial, c'est-à-dire d'un salaire unique qui doit être suffisamment élevé pour faire

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vivre toute une famille. En conséquence, les femmes célibataires qui se retrouvent sur le marché subissent les effets de ces arrangements institutionnels en se voyant attribuer des salaires à peine suffisants pour subvenir aux besoins d'une personne seule.

Comme troisième conséquence du développement du salariat sur la famille, mentionnons que la spécialisation de la production sur le marché entraîne des besoins en main-d'œuvre plus spécialisée et donc la généralisation des besoins d'éducation et de formation en dehors de la famille. On assiste donc au glissement graduel vers l'extérieur de la famille d'activités qui, jusqu'alors étaient la responsabilité des mères. De nouveaux emplois sont donc créés sur le marché et ces emplois seront disponibles aux femmes car on constate que le marché du travail fait appel aux femmes pour les activités qui sont le prolongement de leurs responsabilités à l'intérieur de la famille (vêtement, textile, éducation, santé, alimentation...). La spécialisation des rôles sur la base du sexe à l'intérieur de la famille trouve sa réplique sur le marché du travail: il y a des emplois d'hommes et des emplois de femmes. C'est-à-dire des emplois qui seront occupés majoritairement par des hommes et d'autres occupés majoritairement par des femmes.

Du point de vue de la situation économique des femmes, le développement du salariat et la division des rôles économiques sur la base du sexe ont les résultats suivants:

Premièrement, comme les femmes deviennent de plus en plus dépendantes de leur conjoint sur le plan monétaire, les activités économiques qu'elles réalisent au profit exclusif de la famille deviennent progressivement invisibles dans le calcul des activités économiques; en conséquence, la valeur économique du travail à l'intérieur de la famille sera sous-évaluée par l'ensemble de la société et le statut social de celles qui le réalise est faible.

Deuxièmement, les femmes sur le marché du travail ne développent pas d'organisation collective de défense de leur condition de travail parce que l'exercice d'un emploi rémunéré ne se fait pas comme dans le cas de hommes avec l'idée que c'est une activité à vie.

Troisièmement, les valeurs héritées du passé façonnent une structure salariale favorisant les hommes; ces derniers se voient octroyer des salaires familiaux alors que les célibataires femmes ne reçoivent que des salaires de subsistance pour une personne seule. Cette structure salariale se perpétue jusqu'à aujourd'hui même si la charge de famille n'est plus le lot exclusif des hommes.

Il faut noter que cette évolution du salariat s'effectue conformément à des valeurs sociales qui sont partagées par la majorité de la société et qui imprègnent le fonctionnement de l'ensemble des institutions et non seulement du marché du travail. Au moment où on dénonce la situation ainsi faite aux femmes sur le marché du travail, on appellera ces interactions «discrimination systémique».

## 2. Pénurie d'emplois et rationnement

Sauf dans les périodes de guerre, on peut affirmer que, depuis le début de l'industrialisation au Canada, il y a toujours eu une pénurie d'emplois, c'est-à-dire que le nombre d'emplois rémunérés est plus faible que le nombre de personnes disposées à occuper ces emplois. Les statistiques

officielles sur le taux de chômage en témoignent; cet indicateur toutefois donne une mesure limitée de ce phénomène et particulièrement dans le cas des femmes. En effet, depuis toujours, les économistes ont constaté que la difficulté de se trouver un emploi et le rang occupé dans les préférences des employeurs pouvaient affecter le comportement même des travailleurs potentiels et les inciter à se retirer du marché.

En raison de cette pénurie chronique d'emplois, des mécanismes de rationnement des emplois se sont développés de façon à attribuer les emplois disponibles aux groupes «les plus méritants». Ce mécanisme joue en tout temps mais est particulièrement visible en période de crise de l'emploi. C'est ce mécanisme que nous décrivons plus précisément dans cette section mais, auparavant, rappelons l'importance de cette question dans le cas des femmes.

Le survol historique que nous avons fait dans la première section souligne bien la dépendance au revenu monétaire qui se développe au fil des temps. Les travailleurs qui perdent leur emploi et se retrouvent chômeurs, constatent à leurs dépens que l'emploi est le moyen le plus efficace d'assurer leur indépendance économique et de se donner des perspectives d'amélioration de leur niveau de vie. A fortiori, pour les femmes à qui la société ne reconnaît pas toujours le droit au travail rémunéré, l'étude du mécanisme de rationnement est d'autant plus important parce qu'il signifie justement l'impossibilité d'atteindre l'autonomie financière; il les maintient donc dans une situation où elles continuent à dépendre de transferts effectués soit au sein de la famille, soit par l'État. En effet, autant les sociétés pré-industrielles qu'industrielles ont toujours accordé une aide de dernier recours aux individus et aux familles sans moyens de subsistance: les familles dans l'indigence. Cette forme de transfert, de nature charitable au départ se transforme peu à peu en aide accordée comme un droit social. Toutefois, les sociétés actuelles considèrent toujours que la famille est le premier responsable d'assurer le minimum vital à ses membres qui ne participent pas au marché du travail comme les enfants, les jeunes et les femmes au foyer; c'est uniquement dans les cas où les familles ne peuvent plus remplir leurs obligations que l'aide de dernier recours est versée par l'État. Donc, les transferts d'aide sociale sont des aides minimales et s'adresse à la famille plutôt qu'aux individus.

Par ailleurs, avec le développement du salariat une forme spécifique de transfert s'est développée pour assurer la continuité des revenus d'emploi lors d'une incapacité à travailler attribuable au chômage—à la maladie—à la retraite. Ce type de transfert a pris la forme d'assurance salariale et les prestations sont liées aux salaires plutôt qu'à la situation de besoins. En conséquence, ces transferts assurent des revenus plus élevés que les aides minimales versées aux familles dans le besoin et sont naturellement versées aux anciens récipiendaires du salaire. On voit donc encore les conséquences pour les femmes d'être exclues des emplois rémunérés puisque cela les confine à des revenus de subsistance et à la dépendance vis-à-vis la famille.

En raison d'une part de l'insuffisance des régimes d'assurance-salaire et d'autre part de l'instabilité accrue de la famille et enfin des difficultés rencontrées par les femmes sur le marché du travail, de nos jours, la proportion des ménages dont le chef est une femme qui se retrouve sur l'aide sociale



s'est fortement accrue. C'est alors que la situation économique des femmes apparaît précaire. Et aujourd'hui la situation des femmes met en lumière l'impossibilité de continuer à fonctionner dans la voie traditionnelle. Dans un contexte de plus grande instabilité de la famille, les femmes n'ont plus d'autre choix que de construire leur propre autonomie financière en occupant un emploi rémunéré. Il est donc essentiel de comprendre le processus de rationnement qui les a tant défavorisées. En effet, tout au long du développement historique, on voit que le marché du travail offre un nombre limité d'emplois et qu'il se développe un ordre de priorité parmi les travailleurs potentiels. Selon son système de valeurs, la société décide qui sera servi en premier.

Le premier mécanisme de rationnement s'opère par le biais de l'âge. De tout temps, les hommes dans la force de l'âge sont les candidats préférés. Ce système de préférence ne défavorise pas seulement les femmes en général mais aussi les jeunes et les personnes âgées. Ces mécanismes par lesquels cette préférence peut se manifester sont multiples. Le plus évident est probablement l'exclusion de certains groupes en raison de l'âge. On peut même le voir à l'œuvre dans la société actuelle malgré des discours officiels qui défendent le droit individuel au travail.

Pour appuyer ce point, imaginons les résultats d'un sondage sur la question suivante: quel groupe de personnes sans emploi devrait recevoir l'attention des programmes de création d'emplois du gouvernement: les jeunes entre 20 et 25 ans ou les personnes entre 60 et 65 ans? Plusieurs indices nous laissent croire que la société a déjà choisi en faveur des jeunes: l'assouplissement des règles de prise de la retraite, autant dans les entreprises qu'au niveau des régimes publics, la négociation de modalités de pré-retraite, l'existence même de programmes d'emplois spécifiques pour les jeunes alors qu'il n'y a pas de contrepartie pour les personnes âgées, les réactions négatives de l'opinion publique devant l'idée d'éliminer les pratiques d'âge obligatoire de la retraite et les appels fréquents lancés aux plus âgés de laisser leur place aux plus jeunes. Tout ceci reflète une préférence sociale qui se traduit, dans les faits, par une exclusion graduelle des personnes âgées du marché du travail. Si cette exclusion est efficace, elle diminue les problèmes causés par la pénurie d'emplois actuelle et contribue par le fait même, à protéger la cohésion sociale puisque le groupe exclu en arrive à voir sa situation comme normale.

Un autre exemple d'exclusion en raison de l'âge a certainement joué et joue probablement encore à l'autre extrémité de la pyramide d'âge: on a réglementé l'âge d'entrée sur le marché du travail par la législation sur la fréquentation scolaire obligatoire. Ce mécanisme se renforce d'ailleurs par toute la pression sociale, en faveur d'une scolarisation plus poussée lorsqu'il n'y a pas d'emplois en nombre suffisant.

Derrière ces deux exemples, on peut voir se développer tout un discours vantant les mérites de nouvelles opportunités offertes aux groupes qu'on veut exclure du marché du travail. Sans être totalement faux, ce discours passe sous silence la conséquence première de ce nouvel état de fait à savoir qu'on nie collectivement à ces groupes le droit à un emploi rémunéré avec tous les avantages qui s'y rattachent.

Un deuxième mécanisme de rationnement est à l'œuvre quand on assiste à l'élévation graduelle des exigences académiques pour tous les niveaux d'emplois. Ce phénomène se

produit quand les nouveaux diplômés sont en nombre suffisant pour remplir les nouveaux postes vacants. Prenons par exemple tous les emplois d'entretien dans un organisme public. Les exigences officielles indiqueront qu'il est nécessaire de détenir un diplôme d'études secondaires pour occuper ces fonctions. L'utilité de ces exigences n'est pas de choisir les candidats les plus aptes à occuper ces fonctions mais uniquement de diminuer le nombre de candidats admissibles. On pourrait reproduire l'exemple pour de nombreux autres types d'emplois, certains étant passés traditionnellement d'une exigence de diplôme secondaire à un diplôme de collège, d'autres passant d'un diplôme de collège à un diplôme universitaire, certains de ceux-ci en étant même arrivés à exiger une maîtrise.

Ces différentes facettes du processus de rationnement jouent à différents niveaux. Parfois, elles s'incarnent dans des pratiques d'entreprises (exigences à l'embauche) qui ne sont pas nécessairement formelles ni partagées instantanément par l'ensemble du marché. D'autres s'incarnent dans des réglementations et des législations qui au contraire sont tout à fait publiques et devraient normalement refléter le consensus social de l'époque. Enfin, les plus diffuses passent par les discours et les pressions sociales qui visent à amener les gens à se conformer aux rôles qui leur sont assignés.

Dans le cas des femmes qui nous intéressent particulièrement, le processus de rationnement a pris une forme additionnelle particulière. Pour les femmes, en effet, l'accès à un emploi rémunéré est limité d'abord et avant tout par l'identification de ce qui constitue un emploi d'hommes ou un emploi de femmes. C'est ce qu'on nomme maintenant la ségrégation des emplois et dont nous traiterons plus longuement dans la section suivante.

Le processus de rationnement s'appliquant aux femmes joue aussi au niveau de l'identification des catégories de femmes qui seront prioritairement acceptées sur le marché du travail. On verra d'abord les célibataires, les femmes mariées sans enfant, les femmes ayant fini d'élever leurs enfants, les mères d'enfants d'âge scolaire et finalement les mères de jeunes enfants. L'inclusion d'une nouvelle catégorie de femmes sur le marché se fait au rythme des besoins en main-d'œuvre pour des emplois qui prolongent des activités domestiques exercées par les femmes, pour des emplois qui représentent un accroissement des activités déjà exercées par les femmes sur le marché du travail et pour des types d'emplois qui sont délaissés par des hommes. Ce processus d'insertion des femmes sur le marché du travail qui entraîne la création d'emplois typiquement féminins conduit à la ségrégation. La ségrégation des emplois est donc le principal mécanisme de rationnement des emplois qui joue contre les femmes. Mais, l'existence même de cette ségrégation permet aussi de donner aux emplois typiquement féminins des conditions de travail (salaires, avantages sociaux et perspectives de promotion) telles que les femmes elles-mêmes ne développent pas d'attachement durable au marché du travail. Elles acceptent donc de se retirer du marché lorsqu'elles tombent dans une catégorie qui est encore peu tolérée sur le marché (par exemple, le retrait quasi automatique des femmes au moment de leur mariage ou, plus tard dans l'histoire, à la naissance de leur premier enfant). L'utilité de ce mécanisme est de laisser la chance à d'autres femmes d'occuper des emplois féminins qui sont en nombre limité.

En plus du mécanisme de ségrégation et d'exclusion de femmes sur la base de leur statut familial, d'autres mécanismes ont aussi joué pour renforcer le rationnement de la main-d'œuvre féminine. La législation interdisant le travail de nuit pour les femmes (à l'exception des hôpitaux faut-il le noter), le travail dans les mines, bref l'ensemble de la législation «protectrice» des femmes (et des enfants) avait comme résultat concret d'exclure les femmes de certains secteurs d'emplois et de renforcer la préférence des employeurs pour des travailleurs masculins. La loi sur la durée du travail dans les fabriques et la loi du salaire minimum, qui, à ses origines, ne s'appliquent qu'aux femmes font aussi partie des tentatives pour favoriser l'emploi des hommes. La société révèle aussi sa préférence pour tenir les femmes hors du marché du travail par l'adoption de l'aide aux mères nécessiteuses qui, à ses débuts, donnait un niveau de revenu à peu près équivalent au salaire minimum des femmes. La générosité de ce programme est en harmonie avec les valeurs de l'époque qui attribuent aux femmes le rôle des mères au foyer.

### 3. La ségrégation et ses conséquences

Nous avons donc vu que le processus de rationnement qui s'applique aux femmes prend des formes qui sont très semblables à celles qui s'appliquent aux autres groupes sur le marché mais qu'il y a une caractéristique particulière: la ségrégation. Il serait bon de distinguer immédiatement ségrégation et discrimination. Par ségrégation, nous entendons la tendance à séparer hommes et femmes sur le marché du travail et par conséquent, à créer des emplois soit féminins, soit masculins. La ségrégation implique donc l'existence de barrières à l'entrée de certaines professions et empêche la comparaison directe des conditions de travail des hommes et des femmes.

Par discrimination, nous entendons le fait de traiter différemment les hommes et les femmes. La société, dans sa tentative pour donner une définition opérationnelle à la discrimination qu'elle voulait enrayer, a cependant réduit le sens de discrimination en voulant l'appliquer au comportement d'une personne face à d'autres dans un même lieu de travail, à un moment donné. Selon la lettre de la loi, la discrimination ne peut donc être qu'individuelle et implique qu'il y a un responsable. C'est en constatant les limites de cette définition que les groupes de femmes en sont venus à parler de discrimination systémique, en entendant par là l'ensemble des influences diverses qui concourent à produire des résultats différents, même s'il est impossible d'identifier dans le processus, un acte précis de discrimination au sens étroit du terme. Il est évident que la ségrégation des emplois fait partie de la discrimination systémique puisqu'elle sépare les travailleurs et les travailleuses dans le but, justement, de les traiter différemment.

Les emplois qui sont devenus typiquement féminins n'ont pas été choisis au hasard. Il faut constater que la grande majorité de ces emplois sont le prolongement des responsabilités que les femmes assumaient dans la famille: l'alimentation, le vêtement, les soins personnels et l'éducation des enfants. Les emplois de bureau, sans avoir de contrepartie directe dans la famille, sont toutefois proches des activités de services qu'assument les femmes auprès des autres membres de la famille. Le caractère d'emploi subalterne est aussi très conforme au statut de dépendance des femmes dans la famille et dans la société. Il faut aussi remarquer que les

emplois de bureau sont devenus typiquement féminins en période de pénurie de main-d'œuvre masculine pendant la première guerre mondiale.

La ségrégation des emplois et l'identification d'emplois féminins créent un marché du travail typiquement féminin. Cela signifie que les ajustements entre l'offre et la demande de travail féminin ne se règlent que sur ce marché. C'est en période de croissance de ces emplois qu'on observe l'augmentation du taux d'activité des femmes. C'est à cause de l'existence de ce marché qu'il est possible d'observer un classement social des groupes de femmes entre elles pour l'obtention de ces emplois selon leur statut familial.

Les conditions de travail spécifiques qu'on retrouve associées aux emplois féminins sont d'ailleurs responsables de la facilité avec laquelle on a réussi à évincer certains groupes du marché et à les retourner au foyer, soit lors de leur mariage ou à la naissance d'enfants pour des périodes plus ou moins longues. Ces conditions spécifiques se résument en effet à dire que l'ancienneté dans ces emplois n'est pas payante. En effet, les salaires sont bas, il y a peu ou pas de possibilités de promotion, les avantages sociaux qui, traditionnellement lient les travailleurs masculins à leur employeur, sont presque inexistantes (fonds de pension, assurance-salaire, sécurité d'emploi...). La première conséquence de ces conditions de travail est qu'on observe que les femmes ne développent pas de lien durable avec le marché du travail. Elles prennent plus facilement que les hommes la décision de se retirer du marché du travail parce qu'elles perdent moins d'avantages puisque leur situation sur le marché est moins payante. C'est, entre autre par ce moyen que la société s'est assurée que les femmes seraient toujours là où il fallait, dépendant des besoins: soit sur le marché, soit dans la famille. Notons aussi que le fait que ce soit surtout des femmes qui occupent les emplois précaires et les emplois à temps partiel traduit aussi l'idée que les femmes ne doivent pas avoir de vraies responsabilités financières. De façon insidieuse, cette situation maintient la dépendance des femmes à un revenu autre que le leur. Toutes les femmes même celles qui ont dans les faits, de telles responsabilités en subissent les conséquences parce qu'elles aussi sont limitées aux emplois typiquement féminins.

Une autre conséquence de cette organisation du travail féminin soit la non-valorisation de la stabilité, touche aux difficultés que les femmes ont eues et ont dans un tel contexte, à organiser leur pouvoir collectif. Le plus faible taux de syndicalisation des femmes a souvent été souligné. Cela n'est pas étranger aux types d'emplois qu'elles occupent ni aux pressions exercées pour qu'elles se retirent effectivement du marché. Il devient ainsi irrationnel de dépenser beaucoup d'énergies pour améliorer ses conditions sans avoir la perspective de demeurer sur le marché suffisamment longtemps pour en profiter.

On voit que les valeurs sociales spécifiant le rôle que les femmes doivent occuper dans la société modèlent les caractéristiques des emplois qui leur sont réservés. Ceci fait, il n'est pas étonnant de constater que les femmes se sont pliées à ce qu'on attendait d'elles puisque tout le système les amène à adopter des comportements conformes.

D'ailleurs, quand des travailleurs masculins subissent le même type de conditions de travail, ils ne démontrent pas, eux non plus, des comportements stables sur le marché du

**TABEAU 1**  
**Projection d'indicateurs économiques pour le Canada,**  
**1983-1988**

|                                         | 1983 | 1984 | 1985 | 1986 | 1987 | 1988 |
|-----------------------------------------|------|------|------|------|------|------|
| Produit national brut                   | 3.0  | 2.7  | 0.4  | 0.7  | 2.8  | 2.9  |
| Indice des prix à la consommation       | 5.8  | 4.9  | 5.7  | 5.7  | 4.6  | 4.2  |
| Productivité secteur privé non-agricole | 2.4  | 0.4  | -0.7 | 0.6  | 1.9  | 0.7  |
| Emploi                                  | 0.5  | 2.8  | 1.4  | 0.4  | 1.4  | 2.4  |
| Salaire hebdomadaire moyen (réel)       | 0.1  | 0.0  | 0.6  | -0.3 | 0.7  | 0.8  |
| Taux de chômage                         | 12.1 | 11.0 | 10.9 | 11.2 | 11.1 | 10.8 |

Source: The Conference Board of Canada, *Quarterly Canadian Forecast*, oct. 1983, Vol. 1D, no. 3.

travail. De plus, quand pour des raisons historiques, des entreprises engagent majoritairement des hommes pour occuper des emplois qui sont ailleurs considérés comme féminins, on observe des modifications dans l'organisation du travail, modifications qui vont toutes dans le sens de favoriser et rentabiliser un comportement plus stable de la main-d'œuvre.<sup>1</sup> Ceci démontre que les conditions de travail associées aux emplois typiquement féminins ne sont pas déterminées par la technologie mais sont adaptées au type de main-d'œuvre qui les occupent et en harmonie, avec les valeurs sociales et les présumés besoins financiers des différents groupes sociaux.

#### 4. Constat sur les prévisions actuelles

La conjoncture économique et politique actuelle ainsi que les prévisions pour les prochaines années ne permettent pas d'entrevoir de changements très importants dans les conditions de vie des femmes canadiennes si les stratégies de politiques économiques ne sont pas réévaluées. Le tableau 1 présente une série d'indicateurs de ces tendances jusqu'en 1988; elles sont peu encourageantes compte tenu des prévisions sur le chômage. On prévoit une croissance économique positive mais relativement faible surtout en 1985 et 1986. Toutefois, ce sont les tendances quant à l'emploi et au chômage qui apparaissent les plus inquiétantes; la croissance de l'emploi est trop faible pour réduire le chômage en deçà de 10%. Compte tenu des tendances historiques, la persistance d'un taux de chômage aussi élevé pendant une très longue période rendra très difficile l'amélioration de la situation économique des femmes.

Ces prévisions économiques présentées au tableau 1 et corroborées par d'autres études prospectives font l'unanimité sur au moins un point: le taux de chômage officiel restera à un niveau très élevé selon les normes historiques pour les cinq prochaines années au moins. Pourtant, ces mêmes spécialistes commentent «la reprise» qui se réalisera pendant cette même période, sans même souligner que c'est la pre-

mière fois dans l'histoire qu'on associe une reprise économique avec la persistance d'un taux de chômage au-dessus de 10%.

Si on se reporte à notre analyse du fonctionnement du marché du travail, entre autre au mécanisme de rationnement des emplois, les prévisions économiques laissent entrevoir des impacts très négatifs sur les femmes. Quand le taux de chômage officiel est si visible, les pressions en vue de resserrer le processus de rationnement des emplois sont encore plus fortes, même si le chômage officiel n'est qu'une mesure imparfaite de l'état réel de pénuries d'emplois. Dans cette situation, il pourrait se développer de fortes pressions pour retourner les femmes à leur mode de vie d'antan, c'est-à-dire à la dépendance au revenu monétaire du conjoint ou aux transferts publics de type aide sociale. La promotion des activités de bénévolat s'exerçant dans la sphère des services sociaux tels les soins aux malades et aux personnes âgées est une forme que prennent ces pressions puisque ce sont les femmes, historiquement qui les ont assumées. Dans un contexte où les déficits gouvernementaux (issus de la crise et de l'augmentation des transferts) sont devenus la cible de toutes les critiques adressées à l'État et où un nouveau conservatisme vise la réduction non seulement des déficits mais aussi des budgets mêmes du gouvernement, l'encouragement du bénévolat est une solution de facilité pour les gouvernements. Non seulement coupent-ils les services publics qu'ils avaient développés mais, en ce faisant, ils détruisent des possibilités d'emplois qu'occupaient des femmes, et les obligent du même coup à réaliser gratuitement ces activités, soit à l'intérieur de la famille, soit dans un réseau plus structuré de bénévolat. Il s'agit là d'un retour en arrière dans l'organisation des services sociaux qu'on essaie d'imposer malgré les transformations qui se sont opérées dans la famille, malgré les besoins d'autonomie financière exprimés par les femmes et malgré le potentiel économique des femmes.

Un autre aspect du mécanisme de rationnement enclenché par la situation de crise que nous avons connue au cours de la dernière décennie risque de s'institutionnaliser dans une perspective de maintien d'un taux de chômage élevé. Il s'agit du phénomène de la précarisation des emplois. On a

1. Pour plus de détails sur toutes ces questions voir Ginette Dussault, *La discrimination sur le marché du travail: le cas des employés de bureau à Montréal*, thèse de doctorat, Université McGill, Montréal, 1983.



observé, en effet, que les entreprises ont développé des pratiques de gestion de leur main-d'œuvre qui n'accordent plus désormais de stabilité d'emploi qu'à un nombre restreint de travailleurs et travailleuses. Leurs autres besoins en main-d'œuvre sont comblés par recours à la sous-traitance, au travail à la pige, au travail temporaire, au temps partiel. Ces nouvelles formes de gestion font peser sur les individus tout le poids de l'insécurité économique. Cela risque d'encourager davantage les pratiques d'instabilité qu'on observe déjà dans les emplois féminins.

D'autres conséquences peuvent découler de l'acceptation du maintien d'un taux élevé de chômage. Par exemple, les revendications concernant l'amélioration de la qualité des emplois ne recevront que peu d'écoute si la société considère déjà comme privilégiés les détenteurs d'emploi. Cette réaction risque de nuire davantage aux femmes qu'aux hommes puisqu'elles occupent les emplois situés au bas de l'échelle. D'ailleurs, les conditions de travail des emplois typiquement féminins ont, comme conséquence, d'entretenir chez les femmes un faible attachement au marché du travail et un contexte de pénurie persistante d'emplois ne favorise guère la correction de cet état de fait.

Le chômage élevé et durable provoque aussi une augmentation des inégalités de revenus. La façon dont le marché du travail fonctionne implique que ce sont toujours les mêmes groupes qui sont évincés des emplois rémunérés. Ces groupes sont les «minorités visibles»: jeunes, vieux, handicapés et femmes. Ils devront avoir recours de plus en plus aux transferts privés (à l'intérieur de la famille) ou publics qui assurent des revenus inférieurs à ce qu'un emploi rémunéré leur procurerait. Cette dépendance aux transferts va hypothéquer les budgets du gouvernement qui, en réaction, va essayer de contrôler ses dépenses en coupant dans les services sociaux. Le caractère d'universalité de certains programmes est remis en question dans des périodes de crise de l'emploi et on assiste au développement d'un discours qui favorise le retour à une conception du soutien de l'État aux plus démunis uniquement, s'apparentant davantage à la notion de charité publique plutôt qu'à une notion d'assurance sociale. Ce mouvement risque de pénaliser surtout les femmes qui devront se soumettre au contrôle de leur vie privée pour avoir droit à des revenus de subsistance.

Ce scénario plutôt pessimiste est celui qu'on peut tracer à partir des prévisions économiques élaborées par les spécialistes qui font l'hypothèse que les gouvernements s'en tiendront aux politiques traditionnelles. Il devrait être clair pour les femmes qu'un revirement dans les politiques gouvernementales est nécessaire. Les femmes devront exiger des gouvernements que ceux-ci s'attaquent aux deux problèmes majeurs qui sont la source de leur insécurité économique actuelle: la pénurie d'emplois et l'inégalité en emplois (discrimination et ségrégation).

## 5. Politique de plein emploi

Pour répondre au problème de pénurie d'emplois les gouvernements doivent adopter une politique de plein emploi. Par politique de plein emploi, nous entendons une politique qui permet à tous ceux qui veulent participer à l'effort productif rémunéré de le faire selon leurs qualifications, au taux de salaire courant et à une distance raisonnable du domicile. Dans le cas des femmes, le faible taux de chômage est un

objectif partiel d'une telle politique. Il faut viser à la fois un faible taux de chômage et un haut taux d'activité.

Pour remplir ces objectifs, il faut un ensemble de mesures, certaines jouant sur l'offre de main-d'œuvre (qualification, formation, mobilité), d'autres sur la demande de main-d'œuvre (amélioration des emplois existants, création d'emplois dans le secteur public ou/et le secteur privé, développement régional); d'autres enfin visent particulièrement les ajustements entre l'offre et la demande (information sur le marché du travail, assurance-chômage, mobilité du capital...). Dans le cas des femmes, une attention particulière doit être portée à leur intégration sur le marché: tout le support institutionnel accordé aux familles avec enfants, l'assouplissement des règles du marché du travail pour permettre un passage plus souple sans perte de droits, entre le secteur rémunéré et le secteur non rémunéré, les mesures de redressement nécessaires pour leur permettre l'accès à de bons emplois. Les programmes d'accès à l'égalité font donc intégralement partie d'une politique de plein emploi.

Notre analyse du marché du travail nous a aussi indiqué que le problème de l'emploi est un problème tellement permanent dans les économies de marché qu'il appelle des interventions permanentes et énergiques.

Une politique de plein emploi ne peut donc pas se définir uniquement par l'ensemble des mesures qui la composent. Elle se caractérise aussi par la forme concrète dans laquelle elle va s'incarner, c'est-à-dire par l'environnement institutionnel créé pour la mettre en œuvre. Pour que la politique soit efficace, il faut assurer la permanence des interventions dans le domaine de l'emploi par la mise sur pied d'institutions qui reposent sur la participation des groupes concernés, soit les organismes patronaux, syndicaux, de femmes et les gouvernements. Ces institutions se doivent aussi d'être décentralisées pour assurer que les mesures adoptées répondent vraiment aux besoins spécifiques des groupes et des régions. La participation et la décentralisation assurent aussi le support politique nécessaire au succès d'une politique qui se veut énergique et permanente.

Évidemment, un objectif d'une telle envergure exige au préalable un engagement politique des gouvernements en faveur d'un développement économique axé sur la pleine utilisation des ressources humaines, engagement qui serait un virage par rapport aux politiques actuelles que seule une pression politique des groupes concernés peut provoquer.

Ce modèle de développement économique basé sur les ressources humaines n'est pas une vision utopique du monde. En effet, on retrouve dans plusieurs pays un tel engagement en faveur du plein emploi, engagement qui a résisté à la crise des dernières années, faisant ainsi la preuve de l'efficacité de ce type de politique basée sur la participation et la décentralisation. L'expérience de ces pays (Suède, Norvège, Autriche, Allemagne) révèle aussi la rentabilité économique de cette stratégie puisque, grâce à leur haut taux d'emploi, qu'ils se sont acharnés à maintenir durant cette période difficile des années 70, leur performance économique a été supérieure à celle des autres pays industrialisés.

## 6. Programmes d'accès à l'égalité

Les programmes d'accès à l'égalité font donc partie d'une politique de plein emploi bien comprise puisqu'ils visent à corriger la sous-utilisation traditionnelle de certains groupes

sur le marché du travail, plus particulièrement des femmes. Comme l'adoption d'une politique de plein emploi ne se fera que s'il se développe de fortes pressions dans cette direction, les revendications concernant les programmes d'accès à l'égalité doivent s'exprimer dès maintenant, car il faut mettre en lumière que l'objectif visé par ces programmes, soit l'égalité entre les différents groupes sur le marché, ne pourra être atteint sans le plein emploi. En aidant à redonner son vrai sens à l'expression «plein emploi», les revendications en faveur des programmes d'accès à l'égalité apporteront des retombées positives à l'ensemble de la société.

Notre analyse du mécanisme de ségrégation des emplois nous a fait voir que ses racines sont économiques mais qu'il s'est développé en harmonie avec un contexte culturel et socio-politique bien défini. Les valeurs sociales restent

empreintes de cet héritage du passé et c'est à cet ensemble de préjugés maintenant institutionnalisés que les programmes d'accès à l'égalité s'attaquent. Sans effort particulier, en effet, même une politique de plein emploi relativement efficace au niveau du nombre d'emplois créés, ne réussirait pas à assurer aux femmes l'égalité en emploi.

Puisque les raisons à la base de la ségrégation et qui expliquent les conditions de travail des emplois typiquement féminins sont de nature culturelles et non pas technologiques, une politique favorisant l'égalité en emploi sera plus efficace si elle est coercitive et s'applique à toutes les entreprises. Quand on reconnaît qu'il n'y a pas de justification économique ou technique à un comportement dont les effets sont discriminatoires et pénalisent la majorité de la population, la logique de l'action positive s'impose d'elle-même.

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## THE SOCIO-ECONOMIC COSTS AND BENEFITS OF AFFIRMATIVE ACTION FOR CANADA

Monica Townson

### Sommaire

L'étude porte sur les répercussions socio-économiques et les avantages de l'action positive au Canada. Elle analyse, sous l'angle humain, les conséquences pour le Canada de la non utilisation de toutes ses ressources humaines. Les difficultés que comporte la mise en œuvre de nouveaux programmes pour améliorer les possibilités d'emploi, alors que le taux de chômage est élevé, que la technologie évolue rapidement et que les marchés du travail connaissent des problèmes structurels, sont abordées. L'auteure explique comment l'action positive pourrait résoudre les besoins des groupes défavorisés en matière d'emploi et souligne certaines fausses idées à l'égard de l'action positive qui semblent très répandues au Canada.

Elle décrit ce que l'action positive coûtera et rapportera aux diverses entreprises, ainsi que la réaction des agents d'action positive des États-Unis face aux changements éventuels de la formule de mise en œuvre de l'action positive dans leur pays.

Dans la dernière section, l'auteure analyse brièvement d'autres moyens d'améliorer les possibilités d'emploi et tire des conclusions de son analyse.

Il y a des preuves considérables que les quatre groupes sur lesquels la Commission sur l'égalité doit se pencher font l'objet de discrimination en matière d'emploi. Plus cette situation persiste, plus le prix à payer sera élevé pour la société canadienne. Il y a des coûts sociaux associés au gaspillage de potentiel et à la démoralisation de la main-d'œuvre; et il y a des pertes économiques dues à une moindre productivité, aux coûts accrus des programmes de soutien sociaux pour les groupes défavorisés et à la sous-utilisation des ressources humaines.

Les programmes d'égalité des chances, comme ceux mis en œuvre par la Fonction publique fédérale, ont à peine amélioré la situation. Il faut des mesures plus énergiques. Il est évident, d'après l'expérience de la Commission de la Fonction publique qui a mis en œuvre le programme des langues officielles pour favoriser l'embauchage des francophones, que l'action positive peut donner des résultats si les intéressés à tous les niveaux y croient vraiment.

Il est évident que le climat dans lequel l'action positive évoluera au Canada sera bien différent de ce qu'on avait prévu à la fin des années 1970 alors que de tels programmes étaient à l'étude. L'expérience américaine en ce qui concerne l'action positive montre que les avantages de l'action positive l'emportent sur les inconvénients, tant pour les employeurs individuels que pour l'économie dans son ensemble.

Pour le Canada, le coût de la mise en œuvre d'un programme d'action positive à l'échelle nationale n'a pas nécessairement besoin d'être astronomique. Quoiqu'il en soit, tout laisse croire que le Canada ne peut se payer le luxe de rester indifférent.

### Summary

This paper looks at the socio-economic costs and benefits of affirmative action for Canada. It discusses the cost, in human terms, of failure to make full use of all this country's human resources. It also discusses the difficulties associated with implementing new programs to improve employment opportunities in a time of high unemployment, rapid technological change, and structural problems in labour markets. It examines the potential of affirmative action as a solution to the employment needs of the identified groups and highlights some of the misperceptions about affirmative action that appear to be widespread in this country.

The costs and benefits of affirmative action for individual firms are suggested, as well as the way in which affirmative action practitioners in the United States have responded to possible changes in the implementation of affirmative action there.

A final section of the paper looks briefly at other ways of improving employment opportunities and draws some conclusions from the analysis.

There is overwhelming evidence that the four target groups on which the Commission on Equality in Employment is asked to focus suffer inequities in employment. The longer these inequities continue, the greater will be the cost for Canadian society. There are social costs in terms of wasted potential and low morale, and there are costs to the economy in terms of lower productivity, higher costs of social support systems for disadvantaged groups, and underutilization of human resources.

Equal opportunity programs such as those implemented by the federal public service have done little to ameliorate the situation. Stronger measures are needed. The Public Service Commission's experience with the Official Languages Program to promote employment of francophones demonstrates that affirmative action, with strong commitment to goals at all levels, does achieve results.

It is clear that the future climate for affirmative action in Canada will be very different from that envisaged in the late 1970s when such programs were being explored in this country. But the U.S. experience with affirmative action demonstrates that there are significant benefits to be achieved, and that in all likelihood these benefits outweigh the costs—both for individual employers and for the economy as a whole.

For Canada, the costs of implementing affirmative action on a national scale need not be prohibitive. The cost of continuing inaction may well prove to be one that Canada cannot afford.



## THE SOCIO-ECONOMIC COSTS AND BENEFITS OF AFFIRMATIVE ACTION FOR CANADA

Monica Townson\*

### I. INTRODUCTION

Employment opportunities for women, native people, disabled persons, and visible minorities could be improved through affirmative action programs. But can we afford affirmative action? For anyone committed to achieving equality for all groups within the labour force, it is probably not acceptable to pose the question in those terms. Yet in times of little or no economic growth, questions like this are asked with increasing frequency.

Affirmative action practitioners point out the waste of human resources when various groups are denied full participation in the workforce. Employment and Immigration Canada's affirmative action training manual makes the statement that:

*The underutilization of women, Natives and physically disabled people represents an enormous economic cost in terms of lost production and under-developed potential. In addition, there are substantial social costs associated with low incomes, poverty and inequity, including the cost of maintaining people on social welfare who could be productively employed.<sup>1</sup>*

Many employers have recognized the benefits of making full use of all their human resources, and some have implemented special programs to achieve that end. Many more, perhaps, remain to be persuaded of the view expressed by CEIC<sup>2</sup> that "affirmative action facilitates the smooth and rational operation of the labour market and results in a positive impact on society as a whole". And there are undoubtedly many employers who express the view that "now is not the time to be asking for equality".

All of these viewpoints relate in some way to the perceived costs or benefits of affirmative action. Employers who have implemented programs presumably have found that the costs of such programs are outweighed by the benefits achieved, while the majority of employers apparently perceive the cost of such programs to be greater than any possible benefits.

For the latter group, there appears to be very little Canadian evidence to support their decision. In the United States, affirmative action programs have been in place for 20 years. The way in which affirmative action has evolved in that country makes it possible to estimate some of the costs of the program.

For instance, firms that have federal government contracts for more than a particular amount and that employ more

than a certain number of employees must file a written affirmative action plan and undergo a review to ensure that they are complying with the legislation. It has been estimated that a single compliance review at a local plant or office typically costs a contractor more than \$20,000.<sup>3</sup> Fortune 500 companies were estimated to be spending close to \$1 billion a year on routine compliance activities.

There is no way of knowing just how reliable these estimates are. Another author calculates the cost to the U.S. economy of Equal Employment Opportunity regulation at \$10 billion a year.<sup>4</sup> But the "value added" to the economy by higher wages of those who benefit from the EEO programs is estimated to be \$15 billion a year.

Estimates such as these can only be very rough approximations because they depend on assumptions impossible to verify with hard data. In any case, such costs cannot be applied to the Canadian situation. The mechanisms for contract compliance have not been put in place in Canada, and even if they were, there is no reason why such structures must follow the same pattern as those in the United States. The cost of complying with affirmative action regulations in Canada would clearly depend on what type of regulation, if any, Canada decides to adopt.

From the point of view of the individual employer, the cost of establishing an affirmative action program would depend on the particular circumstances of the employer and the type of program implemented.

Although many Canadian employers have implemented special programs to improve employment opportunities of previously disadvantaged groups, few of these programs are affirmative action programs in the sense that this term is understood in the United States. The current Canadian practice of labelling any special program "affirmative action" tends to confuse the issue. It is not unusual for an employer who has hired a single equal opportunity officer to claim that an "affirmative action" program is in effect.

This practice has other unfortunate results. The ineffectiveness of what are really equal opportunity programs is then attributed to "affirmative action", leading to the conclusion that "affirmative action doesn't work anyway".

In addition, all the arguments used against the U.S. version of affirmative action are then marshalled against any existing or proposed special program for disadvantaged groups in Canada.

Any analysis of affirmative action, then, must start with a clear understanding of the term and the reasons such programs are now being proposed in an attempt to improve employment opportunities for particular groups of workers in Canada.

It is widely acknowledged that Canadian efforts to improve employment opportunities for previously disadvantaged

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groups have been slow to take effect. The terms of reference of the Commission of Inquiry on Equality in Employment make the point that:

*... the measures taken by Canadian employers to increase the employability and productivity of women, native people, disabled persons and visible minorities have as yet not resulted in nearly enough change in the employment practices which have the unintended effect of screening a disproportionate number of those persons out of opportunities for hiring and promotion.<sup>5</sup>*

The lack of progress has led to calls for stronger measures to deal with employment discrimination, while others who favour a continuation of the existing voluntary approach make the point that "entrenched attitudes don't change overnight".

The evolution of the approach to employment discrimination taken by the United States has been outlined by Peter Robertson in a paper written for Employment and Immigration Canada.<sup>6</sup> Initially, Robertson says, when confronted with different unemployment rates, occupational distribution, and income levels of minorities and women, policymakers in the United States attempted to change the situation by making it illegal to discriminate. But when policy measures appeared to be having very little impact on the problem, another possibility was raised. Failure to change the underlying situation of women and minorities perhaps was not a failure of the anti-discrimination legislation but a failure to understand the real nature of discrimination. It is this awareness that has prompted calls for a new approach to special programs to improve employment opportunities for disadvantaged groups in Canada.

The legal concept of "systemic discrimination", in which biased systems rather than deliberate discrimination on the part of an employer may result in unequal outcomes, was first delineated in the United States in the landmark case of *Griggs v. Duke Power Co.*<sup>7</sup> An employer who treated both black and white employees equally required potential employees to pass a written test as a condition of hiring that effectively screened out a disproportionate number of blacks. In other words, a biased system rather than deliberate discrimination had resulted in the unequal outcome.

Affirmative action programs were developed to correct this kind of systemic bias.

Affirmative action is a results-oriented, comprehensive planning process adopted by an employer. For such a process to be truly an "affirmative action" program, certain key elements must be present. They were outlined succinctly by Ken Norman, Chief Commissioner of the Saskatchewan Human Rights Commission, in an April, 1983, speech.<sup>8</sup> An acceptable affirmative action program must entail:

1. A systematic analysis of an employer's current workforce;
2. A comparison of the make-up of that workforce with that of the larger surrounding community;
3. Establishment of management policies which will move in the direction of overcoming those imbalances which have been identified, within a certain time frame;

4. A monitoring system in order that the goals not slip out of sight and the timetables not be ignored.

Norman goes on to make a convincing argument that "nothing less than these comprehensive criteria be allowed to march under the banner of affirmative action".

Not many employers in Canada have adopted this kind of comprehensive human resources planning process, which can legitimately be called "affirmative action". But it has been argued that if such programs were required, perhaps of all employers with federal government contracts or of all employers under federal jurisdiction, dramatic improvements in the full and equal integration of previously disadvantaged groups of workers into the Canadian labour force would be possible.

## II. THE NEED FOR MEASURES TO IMPROVE EMPLOYMENT OPPORTUNITIES

It should be obvious that if Canada does not use all its human resources to their full potential, there will be a cost involved. Such costs, while perhaps hard to quantify, might be measured in terms of wasted potential; poor employee morale leading to higher turnover or absenteeism; higher unemployment and thus higher costs for social support programs; and perhaps even general social unrest as a result of lack of opportunities for particular groups.

What evidence is there that Canada is not making full use of all its human resource potential? And is there really a need for special measures to improve employment opportunities?

Higher unemployment rates, lower occupational status, and lower income levels of particular groups have usually been held to be *prima facie* evidence of unequal employment opportunities. One U.S. writer<sup>9</sup> refers to these as the "social indicators of job discrimination".

### Women

Canada has made very little progress in improving these indicators for any of the four target groups that the Commission has been asked to investigate. Labour Force Survey data for Canada as a whole are only helpful in assessing the employment position of women. Indians on reserves are excluded from the data, and disabled persons and visible minorities are not identified separately. However, there is little room for encouragement about the position of women. Despite a decade of equal opportunity programs, 62 per cent of women workers are clustered in only three broad occupational categories (see Table 1).

Women in the Canadian workforce are also overwhelmingly concentrated in the lower salary ranges (see Table 2). Fifty-nine per cent of women with full-time jobs earn less than \$15,000 a year. Fewer than 24 per cent of men working full time earn less than \$15,000 annually.

Census data do not throw much light on the position of the other three target groups. Labour force participation and unemployment rates of native people are available from the 1981 Census of Canada. No question on disability was included, although it is being considered for the 1986 Census. Questions on ethnic origin were included in the census, but it is not clear how these would relate to "visible minorities" in the way that the Commission might wish to see this

TABLE 1

## The Occupational Distribution of Women

| Female labour force by occupation    |       |       |
|--------------------------------------|-------|-------|
| Annual averages 1982                 |       |       |
| All classes of workers               | '000  | %     |
| Managerial, administrative           | 276   | 5.7   |
| Natural sciences                     | 62    | 1.3   |
| Social sciences                      | 89    | 1.8   |
| Religion                             | 4     | 0.1   |
| Teaching                             | 282   | 5.8   |
| Medicine, health                     | 416   | 8.5   |
| Artistic, recreational               | 69    | 1.4   |
| Clerical                             | 1,627 | 33.3  |
| Sales                                | 488   | 10.0  |
| Service                              | 913   | 18.7  |
| Agriculture                          | 127   | 2.6   |
| Processing                           | 91    | 1.9   |
| Machining                            | 16    | 0.3   |
| Product fabrication                  | 235   | 4.8   |
| Construction trades                  | 10    | 0.2   |
| Transport equipment operating        | 27    | 0.6   |
| Materials handling                   | 65    | 1.3   |
| Other crafts and equipment operating | 27    | 0.6   |
| Unclassified                         | 52    | 1.1   |
| Total female labour force            | 4,884 | 100.0 |

Source: Statistics Canada, *The Labour Force*, December 1982.

TABLE 2

## Percentage Distribution of Full-time Workers by Earnings Groups and Sex, 1981

|                   | Males    | Females  |
|-------------------|----------|----------|
|                   | %        | %        |
| Under \$1,000     | 0.8      | 1.1      |
| \$1,000 — \$1,999 | 0.6      | 1.2      |
| 2,000 — 3,999     | 1.4      | 2.5      |
| 4,000 — 5,999     | 2.0      | 4.7      |
| 6,000 — 7,999     | 2.5      | 6.5      |
| 8,000 — 9,999     | 3.4      | 10.1     |
| 10,000 — 11,999   | 4.2      | 12.0     |
| 12,000 — 14,999   | 8.9      | 20.9     |
| 15,000 — 19,999   | 19.6     | 21.9     |
| 20,000 — 24,999   | 20.3     | 10.3     |
| 25,000 — 29,999   | 14.6     | 5.2      |
| 30,000 and over   | 21.7     | 3.7      |
| Total             | 100.0    | 100.0    |
| Average earnings  | \$22,955 | \$14,608 |
| Median earnings   | 21,616   | 13,725   |

Source: Statistics Canada, *Income Distributions By Size in Canada*, 1981.

group defined. In fact, there are obvious conceptual difficulties in arriving at an appropriate definition of this group for the purposes of improving employment opportunities.

Despite all these problems, it is possible to identify some sources of information about the "social indicators of job discrimination" for the other three groups.

## Disabled Persons

The Canada Health Survey of 1978-79<sup>10</sup> reported that approximately 60 per cent of disabled male adults were in the workforce. For the same period, labour force participation of male adults not limited in activity was about 80 per cent.

Among disabled female adults, the major activity was keeping house for 60 per cent of this population, while 23.8 per cent worked outside the home. For female adults not limited in activity, 37.1 per cent reported their major activity as keeping house, while 41.4 per cent were working outside the home.

The labour force status of disabled adults was as follows: one half were not in the labour force, 40 per cent were employed, and 10 per cent were unemployed. For adults not limited in activity, the comparable figures were 26.6 per cent not in the labour force, 65 per cent employed, and 7.1 per cent unemployed.

The survey found that a large number of disabled adults (24 per cent or 417,000) belonged to an economic family whose income was in the lowest income quintile. The average income of a disabled person between the ages of 15 and 64 was \$6,200, compared with \$7,800 for a person not limited in activity.

The Canada Health Survey covered the non-institutionalized Canadian population, excluding residents of the Territories, Indian reserves, and remote areas as defined by Statistics Canada's Labour Force Survey. It was estimated that those excluded from the survey comprised approximately three per cent of the entire population (see Table 3).

It should be noted that there are limitations to the data generated from the Canada Health Survey. Fedyk's study points out that "mainly because of the sampling size, only

TABLE 3

## Population by Activity Limitation, 1978-79

| Age group 15-64          | Males | Females | Total  |
|--------------------------|-------|---------|--------|
|                          | '000  | '000    | '000   |
| No limitation            | 6,882 | 6,852   | 13,734 |
| Limited activity (total) | 815   | 923     | 1,739  |
| Some limitation          | 160   | 233     | 393    |
| Major activity limited   | 426   | 610     | 1,035  |
| Cannot do major activity | 230   | 80      | 310    |
| Total population         | 7,697 | 7,775   | 15,473 |

Source: F. C. Fedyk, "The Health Characteristics of Persons with an Activity Limitation", Canada Health Survey, 1978-79, Health and Welfare Canada, September, 1982.

data collected during the period July 1978 to March 1979 was available for analysis and data is not readily available for geographic areas smaller than Canada's five regions". Sampling error occurs because the survey sample does not include every person in the population and hence leads to a degree of uncertainty in any population estimates derived from the sample.

With these caveats in mind, however, we can derive some estimate of labour force participation and unemployment rates of disabled persons (see Table 4).

By way of comparison, the unemployment rate for the total Canadian labour force (age group 15-64) in 1978 was 8.5 per cent and in 1979 was 7.6 per cent. Labour force participation rates for those aged 15 to 64 were 69.5 per cent in 1978 and 70.5 per cent in 1979.

More recent and more accurate data on the labour force activity of disabled persons will be available by mid-1984. Statistics Canada added a supplement to the October, 1983, Labour Force Survey designed to gather information about those with disabilities. These data are now being processed and the results are expected to be available late in 1984. It will then be possible to compare unemployment rates and participation rates of the general population and of the disabled population on the same basis.

Estimates of the unemployment rate of employable disabled persons have ranged much higher than those indicated by the Canada Health Survey data. The House of Commons Special Committee on the Disabled and the Handicapped<sup>11</sup> quotes estimates of 50 per cent, 80 per cent, and 90 per cent. The committee said that "whatever the exact figures, there is no doubt that the rate of unemployment for disabled persons is much higher than for the Canadian population as a whole".

### Native People

Information on the labour force activity of indigenous people from the 1981 Census of Canada is now available. While labour force participation of native people is generally lower than that of the non-native population, unemployment rates are significantly higher. At a time when just over seven per cent of the non-native population were without work, unemployment among indigenous people was 14.5 per cent for Métis, 14.5 per cent for non-Status Indians, 17.0 per cent for Status Indians, and 15.2 per cent for Inuit. Rates in some regions of Canada were much higher than this. In Newfoundland, for example, while 17.4 per cent of the non-native population were unemployed, 29.4 per cent of Status Indians were without work, 31.3 per cent of non-Status Indians were jobless, and the unemployment rate of Inuit persons was 25.4 per cent. Twenty per cent of Status Indians were unemployed in Manitoba, while the unemployment rate for the non-native population was 4.6 per cent. Status Indians in Saskatchewan faced an unemployment rate of 18.9 per cent, with only 4.1 per cent of the non-native population out of work. In Alberta, with 3.6 per cent of the non-native population unemployed, unemployment rates for Métis, Status, and non-Status Indians ranged from 11.4 per cent to 11.8 per cent. And in British Columbia, 19.4 per cent of Status Indians were without work, while unemployment among the non-native population stood at 6.2 per cent (see Table 5).

### Employees in the Federal Public Service

Aggregate data for the Canadian labour force show clearly the inferior position of members of the target groups measured by the "social indicators of job discrimination". It is probably reasonable to infer that there are costs to the Canadian economy in terms of the waste of human resources that this represents, as well as additional costs through social support programs.

**TABLE 4**  
**Population with Activity Limitation by Labour Force Status and Occupation, 1978-79**

| Age group 15 to 64          | Some limitation<br>'000 | Major activity limited<br>'000 | Cannot do major activity<br>'000 | Total of limited population<br>'000 |
|-----------------------------|-------------------------|--------------------------------|----------------------------------|-------------------------------------|
| Not in labour force         |                         |                                |                                  |                                     |
| Labour force status unknown | 130                     | 442                            | 232                              | 804                                 |
| Total employed              | —                       | 8                              | —                                | 22                                  |
| Managerial and Professional | 234                     | 482                            | 29                               | 744                                 |
| Other white collar          | 73                      | 84                             | —                                | 160                                 |
| Blue collar                 | 91                      | 219                            | —                                | 322                                 |
| Occupation unknown          | 67                      | 171                            | 13                               | 251                                 |
| Unemployed                  | —                       | —                              | —                                | —                                   |
|                             | 26                      | 103                            | 39                               | 168                                 |
| Total                       | 393                     | 1,035                          | 310                              | 1,739                               |
| Labour force participation  | 66.9%                   | 57.3%                          | 25.2%                            | 53.8%                               |
| Unemployment rate           | 9.9%                    | 17.4%                          | 50.0%                            | 18.0%                               |

Source: F. C. Fedyk, *op. cit.*



TABLE 5

## Labour Force Activity of Indigenous People, 1981

|                           | Male   | Female | Total  |
|---------------------------|--------|--------|--------|
| <b>Inuit</b>              |        |        |        |
| Employed                  | 3,580  | 2,350  | 5,925  |
| Unemployed                | 625    | 440    | 1,060  |
| Not in Labour Force       | 3,150  | 4,360  | 7,515  |
| Participation Rate        | 57.2%  | 39.0%  | 48.2%  |
| Unemployment Rate         | 14.9%  | 15.8%  | 15.2%  |
| <b>Status Indians</b>     |        |        |        |
| Employed                  | 41,385 | 26,605 | 67,990 |
| Unemployed                | 3,185  | 5,725  | 13,910 |
| Not in Labour Force       | 36,100 | 59,325 | 95,425 |
| Participation Rate        | 77.9%  | 35.3%  | 46.2%  |
| Unemployment Rate         | 15.5%  | 17.7%  | 17.0%  |
| <b>Non-Status Indians</b> |        |        |        |
| Employed                  | 15,180 | 10,760 | 25,935 |
| Unemployed                | 2,425  | 1,955  | 4,385  |
| Not in Labour Force       | 5,715  | 12,535 | 18,245 |
| Participation Rate        | 75.5%  | 50.4%  | 62.4%  |
| Unemployment Rate         | 13.8%  | 15.4%  | 14.5%  |
| <b>Métis</b>              |        |        |        |
| Employed                  | 17,475 | 11,450 | 28,930 |
| Unemployed                | 2,955  | 1,955  | 4,910  |
| Not in Labour Force       | 8,425  | 17,090 | 25,505 |
| Participation Rate        | 70.8%  | 44.0%  | 57.0%  |
| Unemployment Rate         | 14.5%  | 14.6%  | 14.5%  |
| <b>All other</b>          |        |        |        |
| Participation Rate        | 78.4%  | 52.0%  | 65.0%  |
| Unemployment Rate         | 6.3%   | 8.6%   | 7.2%   |

Source: Statistics Canada, Census of Canada 1981, Microfiche.

The position of the four target groups in the federal public service is perhaps even more revealing. It is now almost 10 years since the Public Service Commission established its equal opportunity programs for three target groups: indigenous people, women, and the disabled. As well, a Black Employment Program was established in 1973 to improve the participation of blacks in Nova Scotia in the federal public service there.

The goal of the equal opportunity programs, according to the Public Service Commission's 1982 Annual Report, is "a Public Service that reflects, within a reasonable time, the proportion of qualified and interested Canadians found in these groups".<sup>12</sup> No definition of "a reasonable time" was offered, but the results to date have not been impressive (see Table 6).

The occupational segregation of women in the public service has worsened. Sixty-five per cent of female public servants now hold jobs in the administrative support category, compared with 60 per cent in 1976. More than 82 per cent of those now in this category are female, compared with 78 per cent in 1976. The percentage of women employees in the scientific and professional category has remained roughly constant, while the percentage of management jobs held by women has increased from 2.4 per cent in 1976 to 5.4 per cent in 1982.

In terms of salary, more than 47 per cent of women in the public service earn less than \$20,000 a year, while only 16 per cent of male public servants are in this income bracket.

TABLE 6

## Occupational Distribution of Women in the Federal Public Service, 1976 and 1982

|                                    | 1976   |       | 1982   |       |
|------------------------------------|--------|-------|--------|-------|
|                                    | Number | %     | Number | %     |
| Management                         | 30     | 0.0   | 172    | 0.2   |
| Scientific and Professional        | 5,637  | 6.0   | 5,150  | 5.7   |
| Administrative and Foreign Service | 10,033 | 10.7  | 17,605 | 19.6  |
| Technical                          | 2,554  | 2.7   | 3,289  | 3.7   |
| Total Officer Categories           | 18,253 | 19.4  | 26,214 | 29.2  |
| Administrative support             | 56,266 | 59.9  | 58,142 | 64.7  |
| Operational                        | 19,330 | 20.7  | 5,454  | 6.1   |
| All categories                     | 93,997 | 100.0 | 89,922 | 100.0 |

Source: Public Service Commission of Canada, Annual Reports, 1977 and 1982.

The lack of progress of women in the public service, despite 10 years of equal opportunity programs, is in marked contrast to the achievement of balanced francophone representation under the Official Languages Program. This program was instituted in 1973, and within three years francophone public servants were relatively well-represented in all categories of the public service in proportion to their representation in the public service as a whole and to their representation in the general population (see Table 7).

The 1977 Annual Report of the Public Service Commission of Canada speaks quite frankly about the backlash created by the Official Languages Program. At the same time it reveals why the program achieved its objective in such a short period of time:

TABLE 7

Public Service Employment by Sex and Language Group, 1976  
(Percentage of target group in each category)

|                                    | Women  | Franco-phones |
|------------------------------------|--------|---------------|
|                                    | %      | %             |
| Management                         | 2.4    | 20.4          |
| Scientific and Professional        | 23.4   | 20.4          |
| Administrative and Foreign Service | 20.4   | 26.0          |
| Technical                          | 9.8    | 18.1          |
| Total Officer Categories           | 18.1   | 22.5          |
| Administrative Support             | 78.4   | 30.4          |
| Operational                        | 18.2   | 27.2          |
| All categories, total employed     | 93,997 | 69,988        |
| Percentage of total public service | 33.7   | 26.3          |

Source: Public Service Commission of Canada, Annual Report, 1977.

*Neither the Official Languages Act nor the Official Languages Program, nor indeed the 1973 Parliamentary Resolution would have seen the light of day had there not been a deep conviction that the role of the French language and of francophones in the Public Service had to be expanded and put on a firmer footing.*

*The application of the policy, in particular, came in for harsh criticism, with some people complaining that the human and professional realities of the working environment had not been taken into account. Such criticisms were, to a large extent, justified. But people tend to forget that it was a Herculean task to transform the linguistic environment within the Public Service in a relatively short space of time.*

*But despite the many shortcomings, the action of the central agencies did produce results which have not always been valued at their full worth.<sup>13</sup>*

To affirmative action practitioners, some of the criticisms of the Official Languages Program may have a familiar ring. Although the program is not often referred to as an affirmative action program, in effect this is what it is. It has all the essential elements of such programs, including goals and timetables, commitment at the very highest level communicated forcefully to all managers, and effective monitoring to see that objectives are met.

In the six years since 1976, francophone representation in all categories has remained relatively well-balanced. Women, on the other hand, have made only slight inroads into the officer categories and are more heavily concentrated in the administrative support category than ever before (see Table 8).

**TABLE 8**

**Public Service Employment by Sex and Language Group, 1982**  
(Percentage of target group in each category)

|                                    | Women  | Franco-<br>phones |
|------------------------------------|--------|-------------------|
|                                    | %      | %                 |
| Management                         | 5.4    | 19.5              |
| Scientific and Professional        | 22.9   | 21.0              |
| Administrative and Foreign Service | 32.5   | 28.4              |
| Technical                          | 12.0   | 19.8              |
| Total Officer Categories           | 24.4   | 24.4              |
| Administrative Support             | 82.2   | 31.8              |
| Operational                        | 12.3   | 24.5              |
| All categories, total employed     | 89,922 | 59,099            |
| Percentage of total public service | 40.4   | 26.8              |

Source: Public Service Commission of Canada, Annual Report, 1982.

**TABLE 9**

**Salary by Sex and Language Group, 1982**  
(Percentage of target group in each range)

|                    | Women | Franco-<br>phones |
|--------------------|-------|-------------------|
|                    | %     | %                 |
| Less than \$20,000 | 65.6  | 29.6              |
| \$20,000 — 29,999  | 37.1  | 26.7              |
| 30,000 — 39,999    | 17.6  | 25.8              |
| 40,000 — 49,999    | 7.7   | 19.7              |
| 50,000 — 59,999    | 4.2   | 15.6              |
| 60,000 and over    | 3.9   | 20.1              |

Source: Public Service Commission of Canada, Annual Report, 1982.

Salary data show the same kinds of differences between the two target groups (see Table 9).

Public service programs for native people, visible minorities, and the disabled show the same disappointing lack of progress as those for women.

The Black Employment Program was initiated in Nova Scotia to "eliminate barriers to the full participation of blacks in the Public Service".<sup>14</sup> At that time, there were 172 black federal public servants in the Halifax-Dartmouth area, or 1.5 per cent of public servants located there. Blacks were significantly under-represented, as they formed nearly 5 per cent of the population of that area.

In the 10 years since the program started, 722 blacks have been appointed to the federal public service in Nova Scotia; only 46 of these appointments were in officer categories. Appointments of blacks in 1982 represented 2.7 per cent of all federal public service appointments in Nova Scotia (see Table 10).

**TABLE 10**

**Black Persons Appointed to Public Service in Nova Scotia, by Category**

|                                    | 1973 | 1982 | Total<br>1973-82 |
|------------------------------------|------|------|------------------|
|                                    |      |      |                  |
| Senior Executive (Management)      | 0    | 0    | 0                |
| Scientific and Professional        | 0    | 0    | 3                |
| Administrative and Foreign Service | 3    | 4    | 36               |
| Technical                          | 1    | 1    | 7                |
| Total Officer Categories           | 4    | 5    | 46               |
| Administrative Support             | 3    | 90   | 270              |
| Operational                        | 3    | 80   | 406              |
| Total appointments                 | 10   | 175  | 722              |

Source: Public Service Commission of Canada, Annual Reports, 1977 and 1982.

No information was published on the positions held by blacks in the federal public service other than in Nova Scotia.

In 1982, 464 disabled persons were appointed to the public service, down from 547 the year before—a decline that the Public Service Commission says "reflects the general decrease in appointments to the Public Service".<sup>15</sup> Almost 78 per cent of the new appointments were in the support staff categories, and 70 per cent of all new appointments of disabled persons were to term positions, some for terms of less than six months. Appointments of disabled persons represented 0.5 per cent of all appointments to the public service in 1982 (see Table 11).

TABLE 11

**Appointments of Disabled Persons to  
the Public Service, 1982**

| Level         | Type of Employment |                    |       |
|---------------|--------------------|--------------------|-------|
|               | Term               | Indeter-<br>minate | Total |
| Officers      | 58                 | 45                 | 103   |
| Support staff | 268                | 93                 | 361   |
| Total         | 326                | 138                | 464   |

Source: Public Service Commission of Canada, Annual Report, 1982.

### Visible Minorities

While the Commission on Equality in Employment is charged with examining ways to improve employment opportunities for "visible minorities," no clear definition of this term has yet been established. The Race Relations section of the Multiculturalism Directorate in the Department of the Secretary of State has been working with data from the 1981 Census of Canada in an attempt to find an acceptable definition and to estimate numbers of visible minorities in different provinces.

Respondents to the census were asked to state their ethnic origin. But there are serious problems with the data which will have to be clarified before it will be possible to assess the employment position of "visible minorities" in Canada. For example, for the Caribbean countries, a large number of persons reported only British as their ethnic origin (or French in the case of Haiti). Yet it is highly probable that most of these respondents should have reported either black, Indo-Pakistani, or Chinese.

It is clear from the tables that "visible minorities", as classified above, are virtually non-existent in the Atlantic provinces, with the exception of "blacks" in Nova Scotia. Detailed provincial breakdowns show few Japanese or Koreans in Quebec. Other than Chinese, blacks, Indo-Chinese, and Filipinos, there are few visible minority groups in the province of Manitoba. The only large groups in Saskatchewan are the Indo-Chinese and the Chinese.

Visible minority groups identified from 1981 Census data are distributed as follows:

TABLE 12

**Visible Minority Groups,  
Census of Canada, 1981**

|                        | Canada and<br>Provinces |
|------------------------|-------------------------|
| Indo-Pakistani         | 205,380                 |
| Indio-Chinese          | 56,220                  |
| Korean                 | 22,570                  |
| Japanese               | 46,065                  |
| Chinese                | 299,990                 |
| Filipino               | 75,525                  |
| Pacific Islands        | 8,595                   |
| Black                  | 158,840                 |
| Central/South American | 23,785                  |
| Arabic                 | 47,870                  |
| Other                  |                         |
| Maltese                | 18,835                  |
| Turkish                | 4,500                   |
| Iranian                | 5,970                   |
| Armenian               | 22,250                  |
| Total for Canada       | 996,395                 |
| Newfoundland           | 2,450                   |
| Prince Edward Island   | 505                     |
| Nova Scotia            | 11,230                  |
| New Brunswick          | 3,360                   |
| Quebec                 | 124,220                 |
| Ontario                | 473,600                 |
| Manitoba               | 36,536                  |
| Saskatchewan           | 15,855                  |
| Alberta                | 106,670                 |
| British Columbia       | 220,980                 |
| Total for Canada       | 996,395                 |

Source: Census of Canada, 1981. Table prepared by Multiculturalism Directorate, Secretary of State Canada.

Once an acceptable definition of "visible minority" has been established, data on labour force activity and incomes would have to be classified in the same way. Lack of information in this form prevents any assessment of the "social indicators of discrimination" for Canada's population of "visible minorities".

### III. LABOUR MARKETS, THE RECESSION, AND TECHNOLOGICAL CHANGE

It is evident that a decade of equal opportunity programs has done little to help groups on which the Commission on Equality in Employment is asked to focus. As far as the fed-



eral public service is concerned, good intentions have translated into very slow progress. And the "reasonable time" within which the public service was expected to achieve its equality objective stretches further and further into the future.

Outside the public service, with only a small minority of employers implementing any kind of special programs, members of the target groups appear to be slipping even further behind.

Employment and Immigration Canada makes a strong case for affirmative action to correct the situation,<sup>16</sup> citing the waste in human resources as a result of underutilization of target groups. In early 1982, when the department's affirmative action training manual was published, its case was reinforced by the labour market projections for the 1980s. The department said that:

*Serious shortages of labour supply are anticipated, particularly in high-growth regions of Canada and in high-growth industries. Significant shifts will occur in occupational demand, pointing to potentially serious imbalance between the skills needed by employers and the skills available in the labour market.*

*The rapid pace of technological change will contribute greatly to these shifts.*

*The labour force will be growing more slowly and changing significantly in composition. Decline in the number of youth and immigrant workers will mean fewer of the workers most able to adjust to regional and occupational shifts in demand.<sup>17</sup>*

In outlining what seems like a very favourable climate for affirmative action programs, CEIC drew on projections from the Report of the Task Force on Labour Market Development.<sup>18</sup> This was one of a series of major reports on labour market prospects for the current decade. Others included the report of the Parliamentary Task Force on Employment Opportunities for the '80s,<sup>19</sup> and the Economic Council of Canada's 1982 report *In Short Supply: Jobs and Skills in the 1980s*. Unfortunately, all these reports were based on analysis completed before the 1981-83 recession. The recession will clearly have a serious impact on the projections of economic growth and the demand for labour, but detailed revised projections are not yet available.

The Labour Market Task Force, for example, based its projections of labour demand for the 1980s on the assumption that real economic growth in the period 1980-85 would average between 2.7 per cent (the "slow growth" scenario) and 3.2 per cent (the "fast growth" scenario) per annum. The unemployment rate, under the slow growth projection, was expected to drop to 6.6 per cent by 1985 and to 4.9 per cent by 1990.<sup>20</sup> Projections from the Department of Finance<sup>21</sup> suggest that unemployment will now average almost 11 per cent in 1985.

As economic growth has resumed, unemployment has remained high. But many economists had expected this. The usual pattern after an economic downturn is that, when signs of a recovery become evident, discouraged workers return to

the workforce, swelling the numbers of those looking for work. This phenomenon is likely to be more pronounced as the economy comes out of the recent recession.

Many economists now believe that the predicted shortages of skilled labour may not materialize until the unemployment rate for the labour force as a whole drops to between seven and eight per cent, and most projections do not expect that level to be reached until well into the next decade.

Added to the lingering effects of the worst recession Canada has experienced in more than 50 years will be the impact of technological change. The impact of microchip technology on women's jobs has been well-documented. One writer has suggested that "unless appropriate measures are taken" nearly a million women could be out of work by 1990.<sup>22</sup>

New technology optimists have made the argument that potential job losses as a result of computerization should not really be such a cause for concern. They point out that when computers were first introduced into the banking industry, for example, it became possible to offer all kinds of services that had not been available before—daily interest accounts, new kinds of loans on which interest could be calculated quickly, and different savings options. The increased volume of business that these services generated meant there was no significant loss of jobs because of automation. Besides which, the argument went, even where it was possible to do the work with fewer employees, no one was fired. The number of employees was reduced through the normal attrition process.

While this may all have been true when microtechnology was introduced into the banking industry, it would be unwise to assume the same arguments apply in relation to office automation and microchip applications in other work still done mainly by women. There seems no doubt that the process will be definitely more complex as a result of the recession.

While it is possible that the state of the economy over the past two years may slow down the rate of diffusion of new technology, there are other more serious concerns.

When Canada first went into the recession, in the second half of 1981, many employers dealt with it in the way they often deal with downturns in the business cycle. They implemented hiring freezes; they probably decided not to start any new training programs for the time being; and they may have been reluctant to give big wage increases.

When the severity of the recession became apparent, they had to look at other measures. Hiring freezes were not enough; layoffs had to be implemented as well. Employers also began experiencing another phenomenon. Normal attrition rates did not seem to operate any more. Because the economic situation was so bad and unemployment was so high, turnover rates dropped. Workers who had jobs decided to hold on to them rather than try to switch to jobs with better prospects or more opportunities.

Employers then began to tighten up and reorganize. Cost-cutting became a matter of life and death. The Conference Board of Canada studied the retrenchment programs instituted by some of the major Canadian employers.<sup>23</sup> They found that for many of those interviewed, there had been a major restructuring of the way in which work was done. That restructuring extended to different industries and, in many ways, to the economy as a whole. It means that many of the

jobs lost during the recession will not reappear as economic growth resumes.

Continuing high unemployment will mean stronger competition for those jobs that remain. If women are to be displaced from their traditional job ghettos by the application of new technology, can they be absorbed elsewhere in the economy?

For those displaced by the new technology, and especially for women, there are two serious problems. The first is the difficulty of identifying what skills will be needed. The Dodge Task Force referred to the problem in its report.<sup>24</sup> "[Because] there are great uncertainties about the precise requirements during the decade," said the Task Force, "the system must be flexible. Changes are required if the system is to meet projected skill requirements and be capable of responding quickly to unforeseen demands."

There is a second problem that women must face when it comes to retraining. It concerns the threat to men's jobs posed by both the recession and the application of new technology. For many years now, women have been counselled to break out of their job ghettos by training for "non-traditional" occupations. Government programs have offered special incentives for them to do so. And some employers have implemented successful programs to move women into jobs that have usually been considered "men's work". Desegregation of the workforce, after all, is a major goal of affirmative action programs, at least as far as women are concerned.

Many of these traditionally male jobs have disappeared, perhaps forever, as a result of the recession. Others are being automated, so that the men who have been doing the jobs up until recently will also be displaced by the application of new technology.

If women cannot train to be tool and die makers, for instance, because those jobs are being taken over by robots, will the men who were tool and die makers want to train to be word-processing operators? Will high unemployment among male workers make it virtually impossible for women to get training and to compete for those few traditionally male jobs?

This is the climate in which affirmative action must be examined. The dilemma is that at a time when special measures to improve employment opportunities for disadvantaged groups are desperately needed, other groups may feel their employment situation is threatened by change and uncertainty beyond their control.

#### IV. AFFIRMATIVE ACTION AS A SOLUTION FOR CANADA

Is it feasible to consider affirmative action in the kind of economic climate Canada is now experiencing? Would the costs of implementing affirmative action outweigh any potential benefits?

Our analysis so far allows us to draw the following tentative conclusions:

- There is a need for measures to improve employment opportunities. Blumrosen's "social indicators of job discrimination"<sup>25</sup> applied to the four target groups on which the Commission is asked to focus show continued occupational segregation of women in the workforce; a concentration of

target group members in the lower income brackets; and significantly higher unemployment rates for native people and the disabled than for the population as a whole.

Underutilization of Canada's human resources in this way undoubtedly represents a cost to society in terms of wasted potential. As well, high unemployment rates among target group members imply that social support programs such as welfare, unemployment insurance, and other benefits must be directed to this segment of the population to an extent disproportionate to their representation in the general population.

The concentration of women in the lower income brackets is undoubtedly a major reason for the high incidence of poverty among female-headed families and among elderly women who live as unattached individuals.

- Equal opportunity programs have failed. For the past 10 years, the federal public service has operated equal opportunity programs for the four target groups. The programs appear to have had very little impact. Data show increased occupational segregation of women in the public service; very little progress in moving women or other target group members into the officer categories; appointments of blacks in Nova Scotia at a rate below that which their representation in the general population would suggest; and very limited hiring of disabled persons, mostly to term positions.

By contrast, a comprehensive affirmative action program for francophones, under the Official Languages Program, proved extremely effective and was able to achieve dramatic results in less than three years.

This experience confirms the conclusion reached in the United States more than a decade ago. Anti-discrimination and equal opportunity programs may fail not because the programs themselves are failures but because they do not address the true nature of discrimination. Biased systems, and not necessarily deliberate discrimination, may result in unequal outcomes, and it is this systemic discrimination that affirmative action is designed to correct.

- High unemployment and restructuring of work as a result of the recent recession may make it necessary to re-examine the way in which affirmative action has been presented to employers. Instead of expected labour shortages, there is now an over-supply of workers. Employers will not be persuaded to implement affirmative action voluntarily on the grounds that they will need all the workers they can get.

One positive aspect of the retrenchment programs that many employers have implemented, however, is the fact that many—perhaps for the first time—are now convinced of the importance of effective human resource planning.

Luce's study for the Conference Board<sup>26</sup> points out that a slow economic recovery, which is what Canada appears to be experiencing, will provide a "breathing space in which companies will have the opportunity once again to examine their purpose and goals". According to this author:

*During the recession longer range issues often were ignored because of shorter term survival needs. Even companies who were forewarned about the recession and who had the luxury of making longer range retrenchment plans will want to review their retrenchment programs and where retrenchment has led them.*

*Human resource management will be a central issue because human resources were so drastically affected by retrenchment. Several human resource management issues important for this reassessment will be:*

*the integration of human resources into overall organizational planning, strategy and related management tasks;*

*determining which staff are needed to meet new organizational priorities and challenges; and*

*fostering an organizational culture and climate conducive to achieving organizational goals.*

*... Effective deployment of human resources will be very important, and this will be achieved only if human resource management is an integral part of organizational strategy and planning.*

Affirmative action is a comprehensive planning process for effective human resource management. If employers have accepted the importance of integrating human resource management concerns into organizational purpose and strategy—and there is no reason to doubt the Conference Board hypothesis—then it should not be difficult to convince them that effective human resource management includes making full use of available target group members, and that affirmative action is the process by which this can be achieved.

- Failure to act now to improve employment opportunities for target group members may result not only in a continuing and disproportionate burden on social support programs, which will have to be directed to members of these disadvantaged groups, but in other social costs.

The application of new technology to jobs previously considered "non-traditional" for women may make it harder for women to break out of the occupational job ghettos unless effective programs are implemented to help them do so.

One writer who has looked at the impact of the new information technologies on women describes the development of women's work as crossing two frontiers. Iris Fitzpatrick Martin, one of the co-authors of "The Conserver Society" and a research associate with the GAMMA project, jointly sponsored by the Université de Montréal and McGill University, describes the first frontier when women moved out of the home to take up paid employment.<sup>27</sup> Crossing this frontier was easy, she says, because the kind of employment women took up was mainly an extension of the role they played in the home. Any loss to husband and children was offset by the financial rewards the woman's work brought. "The essentially domestic nature of these tasks", she says, "does not violate the woman's traditional image; by taking on this kind of work, she does not demonstrate any 'unfeminine' abilities and does not threaten the power of the men around her."

But when a woman looks for work requiring abilities traditionally viewed as "masculine", Fitzpatrick Martin says, then she is broaching the more forbidding second frontier. "She is threatening to cross the dividing line between the established sex roles, perhaps also to demonstrate that the dividing line

has no validity." The obvious question that must be asked in the present context is: will microtechnology and the added effect of the recent recession push women back behind the first frontier or help them outward beyond the second?

Affirmative action could help ensure that what little progress women have made to date is not now reversed. It could help women cross the second frontier. Perhaps even more important, such programs could ensure that productivity gains made possible by the application of new technology are shared by all groups in society, and not just allocated to those workers who have always had the most advantages. The social cost of allowing current inequalities to continue may be more severe in the present economic climate than it would be in less troubled economic times.

- In some cases and in some regions, what might be termed "the demographic imperative" makes action to correct inequities a matter of urgent necessity. A recent study of the state of affirmative action in Canada<sup>28</sup> found that in Saskatchewan, for instance, "there is an acute awareness that the inordinately high native unemployment and the resultant poverty combine to create an atmosphere of serious discontent and potential unrest. Many of the respondents in Saskatchewan pointed out that currently one out of four school children are of native ancestry. These children represent 25% of the potential labour force in the next decade."

## V. THE COSTS AND BENEFITS OF AFFIRMATIVE ACTION

While it may be possible to demonstrate that, for society generally, affirmative action could achieve significant benefits, what about the costs? Claims that Canada "cannot afford" affirmative action, especially in the current economic climate, raise several pertinent questions:

1. What would be the cost to the economy as a whole if affirmative action were implemented on a national scale?
2. What would it cost individual employers if they were compelled to implement affirmative action programs?
3. Would the benefits that might be achieved, both on a national scale and by individual employers, justify the cost?

Affirmative action on a national scale would obviously require some form of government intervention, whether through direct regulation of employers or through some form of financial incentive scheme. As the Task Force on Labour Market Development points out,<sup>29</sup> the federal government intervenes in labour markets both for reasons of economic efficiency (to maximize overall gains) and for reasons of equity (to improve distribution of benefits and costs). But the measurement of overall net gains or losses to the economy is complex.

To answer the question "Have Canadians in aggregate been made better off? That is, do the total benefits accruing to all Canadians exceed the costs?" requires an estimate not only of the differential benefits and costs accruing to labour, but also of other factors, such as the change in taxation revenues to Canadian governments; the change in foreign exchange earnings; and the differences in returns to capital.



In its examination of the value to Canada of incremental job creation, the Task Force attempted to determine the value of activities forgone, from the perspective of Canadian society, in order to create additional employment. It came to the conclusion that the long-run gains for permanent employment are in the order of 10 per cent of the wage. In other words, the net benefit to the economy when additional employment is created can be valued at 10 per cent of the wages paid in that employment. But the Task Force said that the short-run gains from permanent employment can be much greater.<sup>30</sup>

As well, says the Task Force, "there will be specific cases where the proponents of government intervention in labour markets can prove that the economic gains are much higher". Its report admits that "major benefits can accrue when workers have difficulty in participating in the normal labour market".

Another way of estimating the potential benefit to the economy of government intervention is to attempt to arrive at some estimate of the cost of systemic discrimination that the intervention is designed to correct. For instance, the cost to the economy of above-average unemployment levels for target group members is twofold. There is a cost in terms of unemployment insurance benefits paid out, and in terms of income tax revenues forgone. The impact may be illustrated with the following example:

In 1981, according to census data, 24,265 indigenous people were unemployed.<sup>31</sup> In that year, median earnings of all workers, including both full-time and part-time employees, were \$12,700.<sup>32</sup> Unemployment insurance benefits are based on 60 per cent of earnings up to maximum insurable earnings of \$315 a week (i.e., the maximum benefit in 1981 was \$189 a week).

To arrive at an approximate estimate of the "cost" of native people's unemployment in 1981, we may make the following assumptions:

- a) All indigenous people who were without work at the time of the census remained unemployed for 52 weeks; (It should be noted that only those who wanted to work but could not find employment are defined as being "without work".)
- b) The usual earnings of these workers averaged \$13,000 a year, entitling them to a maximum of \$150 a week in unemployment insurance benefits.

The total cost of unemployment insurance benefits, under the above assumptions, would therefore have been \$189,267,000 ( $\$150 \times 52 \times 24,265$ ).

At the same time, because these workers were not receiving wages; the government would not have been able to collect income taxes from them. (It should be noted, however, that Status Indians do not pay income taxes.) To estimate the amount of tax revenue forgone, we may make the following additional assumptions:

- a) For income tax purposes each worker claims the basic personal exemption, an exemption for one dependent child, the standard \$100 deduction (in effect in 1981) for medical expenses and charitable donations, as well as the employment expense deduction;

- b) Employment earnings are normally the only source of income, and there are no other deductions or exemptions;

- c) The tax rate applicable in Ontario is applied.

Based on these assumptions, and omitting Status Indians from the calculation, if these workers had employment income they would have paid an average \$1,824 in income taxes in 1981. The total amount of tax revenue forgone would therefore have been \$18,887,520 ( $\$1,824 \times 10,355$ ).

In sum, then, the "cost" of native unemployment in 1981 was more than \$208 million ( $\$189.3 + \$18.9$ ). The accuracy of such a dollar estimate, however, is highly questionable for a number of reasons:

1. There is no way of knowing the usual earnings (full-time or part-time) of these workers;
2. There is no information on the duration of their unemployment or their eligibility for UI benefits;
3. There is no information on their taxable income when they are employed, including what exemptions and deductions they usually claim;
4. Unemployment insurance benefits are taxable, and we have assumed no tax would be paid. (However, this may not be an unreasonable assumption, since once deductions and exemptions are taken into account the taxable income of those who received 52 weeks of benefits at \$150 a week would be very low).

Despite these limitations, it is clear that there is a significant dollar cost to high levels of unemployment among target group members, particularly if unemployment persists for any length of time. And the calculations above do not take into account the indirect costs incurred when groups face long periods of high unemployment, such as costs of social support programs, possible social disruption, and the associated problems of low incomes.

A similar methodology might be used to estimate the costs of the continuing inferior position of women in the labour force. The problems of this particular target group are different, in that women are not at present experiencing significantly higher unemployment rates than other groups in the labour force. However, significantly lower earnings as a result of occupational segregation of women represent both a lack of purchasing power, which will have an impact on overall consumer demand, and reduced tax revenues for the government.

Median earnings of a woman worker with a full-time job in 1981 were \$13,725.<sup>33</sup> Median earnings of men who worked full-time were \$21,616. The consequences of such a wage gap are evident in the data on female-headed families. In 1981, 38.1 per cent of families headed by women had incomes below the poverty level, while only 8.9 per cent of male-headed families were low-income families.<sup>34</sup> Median income of a single-parent family headed by a woman was \$13,938. Median income for single-parent families headed by a man was \$24,813. The median income of all Canadian families in 1981 was \$27,838.<sup>35</sup>

The persistent wage gap between men and women is also reflected in income tax data. In 1981, close to 3.5 million women reported wages and salaries as a source of income on their income tax returns. Total income reported from this

source was \$45.2 billion.<sup>36</sup> There were 5.7 million men who received income from wages and salaries, and they reported \$116.2 billion from this source of income. Net tax payable by all those women who had taxable income was only \$8.2 billion, or an average of about \$2,058 for each tax return. Those men who had taxable income paid \$26.5 billion in taxes, averaging \$4,112 per return.

Any estimate of the costs of affirmative action, then, must take into account the kinds of benefits that would accrue if target group members could find permanent employment, and if the wage gap between men and women could be eliminated. Continued systemic discrimination imposes significant costs of the type outlined above. The elimination of these costs will offset the cost of implementing affirmative action on a national scale. The relevant question, then, is whether or not a national affirmative action program will confer a net benefit.

### The Costs of the United States Program

In the United States, there have been various estimates of the cost to business of compliance with affirmative action requirements under the federal contract compliance program. The Equal Employment Advisory Council published estimates in May, 1981,<sup>37</sup> based on a survey of 21 companies selected on a representative basis from the Fortune 500 listing. The survey was an attempt to establish the approximate annual cost of complying with federal EEO requirements in general and with the regulations of the Office of Federal Contract Compliance Programs (OFCCP) in particular. The survey showed these results:

#### I. Survey of Federal Contractors

|                                                                                                                                                                                                                                                               |                |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| A. Annual cost of all EEO requirements to the Fortune 500:                                                                                                                                                                                                    | \$1.5 billion  |
| B. Annual cost of the contract compliance program to the Fortune 500:                                                                                                                                                                                         | \$942 million  |
| 1. Annual cost to the Top 50:                                                                                                                                                                                                                                 | \$459 million  |
| 2. Annual cost to the Top 100:                                                                                                                                                                                                                                | \$601 million  |
| 3. Annual cost to the Top 300:                                                                                                                                                                                                                                | \$773 million  |
| C. Projected annual cost to all 325,000 federal contractors. (Since an unknown number of federal contractors are subdivisions of larger corporations, 50,000 contractors were arbitrarily not included to compensate for the possibility of double counting.) | \$1.15 billion |
| 1. Annual cost to the Top 500 federal contractors*                                                                                                                                                                                                            | \$942 million  |
| 2. Annual cost to the Top 501-1,000 federal contractors (assuming an average expenditure of \$55,000)*                                                                                                                                                        | \$27.5 million |
| 3. Annual cost to the Top 1,001-50,000 federal contractors (assuming an average expenditure of \$2,000)*                                                                                                                                                      | \$98 million   |
| 4. Annual cost to the middle 124,000 (assuming an average expenditure of \$500)*                                                                                                                                                                              | \$77 million   |

5. Annual cost to the bottom 100,000 (assuming an average expenditure of \$100)\*

\$10 million

- D. Average annual number of compliance reviews for the Fortune 500 = 2.4. This figure would mean that 46 per cent of all the compliance reviews conducted by OFCCP in a given year probably involve Fortune 500 companies. In 1980, one company had 49 of its approximately 100 facilities reviewed.

|                               |     |
|-------------------------------|-----|
| Average number for the Top 50 | 21  |
| Average number for 51-100     | 3   |
| Average number for 101-300    | 1   |
| Average number for 301-500    | 0.5 |

- E. Average cost of a compliance review to a Fortune 500 federal contractor

\$20,283

\* This assumed expenditure would cover such costs as the preparation of all affirmative action plans, the maintenance of necessary employee records, advertising and notice costs caused by regulation, staff time for internal monitoring and responding to agency data requests, work environment alterations to accommodate the handicapped, related legal and consultant fees, and overhead.

#### II. OFCCP activities in fiscal year 1980 (most recent year for which actual numbers exist)

These figures were based on OFCCP's FY 1982 budget justification, which stated that in 1981, 80 per cent of its budget was spent on compliance reviews and the remaining 20 per cent on complaint investigations.

|                                                                                                                                                                                                                                                                                                                                            |                |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| A. Annual budget                                                                                                                                                                                                                                                                                                                           | \$ 51 million  |
| B. Number of employees                                                                                                                                                                                                                                                                                                                     | 1,482          |
| C. Number of compliance actions                                                                                                                                                                                                                                                                                                            | 4,358          |
| 1. Individual complaint investigations*                                                                                                                                                                                                                                                                                                    | 1,736          |
| 2. Number of compliance reviews*                                                                                                                                                                                                                                                                                                           | 2,632          |
| D. Cost of compliance actions                                                                                                                                                                                                                                                                                                              |                |
| 1. Average cost of a complaint investigation                                                                                                                                                                                                                                                                                               | \$5,875        |
| 2. Average cost of a compliance review                                                                                                                                                                                                                                                                                                     | \$15,500       |
| E. Effectiveness of compliance actions                                                                                                                                                                                                                                                                                                     |                |
| 1. The agency stated it found actual discrimination in 113 of its compliance reviews, or only 4 per cent. It believes that there is a possibility of discrimination in another 467, or 18 per cent. Thus, in 2,632 compliance reviews initiated by OFCCP in 1980, it found or believes it will find discrimination in 580, or 22 per cent. |                |
| 2. Total amount spent by the government on compliance reviews in which there was no finding of discrimination                                                                                                                                                                                                                              | \$31.8 million |
| 3. Estimated amount spent by federal contractors on these reviews                                                                                                                                                                                                                                                                          | \$41.6 million |
| 4. Total amount spent on compliance reviews in which there was no finding of discrimination                                                                                                                                                                                                                                                | \$73.4 million |
| 5. Percentage of contractors reviewed assuming each review involved a different contractor                                                                                                                                                                                                                                                 | 0.8%           |

- F. Effectiveness of individual complaint investigations
1. Average cost per investigation to OFCCP \$5,875
  2. Average cost of similar investigation by EEOC (based on EEOC's budget estimates) \$2,000
- a. An individual complaint investigation simply refers to those investigations initiated by the filing of an individual complaint. They usually are limited to specific employment practices and individual problems, but they may allege class violations. Moreover, OFCCP has the discretion to expand an individual complaint into a broad-based review of the contractor.
- b. Such reviews are initiated by the agency and generally involve an examination of all the contractor's employment practices.

While the cost estimates developed by the Equal Employment Advisory Council appear to present concrete evidence of the cost of the U.S. contract compliance program, it is clear they must be treated with some caution. The Equal Employment Advisory Council is a Washington-based business lobby group, and this bias must be taken into account in any assessment of its estimates. As well, investigation of the estimates by EEO experts apparently revealed that the cost of some regular personnel management activities had been allocated to EEO activities (see footnote\* in Section C of survey results), so that estimates of the cost to federal contractors may be overstated.

The suggestion in Section E of the survey results that effectiveness of compliance actions may be measured by the incidence of discrimination uncovered must also be questioned. It may be that the fact that any contractor may be subject to review minimizes the incidence of compliance violations. In other words, just because a review does not turn up evidence of discrimination does not necessarily mean that the compliance review program is not effective.

This survey also attempted to estimate the benefits conferred by the program by examining the participation rate of minorities and women in the nine categories used by the Equal Employment Opportunity Commission to segment the civilian labour force. Estimates were based on data reported by the Commission in its annual summary of all employees filing EEO-1 forms. Any employer with more than 100 employees must annually file such a form, according to Title VII of the Civil Rights Act. It is estimated that approximately 50,000 employers are involved in this program, each filing an average of 3.3 forms annually. It can be presumed that almost all employers submitting EEO-1 forms are also federal contractors or sub-contractors. The study claims to demonstrate that "despite the great cost of the current OFCCP program, it has had little impact on the previously established participation rate of minorities or women". However, the study does acknowledge that the 1971-72 recession may have had some impact in some of the categories.

Another study, conducted by Arthur Andersen & Co. for the Business Roundtable and published in March, 1979,<sup>30</sup> looked at the direct incremental costs incurred by 48 companies in complying with the regulations of six federal agencies in 1977. One of the areas studied was Equal Employment Opportunity (EEO). "Incremental costs" were defined as "the direct costs of those actions taken to comply with a regulation that would not have been taken in the absence of that regulation".

The study found that EEO imposed incremental costs of \$217 million, and that 76 per cent of those costs were related to affirmative action programs for minorities and women. More than 96 per cent of the total \$217 million was for

administrative and operating costs. Companies reported that, in general, EEO record-keeping and reporting requirements were inflexible and made inadequate allowance for companies with proven records of acceptable affirmative action.

Two industries—communications and machinery (except electrical)—accounted for 65 per cent of EEO incremental costs. However, the two industries represent only 40 per cent of the employees of participating companies. EEO incremental costs ranged from approximately \$10 per employee per annum in several industries to approximately \$150 per employee per annum in the communications industry.

The cost of EEO regulation was allocated as follows:

|                                                    | \$ million | %    |
|----------------------------------------------------|------------|------|
| Affirmative action programs, minorities and women  | 165        | 76   |
| General administration                             | 12         | 6    |
| Procedural regulations of the EEOC                 | 11         | 5    |
| Sex discrimination guidelines                      | 9          | 4    |
| Employee selection guidelines                      | 5          | 2    |
| Affirmative action obligations—handicapped workers | 4          | 2    |
| Other                                              | 11         | 5    |
|                                                    | \$217      | 100% |

The affirmative action program for handicapped workers caused low incremental costs in 1977. Companies reported that of the total \$8 million in incremental capital costs, they incurred \$1.5 million of incremental capital costs to ensure that new facilities would accommodate the physical limitations of handicapped workers. The incremental costs of the regulations on handicapped workers were expected to be much larger in the future, particularly with respect to capital expenditures, if companies are required to modify existing facilities.

The Committee on Labor and Human Resources of the United States Senate (the Hatch Committee), which reported in April, 1982,<sup>31</sup> examined all aspects of the U.S. affirmative action program, including the cost. Witnesses appearing before the committee claimed that it costs American business and industries more than \$1 billion a year to comply with OFCCP requirements. (The OFCCP is responsible for monitoring the affirmative action plans of an estimated 325,000 companies.)

"Much of OFCCP's excessive costs are directly attributable to agency demands for data", the committee said. The average affirmative action program is approximately 400 pages in length and OFCCP apparently required contractors to submit more than 3.6 million sheets of paper in fiscal year 1980.

According to the committee report, "witnesses clearly seemed to suggest OFCCP must become more aware of the cost of its regulations, and should ascertain whether its requests during a compliance review are increasing minority and female employment opportunities in some proportion to the cost of contractors to comply with these requests".

A sample study of federal contractors conducted by the committee indicated that in the course of conducting compliance reviews, OFCCP frequently requested additional data, often requiring between 500 and 600 pages of information and costing between \$11,000 and \$13,000 to fill the request.



In all, OFCCP data requests required an average of 1,144 pages of material to be prepared and submitted, costing each contractor \$24,000.

Despite the evidently sceptical comments of the Hatch Committee about the possible benefits of compliance activities, it must be noted that none of the three cost studies cited above makes any serious attempt to assess the benefits of affirmative action. All of the estimates appear to be developed with the aim of documenting the heavy burden imposed on business and industry by government regulation without taking into account the possible benefits to society as a whole or even to business directly.

Nestor Cruz, Director of Review and Appeals, Equal Employment Opportunity Commission, estimates that while EEO in the United States may cost that country close to \$10 billion a year, the benefits are worth \$15 billion, representing a 50 per cent return on the investment in affirmative action.<sup>40</sup>

Cruz's cost estimates for employers break down as follows:

- Specialists in EEO: 400,000, paid on average \$40,000 a year and each spending 25 per cent of time on EEO = \$4 billion;
- Lawyers specializing in EEO work: 10,000, paid an average of \$200,000 a year = \$2 billion a year;
- Senior managers: 100,000, at an average salary of \$60,000 a year each and each spending 5 per cent of time on EEO = \$3 billion a year.

To these costs must be added government enforcement expenses. Cruz estimates the cost of EEO regulation to the U.S. economy at "around \$10 billion per year, as a maximum".

On the benefit side of the equation, his estimates are based on the increased "value added" to the economy when workers in the "protected classes" receive higher salaries as a result of affirmative action programs. He assumes that EEO regulation can increase the "value added" of workers in the "protected classes" by two per cent per annum, a not unreasonable figure, he argues, because a promotion normally carries at least a 10 per cent increase in salary. Based on 65 million "protected" workers, and assuming each has a "value added" of \$11,600, a two per cent increase in this amount results in a gain of \$15 million a year for the economy as a whole.

Just how valuable such cost estimates are is open to question, in view of the unsubstantiated assumptions that are made in the calculations. If we were to apply Cruz's methodology to the Canadian economy, the benefits of affirmative action might well be \$1.4 billion a year. The estimate is arrived at as follows:

| Number of "protected workers"             |           |
|-------------------------------------------|-----------|
| Women in the labour force (1981)          | 4,851,000 |
| Visible minorities (see Table 12)         | 996,395   |
| Disabled (see Table 4)                    | 912,000   |
| Indigenous people (see Table 5, men only) | 91,810    |
|                                           | <hr/>     |
|                                           | 6,851,205 |

Note: Data on disabled and visible minorities are not available by sex. Assuming about half of each category are female, we may deduct 851,205 from the above total to allow for double counting.

Assume 6 million "protected workers" with a value added of \$11,600, or total value added of \$69.6 billion. Cruz assumes EEO regulation can increase the value added by two per cent per year. The "benefits" of affirmative action for Canada, using his methodology, would therefore be 2 per cent of \$69.6 billion, or \$1.392 billion a year.

Whatever method is used to calculate cost, one conclusion that emerges from the literature is that because employers in the United States have had to comply with the legislation, they now accept the costs of compliance as part of the cost of doing business.

Surveys of the U.S. experience with contract compliance support this conclusion. Leah Cohen, in a study for CEIC,<sup>41</sup> found in interviews conducted in Washington and New York City that:

*It was universally agreed or accepted that contract compliance was a "fact of life" for doing business with the United States government, and provided that the rules and regulations are clear and impartially approved there were few, if any, fundamental reservations.*

Cohen found that the major reservations on the part of the corporate sector largely focused on paperwork (hence time and cost) involved in meeting affirmative action program requirements.

Recent changes, instituted by the Reagan administration, appear to be directed at reducing that burden. Firms with more than 50 employees and with a federal contract of more than \$50,000 had been required to submit written affirmative action plans. These thresholds have now been increased to 100 employees and a \$100,000 contract. Civil rights groups have opposed the changes. They say that many minority group members work for small employers who will now be relieved of the obligation to develop a written affirmative action plan.

According to Timothy Ryan, Solicitor for the Department of Labor,<sup>42</sup> "the written AAP [Affirmative Action Program] requirement can be particularly burdensome for smaller employers". But Ryan claimed that increasing the thresholds would relieve a high percentage of employers of the burden of developing written AAPs, while coverage would be retained for a high percentage of workers previously covered.

The debate over changes to the U.S. program suggests some interesting issues for Canadians:

- In easing up on some of the regulatory requirements, there has apparently been no suggestion by the U.S. administration that affirmative action should be abandoned. In fact, Ryan says that the Labor Department concluded:

*...the AAP is a useful management tool for planning, conducting and measuring the results of equal opportunity activities. In particular, the utilization analysis assists contractors in identifying, by organizational unit, problem areas where special recruitment and employment efforts may be necessary.*

- Cost-benefit questions will be an issue where the objective is to cover as many employees as possible while minimizing the cost to business.

- Attempts to ease the regulatory burden on smaller employers may mean that the very employers with whom minorities and women have the most difficulty will not be subject to regulation.

In any event, the reaction of U.S. employers to the Reagan administration changes has been instructive. Their concerns, summarized by Peter C. Robertson in a report for the Affirmative Action Directorate of CEIC, include fear about actions that may require them to deal with a number of pressure groups rather than one specific set of demands framed within the context of legal standards; possible loss of productivity on the part of their existing minority and female employees, should they perceive the program as endangered; and about a possible shift away from a systemic or "bottom-line" approach, because they have discovered that the systemic approach requires them to take a realistic look at the impact of and reason for their employment systems and has often resulted in substantial improvements in those systems in ways unrelated to EEO issues.

Major employers with affirmative action programs, including such giants as Levi Strauss, United Technologies, and Dow Chemical, have recently advertised publicly their commitment to affirmative action in attempts to reassure employees and the general public that there will be no diminution of their efforts to meet affirmative action goals. Clearly the experience of these employers with affirmative action has been a favourable one—a conclusion that is also supported by Cohen's work.<sup>43</sup> Her interviews with business representatives revealed these insights:

*...for the first time, personnel departments are being given the resources with which to do human resource management analysis. Companies are discovering that their job standards are often substantially inflated. ...Employee morale, absenteeism and turnover have all been positively affected.*

*All employees, not just women and minorities, have gained as a result of structural changes in personnel policy. Promotions are no longer at the whim of the manager.*

*International Telephone and Telegraph (ITT) found that both quality and productivity rose [as a result of hiring disabled persons] and as a result, ITT has gone on to hire paraplegics.*

Cohen summarizes her findings in this way:

*The experience of examining traditional personnel policies and practices has often yielded significant improvements. Some federal contractors have acknowledged that the contract compliance program has been invaluable in teaching them how to manage human resources more efficiently.*

*In the long-run there is an anticipated cost reduction. Job qualifications are under scrutiny in an attempt to determine whether high priced*

*degree holders are really more qualified than skilled non-degree holders. This new approach to job classification has promoted increased upward movement in many organizations in that employees, including white males as well as women and minorities, have access to jobs previously inaccessible to them. Productivity, employee morale, absenteeism and turnover have all, in many instances, been positively affected.*

The experience of U.S. employers with affirmative action indicates that such programs do generate substantial benefits to employers.

The conclusions of the Hatch Committee support this finding. They are particularly revealing in light of the fact that Senator Hatch had been a vocal critic of affirmative action and had introduced a constitutional amendment in 1981 to prohibit affirmative action on the basis of race, colour, or national origin. According to the committee:

*The hearing revealed an inspiring commitment from Americans from all walks of life to the original intent of Executive Order 11246—to eliminate the barriers of employment discrimination and to increase employment opportunities for minorities and women. What was debated was not whether there should continue to be a federal investment in equal employment opportunity or in affirmative action. There was strong support for both. What was at issue was whether OFCCP's current regulatory program is capable of achieving the intent of Executive Order 11246 and whether this program is the most effective practical and equitable method available.<sup>44</sup>*

### Regulatory Costs in Canada

While the various estimates of the cost of the U.S. affirmative action program may be of some interest, their direct relevance to the Canadian situation is not readily apparent. Most of the estimates focus on the costs of complying with U.S. regulations; there appear to be no firm estimates of the cost of actually maintaining affirmative action programs.

In addition, the major source of complaints about the U.S. program has been the heavy paperwork burden placed on employers by the need to file written affirmative action programs and to meet requests for information during compliance review procedures. These requirements have been modified as a result of the Hatch Committee report.

The cost of implementing a national program in Canada would depend very much on what type of program Canada decides to implement. But there is no reason to assume that any Canadian affirmative action program would incorporate all the same design features of the U.S. program. In fact, it would clearly be wise to take advantage of the U.S. experience so as to avoid any pitfalls.

The Labour Market Task Force, which examined mandatory affirmative action, had this to say:

*The major advantage of using a mandatory program in Canada is that women and Native people would be utilized in those parts of the labour*

market where they are most needed, thereby increasing productivity, reducing the decline in relative wages and minimizing increases in the unemployment rates for these groups. In addition, such a program would reinforce the movement toward increased human resource planning and training in firms.

A number of potential disadvantages in using a mandatory approach have been identified by the Task Force. The first is the high legal costs that have been associated with the administration of some types of mandatory program. The second is the administrative cost of implementing manpower planning procedures when firms do not already have these in place. The third is the potential loss in competitiveness to firms which adopt employment practices which promote the hiring and advancement of target groups. Finally, there is the fear that a mandatory approach means the use of "quotas", with attendant costs and inefficiencies.

Our preliminary analysis indicates that these disadvantages were clearly present in some of the American experiences. However, analysis also indicates clearly that these costs arose largely because of particular design features of the early programs—features which are not necessary to achieve the goals of the program. The work undertaken for the Task Force indicates that a program can operate efficiently without resort to the use of quotas, and has indicated a number of possible approaches to implementation which would greatly reduce the potential for high legal costs. (As indicated in Chapter Five,) a high fraction of larger Canadian firms have already begun to institute human resource planning systems, so that—as long as affirmative action measures build on these systems—additional costs are likely to be low. Finally, while the potential for putting firms at a serious competitive disadvantage is present in those sectors subject to strong international competition, for other sectors of the economy mandatory action would actually improve the competitive position of firms making efforts to employ target groups by eliminating the "free rider" effect.<sup>45</sup>

Affirmative action could be implemented through regulation of those employers under federal jurisdiction, but it is estimated that such employers account for only about 10 per cent of the Canadian labour force. A program of contract compliance, such as that in effect in the United States, would extend affirmative action to employees of all those firms that contract with the federal government. Detailed proposals for such a program are the subject of other papers.<sup>46</sup>

Alternatives such as tax incentives or a levy-grant system to encourage affirmative action have been suggested in some quarters. Both these approaches appear to have significant disadvantages.

### **Tax Incentives, Loans, and Loan Guarantees**

If mandatory affirmative action (or contract compliance) were to be rejected, would it be possible to persuade firms to adopt affirmative action through tax incentives or through loans or loan guarantees? It has been pointed<sup>47</sup> out that tax incentives may have very limited usefulness because 300,000 employers, or one-third of all employers, pay no taxes.<sup>48</sup>

Again, the Labour Market Task Force examined these options and found them wanting, at least as a way of generating employment. There is little reason to believe these methods might prove effective in encouraging affirmative action.

According to the Task Force:

*Tax incentives have a number of disadvantages:*

*They are not universally applicable. Many small entrepreneurial ventures are not tax-paying. Depreciation, tax shields, start-up expenses often mean that in their early years new firms are not taxable.*

*They are normally general, not specific incentives. Considerable "waste" can occur because the incentives may provide unnecessary inducements to firms that would proceed on their own.*

*"Leakages" outside Canada reduce the effectiveness of these inducements. With 50% of the Canadian manufacturing and mining sectors owned by U.S.-controlled firms, the net value of decreased Canadian tax rates is greatly reduced. Tax benefits in Canada result in increased taxes in the United States when funds are repatriated, the net result being a transfer from the Canadian to the U.S. treasury.*

*They are uncertain, that is, with values contingent on profitability, they do not compare favorably with grants when the expected values of the two instruments to the firm are the same.*

*They are capital-biased and very difficult to structure in such a way as to relate directly to labour.<sup>49</sup>*

The Task Force also found that concessional loans and loan guarantees also have disadvantages for employment generation:

*They are relevant to only a subset of potential applicants. For firms with ready access to capital markets, the value of concessional loans or guarantees are reduced markedly.*

*They can influence firms to introduce high debt loads in their capital structures, making them less capable of withstanding cyclical swings and of remaining solvent. Unfortunately, labour will bear the costs of this induced higher risk.*

*Guarantees in particular can detract from the likelihood of the firm engaging in follow-on investments that would generate additional*



*employment. Because the value of the guarantee will go down as the firm increases its equity investments for expansions, there is a retarding effect on incremental investments.*

The Task Force suggests that "for the purpose of employment generation a cash grant would be the preferred incentive in the vast majority of circumstances". However, the idea of the federal government paying cash grants to firms that agree to implement affirmative action would clearly present serious philosophical and policy development problems.

#### **A Levy/Grant System**

Labour organizations and others have suggested a levy/grant system as a way of encouraging employers to undertake training. The Canadian Labour Congress, in its brief to the Allmand Task Force on Employment Opportunities for the '80s,<sup>51</sup> advocated the levy/grant as a mechanism for resolving shortages of skilled labour and a way of solving the problem of pirating skilled workers among corporations by equalizing training costs.

The CLC proposal, based on the British system established under that country's Industrial training Act 1964,<sup>52</sup> envisages training boards, composed of equal representation of unions and management, to administer the program in each industrial sector. All employers would pay the levy set by the board. Employers that met the criteria for apprenticeship training and upgrading would receive a grant from the board to cover the costs of this training. Employers that did not would receive no grant. The grant to those firms providing training would offset all or part of the cost of training, and if a firm did more than its share of training, it might receive more back in grants than it had paid out in levies.

While such a system may be an appropriate way of encouraging training, it is doubtful that a levy/grant system could be used to encourage firms to establish comprehensive affirmative action programs, of which training is only one part.

As well, the Economic Council of Canada points out that there are "undeniable problems" with the levy/grant approach, even as a mechanism for encouraging training.

*In Britain, for example, the levy-grant initially changed the training behaviour of employers in the desired fashion, but it is not clear whether*

*this trend continued.... the levy-grant poses particular difficulties for small firms, which for a variety of reasons tend to be the net losers overall. In fact, in recognition of this, the British government has excluded small establishments from the system for the past nine years.<sup>53</sup>*

The uncertainties associated with both tax incentives and a levy-grant system indicate that these approaches might perhaps be used to supplement but not to replace a regulatory approach to establishing affirmative action on a national level.

#### **Affirmative Action on a National Scale in Canada**

There is overwhelming evidence that the four target groups on which the Commission on Equality in Employment is asked to focus suffer inequities in employment. The longer these inequities continue, the greater will be the cost for Canadian society. There are social costs in terms of wasted potential and low morale, and there are costs to the economy in terms of lower productivity, higher costs of social support systems for disadvantaged groups, and underutilization of human resources.

Equal opportunity programs such as those implemented by the federal public service have done little to ameliorate the situation. Stronger measures are needed. The Public Service Commission's experience with the Official Languages Program to promote employment of francophones demonstrates that affirmative action, with strong commitment to goals at all levels, does achieve results.

It is clear that the future climate for affirmative action in Canada will be very different from that envisaged in the late 1970s when such programs were being explored in this country. But the U.S. experience with affirmative action demonstrates that there are significant benefits to be achieved, and that in all likelihood these benefits outweigh the costs—both for individual employers and for the economy as a whole.

For Canada, the costs of implementing affirmative action on a national scale need not be prohibitive. The cost of continuing inaction may well prove to be one that Canada cannot afford.

## NOTES

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## APPENDIX

## The Levy/Grant Option\*

\* Extracted from Appendix B of the report of the Task Force on Labour Market Development prepared for the Minister of Employment and Immigration, *Labour Market Development in the 1980s*, Employment and Immigration Canada, July, 1981.

**Nature of Levy/Grant System**

A levy/grant system is one method for the collective financing of investment in certain types of training provided by employers.

A distinction is usually made between training provided by individual employers in skills which are usable only in the firm providing the training (specific training); and training in skills which are transferable between many firms (general training). General or transferable skill training is the concern of a levy/grant system.

The primary objective of a levy/grant system is usually to increase the total level of investment in such training. The levy/grant mechanism seeks to do this by removing all or part of the costs of this training from individual employers and having these costs instead borne by employers collectively. The mechanism operates through the imposition of a levy on firms employing transferable skills and redistribution of funds through grants to those employers who undertake training.

The rationale for the levy/grant mechanism is that a less than optimal level of investment in training for transferable skills occurs because of the high risk to individual employers of securing an adequate return on their investment in such training. This risk is said to arise because of the behaviour of some employers who do not themselves train but instead opt to recruit or "poach" trained workers from the training firms. This "poaching" behaviour of some employers is said to deter other employers from providing training, with the result that the overall level of resources allocated to training is less than adequate to meet the needs of employers generally.

The levy/grant mechanism is intended to combat this type of externality by forcing non-training firms to compensate training firms and thus provide an incentive to the former to undertake training for their own needs and the latter possibly to train beyond their own needs.

**The CLC/BCNI Levy/Grant Proposal<sup>1</sup>**

The introduction of a "national" levy/grant system has been proposed by the CLC/BCNI as a means of ensuring adequate supplies of trades skills and preventing skill shortages. The proposed system would operate through Industry Training Boards established in all industrial sectors where skilled trades shortages are a problem. These boards, administered jointly by labour and management, would be empowered to introduce a compulsory levy on employers and to allocate funds so raised to employers who conduct trades training (both apprenticeship and upgrading) to approved standards,

by way of grants which would offset all or part of the firm's training costs. These Industry Training Boards would also conduct annual assessments of manpower requirements in the skilled trades, but it is not clear how these assessments would be applied in the operation of the proposed levy/grant system.

Under the CLC's proposal, the various national Industry Training Boards would be established under federal legislation which would also authorize these boards to impose, collect and redistribute monies raised through the levy on employers within each industry sector.

The CLC/BCNI proposal is modelled largely on the early British levy/grant and Industry Training Board system established under the *Industrial Training Act 1964*. Like the early British system, CLC support for the levy/grant mechanism is justified principally by the argument that the poaching behaviour of some employers is a major factor deterring other employers from training; and that the "stick and carrot" approach of levy/grant provides an effective instrument for dealing with the poaching phenomenon.

By equalizing the costs of skill training among all employers, the CLC claims that the proposed levy/grant system would deter employers from poaching, and persuade them to undertake sufficient training to resolve skill shortages. It is also suggested that some employers would be encouraged to undertake training beyond their own needs under the structure of financial incentives established through the levy/grant mechanism.

The following sections consider the British experience with the levy/grant system, and the implications of the British system.

**The British Experience with Levy/Grant<sup>2</sup>**

The British levy/grant system and the Industry Training Board system through which it operated, were introduced under the (U.K.) *Industrial Training Act 1964*. The Act had three objectives: to improve the quantity of training, to improve the quality of training, and to distribute the costs of training more equitably between those employers who trained and those who did not. The "objective" of cost reallocation through the levy/grant mechanism, as well as being an equity objective in its own right, was also the means through which the other objectives were pursued.

The main considerations behind the introduction of the 1964 Act, as outlined in a 1962 Government White Paper, were that shortages of skilled labour (particularly in the trades areas) had been a persistent constraint on economic expansion; that shortages arose because some employers (particularly smaller firms) were content to poach those trained in other firms rather than train for their own needs; and that the overall standard of training which was provided was unsatisfactory, again especially in the craft occupations and the engineering (or industrial) trades in particular.

1. The following description of this proposal is taken from the CLC submission to the Special Parliamentary Committee on Employment Opportunities for the '80s.

2. The following description of the British levy/grant system is based on "Training for the Future" (1972) and "Training for Vital Skills" (1976).



Industry Training Boards (ITBs) were established to collect levies from firms within their scope and return the monies collected, less the boards' administrative expenses, in the form of training grants. The rate of levy (expressed as a percentage of an employer's annual payroll), the occupations, the patterns of training for which the grant was paid, the conditions for receipt and the amounts of the various grants, were all at the discretion of each individual board.

Certain industries and areas of employment (e.g., self-employed persons) were deliberately excluded from the scope of the 1964 Act which covered industries employing around 80 per cent of the total labour force. By 1969 some 27 separate training boards had been established covering industries with around 60 per cent of total employment.

Although the skilled trades occupations were of primary concern to the framers of the 1964 Act, the ITBs concerned themselves with training for a considerably wider range of occupations including management, administrative, clerical, technical and industrial operative occupations.

There was also a considerable range in the rate of levy applied by various boards. Around one-half of all Industry Training Boards levied firms at 1 per cent of payroll or more, the highest rate being 3.8 per cent in civil air transport. Only one board, the important Engineering Industry Training Board covering some 28,000 establishments, surveyed training costs in the industry as a basis for determining its levy rate of 2.5 per cent of payroll. In this industry, gross training costs were estimated at around 4 per cent of the total wage bill and net costs at around 2.9 per cent (excluding estimated productive value of trainees' work). These costs related to training for administrative, technical, clerical, industrial operatives and craft apprentices, the last-mentioned representing nearly 70 per cent of total training costs. (Woodhall, 1974).

In 1973, the British Government formally abandoned the 1964 version of the levy/grant system. Following a review of the operations of the *Industrial Training Act 1964*, the levy/grant system was replaced by a system of levy, grant and exemption under the *Employment and Training Act 1973*. Under this new system, Industry Training Boards were required to exclude small firms from the statutory obligation to pay the levy; to exempt from levy those firms which could show that their training arrangements were adequate to their own needs; and to limit the amount of levy normally to a maximum of 1 per cent of payroll. (The 1973 Act also transferred from industry to the government the responsibility for funding the substantial administrative/operating costs of the Industry Training Boards; and foreshadowed greatly increased public funding of training in industry to supplement the reducing levy income available to the boards from which to finance training grants.) In fact, the levy/grant system had effectively been abandoned before 1973. There had by this time been significant changes to the system in practice, which in turn reflected that the objective of substantial cost redistribution between poaching and training firms had been largely abandoned.

The two main changes were that smaller firms—earlier identified as the main culprits in terms of poaching—had been progressively exempted from the levy requirements and thus removed from the system; and as for those firms remaining in the system, the first official review (in 1972) commented that "Boards have in practice tended to develop

their levy/grant schemes in such a way that each firm has a fair chance of getting back in grant most of its levy." Although there continued to be some redistribution of money from firms with a low level of training to those with a high level, poaching firms did not contribute substantially to the cost of training in those firms which did train. Equally, employers who trained beyond the needs of their own business received little compensation for their extra costs from the levy/grant system.

The British levy/grant system was abandoned not because it had already achieved its objective of securing an adequate volume of training in transferable skills, especially craft apprenticeships. After noting that one of the original reasons for the levy/grant mechanism was to increase training of skilled workers and to avoid skill shortage, the 1972 review commented that this aspect of levy/grant schemes had declined in importance. More importantly, the review added "nor is there much evidence that it led to any substantial increase in the number of persons trained in such skills." A later (1976) assessment of the *Industrial Training Act 1964* by the U.K. Manpower Services Commission went one step further with its conclusion that "the (ITB) system did not succeed in raising the quantity of transferable skill training to the level required to meet the needs of industry generally."

As shown in Figure B-1 there was, in fact, a downward trend in recruitment to craft apprenticeships, together with marked fluctuations in recruitment which coincided with cyclical movements in the economy.

Figure B-1

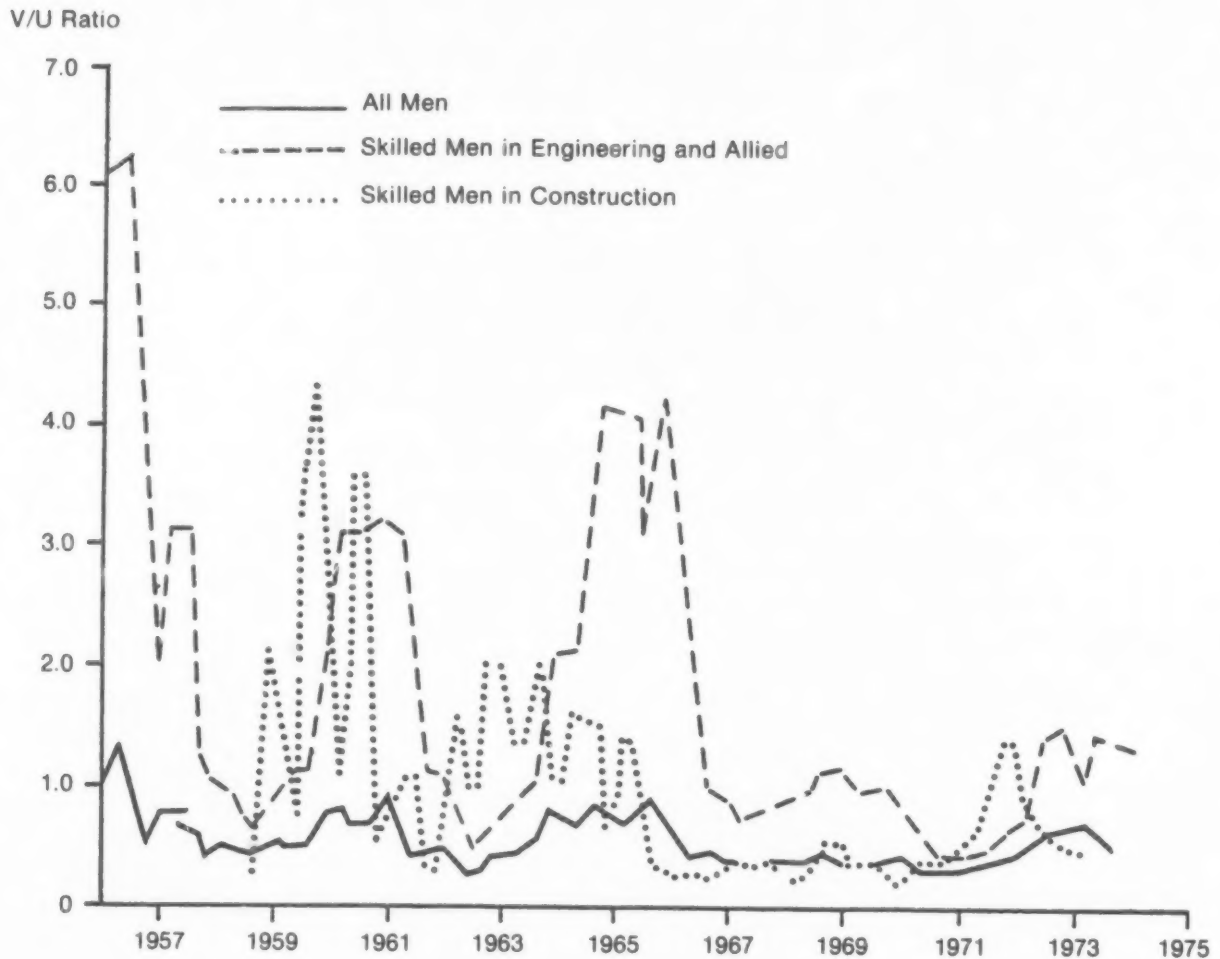
Cyclical Variations in Apprentice Intake and Total Notified Vacancies (all industries and services) Great Britain, 1962 to 1972



Source: "Training for Vital Skills: A Consultative Document," Manpower Services Commission, London (U.K.), June 1976.

Figure B-2

Vacancy/Unemployment (V/U) Ratios for Skilled Engineering, Skilled Construction and All Male Occupations, Great Britain, 1956 to 1974



Source: "Training for Vital Skills: A Consultative Document," Manpower Services Commission, London (U.K.), June 1976.

The Manpower Services Commission conceded that the downward trend in recruitment to training for transferable skills (along with a falling ratio of apprentices to skilled workers in some industries) partly reflected reduced requirements for skilled workers due to technological change.

But the report presented evidence showing that over much of the post-war period—including the period after introduction of the Industrial Training Act 1974—some of the more economically important skills had continued to be in short supply, either persistently over long periods or at peaks of the economic cycle, or both; and that persistent shortages tended to occur in some regions of the country but not others.

The evidence presented included aggregate measures of demand and supply and data on the experience of individual employers in local labour markets. These were drawn from the U.K. Department of Employment Vacancy and unemployment statistics, manpower research studies of shortages in particular occupations and areas, and other employer surveys conducted by business groups. The main findings were as follows:

- There was a widening gap between the vacancy/unemployed (V/U) ratio for skilled engineering and construction trades on the one hand, and all male workers on the other, each time the economic cycle moved upwards, and a consistently higher vacancy/unemployed (V/U) ratio for the skilled trades. (Figure B-2).

Figure B-3

Percentage of Manufacturing Firms in the CBI's Survey of Industrial Trends, Reporting Different Factors as Limits on Production, 1960 to 1975



Source: "Training for Vital Skills: A Consultative Document," Manpower Services Commission, London (U.K.), June 1976.

- Changes in the proportion of firms in the manufacturing industry reporting shortages of skilled labour followed a cyclical pattern similar to that of the vacancy/unemployed ratio for skilled workers. (Figure B-3).
- In some geographical areas many employers continued to report shortages of skilled manpower as a constraint upon production, even when general unemployment was high.

(Also of interest are some of the specific occupations assessed as persistently or cyclically in shortage, since these bear a striking resemblance to the recent Canadian experience. These included press-tool setters, machine tool setters, tool makers, sheet metal workers, engineering draftsmen, production fitters, and turners.)

The report also provided evidence indicating that many factors contributed to the skill shortages experienced by British employers. These included geographic mismatch of demand and supply combined with low worker mobility; inefficient use and deployment of skilled manpower within firms (e.g., their use on semi-skilled repetitive tasks); high rates of wastage from skilled trades occupations in a particular industry, either to another industry or to other occupations, both higher and lower in the skill structure (partly due to pay differentials); and high rates of wastage during training for skilled occupations.

However, the report suggested that the coexistence of the downward trend and cyclical fluctuations in recruitment to training implied that "shortfalls in the provision of training are of great importance."

The levy/grant system was abandoned mainly because in practice its redistributive effects created other inequities even



less acceptable to employers than the unequal sharing of training costs. The objective of full cost redistribution through the levy/grant mechanism was abandoned because it became apparent that this approach would exaggerate these inequities and would lead to rising rates of levy as the volume and cost of training increased.

The original intention of the levy/grant system was to redistribute funds (i.e., the costs of transferable skill/training) from firms which did no training themselves but relied on recruiting skilled workers trained by others, to those firms which actually did the training. In practice, the system operated in such a way as to also redistribute funds for other reasons.

- Firms within the same industry and which paid the same amount of levy (because their total payroll or employment was identical) recovered greatly differing amounts in grants because differences in the skill mix in their enterprises affected their ability to earn training grants.
- Firms which had low turnover among their skilled staff and hence did little training (because it was not necessary) recovered little from their levy and saw themselves as subsidizing less well-managed firms which had high turnover, conducted a great deal of training and hence attracted relatively large training grants.
- Highly specialized firms, with training carefully geared to their own requirements, received a low return on their levy (in the form of grants) because their training did not fit the training boards' grant criteria which were geared to common training standards for the industry as a whole.
- Some firms received a high return on their levy because they could arrange "training" activities which satisfied the boards' grant criteria, even though there was no real need for the training. (In this respect, a system intended to improve allocation of resources to training actually promoted a misallocation of resources.)

The major redistributive effect of the system involved a general transfer of money from small firms to larger firms, partly because small firms had many of the characteristics illustrated above, i.e., low staff turnover, specialized training needs, and difficulties in organizing the forms of training, such as off-the-job training which attracted grants under the system. In the engineering industry, for example, firms with less than 25 employees in 1970/71 received grants equivalent to only 47 per cent of total levies paid while firms with over 5,000 employees received the equivalent of 102 per cent of levies paid.

The 1972 review commented that:

Although some of this effect could be justified as a contribution to larger firms for training craftsmen subsequently employed by small firms, the incidence of this is uneven and does not warrant a general transfer of money away from small firms. (p. 57)

These redistributive problems arose because, on the one hand, the levy/grant system removed funds from firms on the basis of their total annual payroll or employment size, and on

the other hand, the system returned funds on the basis of the firm's specific training behaviour during the same period. But the extent to which a firm was able to undertake the amount and kind of training required to recover in the form of grant what it had paid out in levy depended on characteristics not necessarily related to the adequacy of its training to its own skill needs (such as the types of skills employed within the firm and the labour turnover rate).

Unless firms within scope to a particular Industry Training Board had a high degree of homogeneity with respect to firm size, skill mix, labour turnover rates, etc., these redistributive problems arose. Various ITBs responded to these problems by shifting from a single levy/grant system for all firms within a particular industry to a range of differential levies (and grant systems) for different sectors and firms within the same industry, thereby adding even further to the administrative complexity of the system.

### Implications of the British Experience

The British experience was with a particular form of the levy/grant system. It covered training in many occupational areas as well as the skilled trades (including training specific to firms as well as general training); had objectives related to quality of training which it pursued at the same time as the quantity objectives, and was organized on an industry basis rather than focusing on specific occupations. Care must therefore be exercised in drawing conclusions from experience with this kind of general system. Nevertheless, the experience would seem to support the following conclusions.

First, the system concentrated on removing the influence of only one factor influencing the total level of investment in training for transferable skills—the poaching behaviour of some employers. The system ignored the effect of other important factors influencing the training investment decisions of employers, particularly the impact of cyclical fluctuations on the level of industry-based training. The levy/grant mechanism does not address the problem of instability in the volume of industry-based training arising from cyclical fluctuations in product demand. To the extent that the provision of training is limited more by the firm's level of production than by the costs of training, the implication is that any instrument based on provision of financial incentives to encourage employers to train will be limited in effectiveness.

Secondly, the British experience illustrates the limitations of the levy/grant mechanism as a means of removing the constraint of investment in training for transferable skills exerted by the poaching behaviour of employers. The difficulty arises because of the problem of establishing a levy/grant system which provides an effective structure of financial incentives to train and which is at the same time equitable in the redistributive effectiveness.

To provide a financial incentive to induce poaching firms to train for their own needs rather than recruit trained workers from elsewhere, the levy/grant mechanism seeks to alter the relative economics of training compared to skill acquisition through outside recruitment. That is, the mechanism aims to alter the costs and benefits of training *versus* outside recruitment by imposing an extra cost—the levy—on firms not undertaking training.

But the additional cost imposed on the non-training firms under the system (i.e., a levy based on total employment or

payroll) is a rather clumsy instrument for altering the relative economics of training versus outside recruitment in poaching firms. The costs (and benefits) of training for the same skills vary substantially between firms; and the additional cost of the levy may bear little relationship to the economic advantages which outside recruitment currently represents to poaching firms, compared to the alternative of training to meet its own skill needs. The U.K. experience, where even levy rates of 1 per cent of payroll are still regarded as an "acceptable tax" rather than an incentive to train, illustrates that substantial additional costs may need to be imposed on some poaching firms to alter the balance in favour of the training alternative for these firms.

Moreover, the system which provides this financial disincentive to poaching (and incentive to training) creates its own problems because of the redistributive effects of the levy/grant mechanism. Just as the levy is a clumsy instrument for providing the financial incentive to train, the grant is (on equity grounds) a clumsy instrument for rewarding training which is undertaken and redistributing funds from poaching firms to training firms.

The two main criteria for assessing the equity of a levy/grant system concern its coverage and its redistributive effects. To be equitable—or at least perceived to be so by employers—the system should have total coverage of users and should be confined to transfers of funds from those employers who do not train for their own needs but recruit those trained in transferable skills, to those firms which do train.

The two options for achieving total coverage of firms in the labour market for transferable skills are an industry-focused or an occupation-focused system. An industry-focused system (such as the British) assumes that the labour market for transferable skills is predominantly national and consists of firms within the same industry. But a characteristic of some of the most critical transferable skills is that they are transferable between many industries, and the labour market for these skills is frequently local or regional rather than national.

An occupationally-focused scheme might therefore seem more suitable, until the practical problem of determining criteria for the inclusion of firms within such a system is considered. For if inclusion were to be simply on the basis of whether the firm employed persons trained in the transferable skills in question, it would ignore occupational mobility and would discriminate against firms with workers once trained in certain skills but now working in different occupations altogether. Alternative criteria, such as persons employed in particular occupations, would be administratively contentious if not unworkable.

Whether the system is industry-based or occupation-based, problems of unintended redistributive effects would arise to the extent that firms included in the levy/grant system did not have a high degree of homogeneity with respect to: firm size, skill distribution within total employment; costs of training required; and other characteristics such as labour turnover rates which influenced the frequency with which training is undertaken and hence the extent of levy recovery as under the British system.

Finally, it is worth noting that a recent (1980) assessment of the UK levy/grant exemption system (introduced under the 1973 Act) concluded that this system was even less effective in securing adequate volumes of transferable skill training than the earlier levy/grant system which it replaced. The 1980 report commented that "the 1973 Act has on balance impaired flexibility of response to meet the need for transferable skills through its present requirements for ITBS to have levy/exemption systems." The report suggests that this is in part because levy exemption means reduced levy income available to the board to finance responses to key skill shortage problems. This comment illustrates the extent to which the UK system has departed from its original intention of providing (through the levy/grant and ITB system) a mechanism through which industry would regulate itself to secure an adequate quantity of training.

## IMPLEMENTATION OF AFFIRMATIVE ACTION PROGRAMS IN THE CURRENT WORKPLACE CONTEXT

Janet Cleveland

### Sommaire

Les mesures d'action positive imposées par le gouvernement fédéral aux termes d'un contrat conclu avec une entreprise dont les relations de travail sont sous juridiction provinciale ne seront applicables que dans la mesure où elles respectent les lois provinciales. Parallèlement, lorsque ces mesures sont incorporées à un contrat conclu entre le gouvernement fédéral et une entreprise relevant de la compétence fédérale, elles ne seront valables que compte tenu des lois fédérales et provinciales.

Lorsqu'il y a conflit entre les dispositions d'action positive d'un contrat conclu entre une entreprise et le gouvernement, d'une part, et les dispositions de la convention collective de l'entreprise, d'autre part, aucune disposition n'a préséance. Aussi est-il impérieux d'obtenir l'appui du syndicat, en plus de celui de l'employeur.

Ce sont les programmes d'action positive qui visent à améliorer les conditions de travail de la majorité des employés, en plus de celles des employés appartenant aux groupes cibles, qui sont le plus susceptibles d'obtenir l'appui des syndicats et des employés. La présente étude décrit plusieurs programmes d'action positive qui devraient obtenir l'appui d'un grand nombre d'employés et explique quels aspects de ces programmes sont susceptibles d'entrer en conflit avec des dispositions traditionnelles de conventions collectives.

Le document examine les conséquences pour le milieu de travail des programmes qui préconisent l'égalité de salaire pour un travail de valeur égale; de meilleures dispositions pour les congés de maternité et les congés parentaux; des clauses sur les promotions et les mutations qui limitent les pouvoirs discrétionnaires de la direction; l'élimination des conditions d'éligibilité non-pertinentes au poste, lors de l'embauchage ou de promotion; et le droit d'un employé handicapé suite à un accident de travail d'être muté dans un poste équivalent.

### Summary

Affirmative action measures imposed by the federal government as a term of a contract with an undertaking whose labour relations are under provincial jurisdiction will be enforceable only insofar as they are compatible with relevant provincial legislation. Likewise, where such measures are included in a contract between the federal government and an undertaking whose labour relations come under federal jurisdiction, their validity remains subject to the effect of relevant federal and provincial laws.

Where there is a conflict between affirmative action measures contained in a contract between an undertaking and the federal government, on the one hand, and the provisions of the collective agreement within the same undertaking, on the other hand, neither one prevails over the other. It is therefore particularly crucial to enlist the support of the union as well as that of the employer.

Affirmative action programs designed to improve the working conditions of the majority of employees, as well as those of target group employees, are most likely to gain broad union and employee support. This paper outlines several affirmative action programs that appear likely to gain broad employee support, while indicating likely areas of conflict with typical collective agreement provisions.

The paper studies the impact in the workplace of programs designed to implement the principle of equal pay for work of equal value; improved maternity and parental leave provisions; promotion and transfer clauses that limit management discretion; elimination of irrelevant prerequisites for access to jobs, at hiring or through promotions; and the right of employees who are disabled following work accidents to be transferred to an equivalent job.



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## IMPLEMENTATION OF AFFIRMATIVE ACTION PROGRAMS IN THE CURRENT WORKPLACE CONTEXT

Janet Cleveland\*

### I. AFFIRMATIVE ACTION PROGRAMS: LEGALITY IN VIEW OF LEGISLATIVE AND COLLECTIVE AGREEMENT PROVISIONS

#### 1. Conflict between Provincial Laws and Affirmative Action Measures Contained in a Contract between the Federal Government and a "Provincial" Undertaking.

Throughout this paper, when I refer to "conflict" or "clash" between the terms of an affirmative action program on the one hand and laws or collective agreements on the other, I refer to a situation where compliance with one implies violation of the other. Applying by analogy the reasoning adopted by the Supreme Court of Canada in *Multiple Access Ltd. v. McCutcheon*, 138 DLR (3d) 1, I will assume that mere duplication between the provisions of a federal contract and those of a provincial law, for example, or the coexistence of provisions relating to the same subject that are not directly contradictory, are not in "conflict".

In order to determine what will occur if there is conflict between a provincial law and the terms of a contract between the federal government and a "provincial" undertaking prescribing certain affirmative action measures, it is useful to refer to certain basic concepts of constitutional law concerning jurisdiction over labour relations and human rights regarding employment.

In the case of *"Four B Manufacturing Ltd. and United Garment Workers"* (1980) 1 SCR 1031, at page 1045 of the decision, the Supreme Court of Canada succinctly stated the basic principle concerning constitutional jurisdiction over labour relations:

*With respect to labour relations, exclusive provincial legislative competence is the rule, exclusive federal competence is the exception.*

The federal government has no primary competence over either labour relations or human rights in relation to employment.<sup>1</sup> The jurisdiction of the federal government over these matters is dependent on its jurisdiction over federal works, businesses, and undertakings, or over specific fields of activity such as aeronautics or banking.<sup>2</sup> Federal jurisdiction and provincial jurisdiction in the field of labour relations are mutually exclusive. The federal government may make laws pertaining to labour relations within enterprises coming under federal jurisdiction (a group that is restrictively defined), whereas the provincial legislatures may make laws pertaining to labour relations in all other enterprises (which I will designate as "provincial enterprises" in this paper).

The federal government, therefore, has no legislative jurisdiction to prescribe the working conditions that will be applicable to a provincial enterprise. On the other hand, I agree with the statement contained in Katherine Swinton's paper prepared for the Commission on Equality, "Restraints on Government Efforts to Promote Equality in Employment: Labour Relations and Constitutional considerations", when she says:

*Contract compliance programs are an exercise of the federal spending power. While federal legislative powers are constrained by section 92 of the Constitution Act, the Supreme Court has not overturned exercises of the spending power even if the federal funds are directed to an activity normally within provincial jurisdiction.*

However, it is my contention that if the contract between the federal government and a provincial enterprise contains terms that are in conflict with the applicable provincial law, that term of the contract will not be executory and the contract itself might be voidable.

When the federal government enters into a contract with a company, the applicable law is the law of the province where the contract is to be performed. General provincial laws are applicable unless their application prejudicially affects a federal Crown prerogative or unless they are directly in conflict with a federal law.<sup>3</sup>

Affirmative action programs may be *permitted* by federal law, just as they are *permitted* by the Canadian Charter of Rights and Freedoms, but they do not constitute mandatory standards that will prevail over conflicting provincial legislation.

Therefore, if an affirmative action measure contained in a contract between the federal government and a provincial enterprise is contrary to provincial law, the federal government could not insist on compliance with the affirmative action program.

To express it otherwise, an enterprise remains subject to provincial laws concerning labour relations and human rights regarding employment, notwithstanding the fact that it may have entered into a contract with the federal government. If the employer is sued because he has contravened a provincial law concerning employment standards, it is no defense to say that he or she was simply complying with the conditions contained in the federal contract.

Likewise, I am of the view that if the affirmative action program contained in the contract clashed with provincial legislation, the provincial entrepreneur could probably refuse to carry out this part of the contract on the grounds that the clause was illegal. Under such circumstances, the federal government would not be able to sue for compliance, but could presumably have the contract declared void insofar as

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compliance with the affirmative action program was a vital and essential element of the contract and therefore not severable from the rest of the contract.

I respectfully submit that it is incorrect to speak of federal paramountcy in these particular circumstances. The rule of federal paramountcy is applicable only where the federal government is exercising its jurisdiction. If the federal government grants a contract to a provincial construction company to build an airport runway, the federal government can certainly prescribe the precise composition of the asphalt to be used in paving the runway, the design of the runway, and so forth, and these provisions will be paramount even if they conflict with provincial standards concerning these matters, because the federal government is exercising its constitutional jurisdiction over aeronautics.<sup>4</sup> It would seem that the federal government may validly define certain working conditions in a contract with a "provincial" enterprise, as long as these conditions are not contrary to provincial law. If, however, the federal government enters into a contract with a "provincial" enterprise and prescribes in the contract conditions pertaining to labour relations or working conditions that conflict with provincial law, the provincial law will prevail because the federal government has no constitutional jurisdiction to define working conditions or labour relations in enterprises that come under provincial jurisdiction in this regard and, therefore, the contract conditions do not constitute an exercise of its jurisdiction.

The preceding analysis may well seem hypothetical, for there are probably few instances where provincial legislation conflicts with affirmative action programs. The problem might conceivably arise around the issue of reverse discrimination (affirmative action measures that might be considered to be violations of provincial human rights legislation prohibiting discrimination), either in the case where such a program should be applied before the coming into force of section 15(2) of the Charter, or in a case where a provincial government (such as Quebec) declares that its Human Rights Act applies "notwithstanding" the Charter.

## **2. Conflict between Affirmative Action Measures in a Contract between the Federal Government and a "Federal" Enterprise and other Federal Laws.**

The *Canadian Human Rights Act* contains no "override clause". Generally speaking, therefore, if there is conflict between the *Canadian Human Rights Act* and another law, the CHRA will not necessarily prevail over the other law. Ordinary rules of statutory construction will apply, although the courts may also give some recognition to the "fundamental" character of the CHRA.

When the Governor in Council exercises its delegated authority under section 19 of the *Canadian Human Rights Act*, its powers are obviously no broader than those set out in the Act. The Governor in Council could therefore not rely on its authority under the CHRA to declare that affirmative action programs inserted into federal contracts with "federal" undertakings would prevail over conflicting federal legislation. It would, however, be possible for the federal parliament to amend the *Canada Human Rights Act* or to otherwise legislate so as to make affirmative action programs "overriding". (They will of course be deemed non-discriminatory when section 15(2) of the Charter comes into effect, but they would not for that reason prevail over other federal laws that are

contradictory for other reasons.) In some cases, one may also have to consider the effect of conflicting provincial legislation.

## **3. Conflict between Federal Government Contract Provisions and Collective Agreements in "Provincial" or "Federal" Enterprises.**

As I will explain at some length in Sections II and III, there is a strong likelihood that several affirmative action measures may conflict with provisions commonly contained in collective bargaining agreements. It is therefore particularly crucial to examine the consequences of such a clash.

Basically, if there is a conflict between the two, neither one prevails over the other. The employer would therefore find himself in a position where, if he complies with his contract with the federal government and implements affirmative action measures that constitute a violation of the collective agreement, the employees who are prejudicially affected will have a legitimate grievance that can be successfully carried to arbitration. The employer would then have to pay damages or otherwise rectify the situation. The employer could not rely on his contract with the federal government to excuse his non-compliance with the collective agreement.

On the other hand, I am of the view that the employer probably could not rely on the terms of the collective agreement to excuse his non-compliance with the terms of the federal contract (although I am less sure of this statement than of the preceding one). The employer would therefore be liable to find himself caught between two fires, and to be liable for damages for non-compliance whether he complied with one contract or the other.

The federal government is powerless to legislatively override a collective agreement concluded pursuant to provincial labour laws, except in very exceptional circumstances. Canadian courts have upheld the constitutional validity of federal legislation regulating labour relations in "provincial" undertakings only in wartime or in a situation of alleged "national emergency". Thus, the imposition of wage controls pursuant to the *Anti-Inflation Act* was upheld on the grounds that the level of inflation in Canada was so seriously affecting the economy that there was a situation of national crisis.

If the enterprise comes under federal jurisdiction, the federal parliament could theoretically adopt a special law declaring that the affirmative action measures were paramount, or declaring the conflicting provisions of the collective agreement null and void. In practical terms, however, it is unlikely that the federal government would be prepared to void otherwise valid provisions of a collective agreement, as this would contravene the basic principle of free collective negotiations, which is a cornerstone of the Canada system of labour relations.

In my view, the only realistic solution to this problem is to enlist the support of the union as well as that of the employer for affirmative action measures that the federal government wishes to impose by way of contract compliance. In practical terms, this means that the employer and the union would have to agree to modify the collective agreement in order that it should be compatible with the affirmative action program. This could basically be done by one of two mechanisms: either by inserting in the collective agreement provisions that create an exception to existing provisions



("Notwithstanding section 4.5, disabled persons will have a priority over all other candidates..."); or, alternatively, by actually replacing existing clauses with new ones establishing new rules applicable to all employees and integrating affirmative action principles.

Section 160(2) of the *Canada Labour Code* specifically provides that the parties may agree to revise any provision of the collective agreement (except its term) before the normal date of expiry of the agreement. Provincial labour codes likewise recognize that the parties may, by mutual agreement, modify the terms of the collective agreement before its expiry. There may be some procedural dispositions that must be complied with—in Quebec, for example, filing a copy of the agreement with the Department of Labour within 60 days.

Before a contract is definitively awarded by the federal government, it would therefore be necessary both for the employer and the bargaining agent or agents representing the employees affected by the affirmative action measures to agree formally to make the necessary modifications to the collective agreement to ensure that it is compatible with the affirmative action program.

In view of this context, it will be particularly important to propose affirmative action measures that are as compatible as possible with existing collective agreement terms, so as to attract union support of the program.

In designing the affirmative action programs, it will also be necessary to keep in mind that section 15(2) of the Canadian Charter of Human Rights does not apply to collective agreements. Employees who are prejudicially affected by changes to a collective agreement which integrate affirmative action measures in the agreement may have grounds for a complaint of reverse discrimination.

One way to avoid this problem would be to reach an agreement with provincial human rights commissions where they would agree to give their formal approval to affirmative action programs introduced by the federal government. The program should thereby be immunized against complaints of reverse discrimination.

#### **4. The Scope of Section 19 of the Canadian Human Rights Act**

Finally, it is necessary to comment on the scope of section 19 of the CHRA.

Section 19 empowers the Governor in Council to make regulations to include in government contracts clauses providing for "the prohibition of discriminatory practices described in sections 5 to 13.1...". In my view section 19 allows the federal government to compel provincial contractors to refrain from discriminatory practices prohibited under sections 5 to 13.1 of the CHRA. I believe it would also permit the government to require that contractors take certain positive steps that are directly and clearly related to the elimination of prohibited practices. However, section 19 as currently framed might not be broad enough to enable the federal government to impose sweeping affirmative action programs through contract compliance.

## **II. THE LABOUR RELATIONS CONTEXT**

Quite apart from any legal constraints on the implementation of affirmative action programs, such programs will encounter obstacles inherent in the functioning and the

structures of the workplace. Certain types of affirmative action measures are likely to clash with management concerns of efficiency and productivity, for example, while other measures may tend to be incompatible with the structure of the bargaining unit or the philosophy of seniority rights.

Although a detailed study of the social, economic, and labour relations context of the enterprise is obviously far beyond the scope of this paper, I think it may be useful to describe, albeit in a very superficial manner, certain elements of the general labour relations context into which affirmative action programs may be introduced.

### **1. Management Discretion and the Collective Agreement**

One of the basic realities of labour relations is that management's prime objective is to attain maximum efficiency and productivity at the lowest cost, whereas a union's prime objective is to obtain the best possible wages, to decrease working hours, and to compel management to base its decisions on objective standards rather than on the exercise of absolute discretion.

In a non-unionized context, management has complete discretion to determine rates of pay and working conditions, the only constraint being the minimum standards determined by law. In companies that are unionized and covered by a collective agreement, management retains all its prerogatives save those that are limited by the collective agreement or by law.

Management consistently takes the position that it must maintain its unfettered discretionary powers in order to run an efficient and productive work place at the lowest cost. It therefore takes the position, for example, that promotions must be based solely on merit, irrespective of seniority or other considerations.

This position tends to be inherently discriminatory toward many target group members, for they may be less obviously qualified than other applicants. Thus, it is highly likely that the employer will have to spend money adapting the workplace in order for the disabled person to be able to function at maximum efficiency. The employer might also be compelled to modify the task itself in order to make it possible for a disabled person to perform it; for example, an employer suffering from chronic back pain rest periods during which the employee can move around or sit down, as the case may be.

Likewise, women will often lack the experience or training required by management to accede to certain positions, particularly in non-traditional jobs.

Promotions based solely on the merit principle are common in all non-unionized jobs and in certain unionized jobs. Situations in which management maintains absolute discretion concerning decisions such as promotions also have an unduly high potential for discriminatory practices, in that the management person who makes the decision may give a free rein to personal prejudices and preferences, with very few objective standards to stop him or her from doing so.

Faced with this type of situation, unions attempt to limit management discretion by compelling management to adhere to an objective criteria equally applicable to all employees, namely seniority. As well as being objective,

seniority has the advantage of tending to protect older workers.

In order to illustrate the way organized workers tend to approach the problem of limiting abuse of management discretion and eliminating unjust discrimination, it may be useful to look at the way unionists attempt to negotiate clauses concerning promotions.

The normal union approach is to attempt to make seniority a determining factor as long as the employee has the basic qualifications needed to perform the work. A typical clause is, "Seniority will prevail if the employee is able to meet the normal requirements of the job". Such a clause gives a much better guarantee of equal treatment than the following clause (which is also very common): "Seniority will prevail if two or more employees have relatively equal qualifications". In the latter case, management will in fact be able to choose the most qualified worker, even if the employee who gets the promotion is less senior than other candidates who meet the basic requirements. A more senior employee who wanted to challenge such a decision would have the onus of proving that the employer's decision was arbitrary, discriminatory, based on irrelevant factors, or patently unreasonable. Conversely, with the first clause mentioned above, if a more senior employee fails to get the promotion, it will suffice if he proves that he was able to meet the basic requirements of the job, even though there may have been other candidates who were more qualified than he (a much lighter onus than in the case of "relatively equal" qualifications).

Even a "basic requirements" promotion clause, however, leaves a considerable amount of discretion to management. This discretion may be exercised at two levels: in determining what qualifications, skills, aptitudes, and experience will be considered "basic requirements" for the job; and in choosing and administering the tests or interviews that will be used to evaluate the candidates.

It is not very common for unions to have any input into determining what qualifications will be required in order to accede to a position, or to have any say concerning the type of evaluation process that candidates will undergo. Frequently, these matters come within exclusive management prerogative.

Some unions have succeeded in negotiating clauses such as this: "Qualifications required for access to any position within the Company must bear a reasonable relationship to actual job content. The onus is on the employer to prove that the qualifications required are reasonably related to job content". This type of clause is particularly important given the fact that an important facet of systemic discrimination against target group members is the fact that the employer may impose irrelevant or unnecessary qualifications for access to a job which have the effect of barring target members from promotions (or hiring). Typical examples are height and weight requirements; technical, high school, or other diplomas; prior experience in related jobs; etc. A clause that puts the onus on the employer to prove that job requirements are actually relevant and reasonable can be a useful tool in fighting systemic discrimination.

The employer may also impose certain requirements that are validly related to the job but that have the effect of systematically discriminating against target group members.

This, however, is quite a separate problem, which I will discuss further on in the paper in relation to on-the-job training and pre-job training.

This example concerning promotion clauses may serve to illustrate why unions often argue that seniority provisions need to be strengthened rather than weakened in order to ensure equal opportunity for all employees on a permanent basis.

## 2. Determination of Bargaining Unit Structures

When employees in Canada decide to organize to form a union, they usually request certification on a plant-wide basis or for some identifiable group within the plant or establishment. In an industrial setting, one frequently finds bargaining units covering all plant workers (blue-collar workers), whereas white-collar workers are either not unionized or in a separate bargaining unit. In other cases, blue-collar and white-collar workers may be in the same unit. If the company delivers its own product, the employees working on the trucking operations may well form a separate bargaining unit. In some areas, skilled trades persons or professionals may form separate units.

In the private sector (and in much of the para-public sector), labour laws do not define any specific criteria concerning the appropriateness of the bargaining unit. North American labour relations developed from a situation where workers organized themselves on the basis of common interests in the improvement of their working conditions and forced the employer to recognize them and to bargain a collective agreement regulating those working conditions. Although there are now legislative mechanisms throughout Canada regulating such things as certification, bargaining, strikes, lockouts, or grievance arbitration, the basic premise is still that the parties should work out their differences with a minimum of government intervention. So far as defining the parameters of bargaining units is concerned, this approach means that if the parties agree on the scope of the bargaining unit, there is usually no intervention whatsoever by the labour board as to the appropriateness of the unit. If the parties do not agree on the scope of the unit, the sole role of a labour board is to determine whether or not the unit proposed by the union is reasonably appropriate and whether or not the employer is justified in arguing that certain groups of employees should be included or excluded from the proposed unit. Labour boards are not empowered to impose on the parties their conception of what the most appropriate or best bargaining unit could be.

From an affirmative action point of view, a bargaining unit that covers all employees working in an establishment, or, in some cases, all employees working for the employer in several establishments, is probably desirable because it increases mobility. Thus, it is undoubtedly easier to create mechanisms facilitating access to blue-collar (non-traditional) jobs for (mostly female) white-collar workers if the two groups are in the same bargaining unit. However, it would be unrealistic to decree that the only appropriate bargaining unit would be one that covered all employees in an establishment. Apart from anything else, one has to consider the fact that unions request certification for groups where they have majority support, and that to make an establishment-wide bargaining unit mandatory would, in many cases, mean that unions

would find it even more difficult to obtain the majority support required for certification.

As a general rule, each bargaining unit is represented by a union local which bargains separately and concludes a separate collective agreement. Of course, there are many exceptions to this rule, such as the retail clerks (UFCW), who may have one bargaining unit for all the Steinberg stores in the Montreal region and sign a single collective agreement covering all the stores. Another example are Quebec public and para-public workers who, over the past 10 years, have developed a pattern of joining ranks to negotiate with the government, the end result being a collective agreement for all the CNTU general hospital workers, another collective agreement (with largely the same provisions) for all QFL general hospital workers, an agreement for all nurses in Quebec hospitals, an agreement for all Catholic school teachers, and another one for all Protestant school teachers, etc.

In each case, the decision made by the unions to join forces and to negotiate at a common bargaining table was taken voluntarily, for strategic reasons—to increase their bargaining power. Except for the very particular case of building trades unions in Quebec (a very complex and specific case that I will not attempt to deal with in this paper), I do not know of any case where various union locals representing different bargaining units—for example, within a single establishment—are compelled to bargain jointly.

### 3. The Collective Agreement as a Wage and Benefit Package

Each collective agreement constitutes a compromise between the parties and reflects their bargaining power and the economic context in which the enterprise finds itself. Gradually, over the years, the local union involved will try to improve the collective agreement by adding new provisions and amending the existing ones.

Obviously, the resources of management are not limitless, and during the negotiation process the union may have to forfeit one demand in order to obtain another. To express it in another way, the collective agreement constitutes a total wage and benefit package, and while the union may succeed in increasing one type of benefit, other benefits may remain at the same level. Thus, for example, a union that wishes to substantially increase the wages of the lowest-paid workers (by hypothesis, in order to equalize the salaries of target group members) may be forced to accept a wage freeze for those receiving the highest wages. Likewise, a union that attempts to improve maternity leave provisions may have to forfeit improvements in vacation entitlement.

Basically, collective agreements reflect the relative strength and the bargaining power of each of the parties. One of the consequences is that it may well be unrealistic to try to impose collective agreement terms (by legislation or otherwise) if the bargaining agent does not have the strength to compel the employer to implement those terms.

The terms of the collective agreement must normally be accepted by a majority of union members included in the bargaining unit before it becomes binding. The collective agreement, as well as reflecting each party's degree of bargaining power, reflects their degree of bargaining power in the past (as embodied in the former collective agreement), the current economic situation, union traditions, and, finally,

the competing interests of various groups within the bargaining unit.

### 4. Employment Standards Legislation and Collective Agreements: Minimum or Maximum Standards?

Standards set out in employment standards legislation (also called minimum standards legislation) are, as the name indicates, minimal standards. The employer is therefore free to give employees better wages or more advantageous marginal benefits than those set out in minimum standards legislation. This also implies that standards set out in federal contracts will not clash with employment standards legislation except in the unlikely event that the contract should prescribe standards that are below those set out in the relevant employment standards law.

Standards contained in collective bargaining agreements, on the other hand, are generally considered to constitute both minimum and maximum parameters.

If one considers the wage scale defined for the various classifications or jobs throughout the bargaining unit, it is clear that the wages attached to each job are not defined in the abstract but in relation to the value attributed to other jobs on the scale. A relative value is attributed to each function within the enterprise. Should the employer unilaterally decide to pay one employee or group of employees a salary higher than that defined in the collective agreement, this would tend to conflict with the intervals between the various positions and various steps on the wage scale.

Furthermore, the establishment of a wage scale is intended to limit favouritism and this objective is defeated if management can pay an individual employee a higher wage simply on the basis of personal preference or other subjective grounds unrelated to the nature of the task, performance, or seniority.

A set of collective agreement provisions regulating a particular matter (for example, sick leave) are likely to be viewed as a complete code regulating this matter rather than simply minimum standards if they are complex, sophisticated, and tend to regulate the matter in a detailed fashion. Thus, for example, an arbitrator concluded that in the face of a collective agreement stating in a very detailed manner the way in which firemen who claimed to be ill would be called upon to prove their illness (presentation of a certificate from the family doctor, compulsory visit to the company doctor after a certain period...), the employer was foreclosed from sending a nurse to the employee's home to verify if he was actually ill. The arbitrator based his decision on the view that the provisions concerning sick leave must be viewed as a total package, where the union and the employer had agreed that employees would be entitled to certain benefits, and, in exchange, would be subject to a certain number of specified control mechanisms exercised by the employer. If one adopts this approach, one must conclude that the employer was changing the terms of the agreement or the "benefit package" by adding a control mechanism, thereby violating the collective bargaining agreement.

Affirmative action programs will inevitably clash with collective agreement provisions if their implementation means that all or some employees are treated less favourably than the standards set out in the collective agreement. An obvious



example is that of promotions: if the collective agreement contains a clause providing that "Seniority shall govern if the employee is able to meet the normal requirements of the job", an affirmative action program that would give preference to the most senior qualified woman on the list, despite the fact that she has less seniority than some of the qualified men who had applied for the job, would be invalid.

Likewise, an affirmative action program calling for modification of wage scales in order to bring them in line with the principle of "equal pay for work of equal value" would probably clash with the existing provisions of the collective agreement, because by definition it implies changing the relative value attributed to different jobs on the wage scale. Should the enterprise be one coming under either federal or Quebec jurisdiction, however, the provisions of the collective agreement could be held invalid insofar as they conflicted with the principle of "equal wages for work of equal value" contained in human rights legislation in those two jurisdictions. On the other hand, if the equal pay program were applied to enterprises coming under the jurisdiction of other provinces through contract compliance mechanisms, such a program would probably be deemed inoperative insofar as it clashed with the wage scales defined in the collective agreement, unless the change proposed in the affirmative action program was limited to bringing the wage scales in line with the principle of "equal wages for substantially similar work".

### III. AFFIRMATIVE ACTION PROGRAMS AND THEIR VALIDITY IN RELATION TO EMPLOYMENT STANDARDS LEGISLATION, LABOUR CODES, AND COLLECTIVE BARGAINING AGREEMENTS

In this section, I will be examining the legality of certain specific affirmative action measures in relation to legislative standards in the labour field and also in relation to typical bargaining agreement clauses. I have chosen to examine six specific affirmative action measures that appear to me to be particularly important for promoting equal opportunity for women and disabled persons. Needless to say, there are many other affirmative action measures I have had to leave aside, for the very simple reason that had I examined them all in any depth, this paper would have taken on the proportions of a doctoral thesis.

This section will therefore be divided into six sub-sections, one for each type of affirmative action measure. In each sub-section, I will first of all describe briefly a specific problem of systemic discrimination and the type of affirmative action measures that may be useful in changing the situation. Subsequently, I will describe ways in which this type of measure might come into conflict or be affected by existing employment standards or labour relations legislation. Finally, I will examine the ways in which the affirmative action measure is likely to clash or to harmonize with typical collective bargaining provisions and other labour relations realities.

#### 1. Equal Pay for Work of Equal Value

##### a) The Current Situation

Recent studies indicate that wages paid for jobs where there is a significant proportion of women tend to be considerably lower than jobs of comparable value where there is a significant concentration of men. The problem takes a number of forms.

A typical situation is that where there are two tasks at least somewhat similar in terms of the nature of the work as well as its value, but not sufficiently so to be considered "substantially" similar. A striking example of this is the case that was settled following the intervention of the Canadian Human Rights Commission after a complaint was filed concerning a nearly 20 per cent wage differential between federal government employees in the "Library Sciences" classification (more than 66 per cent female) and employees in the "Historical researchers" classification (more than 75 per cent male). A job evaluation of the two tasks was performed and it was concluded that the librarians did work of equal value to that performed by historical researchers, whereas the librarians' wages were significantly lower. The settlement provided for \$2.3 million in back pay as well as continuing annual adjustments ranging from \$500 to \$2,500.<sup>6</sup>

Another, less immediately obvious situation infringing on the principle of equal pay for work of equal value is the one of men and women performing tasks that are ostensibly different. An example of effective intervention in this area is the case that came to light following a complaint instituted by the Public Service Alliance and that involved employees of the federal government working within the General Services Group. Tasks assumed primarily by women (food, laundry, and miscellaneous personnel services) attracted considerably lower wages than those occupied primarily by men (messenger, custodial, building and store services). A \$17 million settlement was negotiated with Treasury Board in this case, again following a job evaluation of the skill, responsibilities, effort, and working conditions specific to each task which demonstrated that the work accomplished was of equal value, albeit of a different nature.<sup>7</sup>

Systemic discrimination in wages may also result from the fact that there are more steps within certain salary groups than in others. The more steps there are in a salary group, the longer it takes to reach the maximum salary for that group, which in fact means that length of service with the employer is not equally compensated. If predominantly female jobs have more steps in their salary scales than predominantly male jobs, this will be a factor of discrimination.

Other forms of systemic discrimination arise out of situations where the salaries paid to women employees do not even purport to relate to the value of their work, such as rug ranking for secretaries.

Generally speaking, the principle of equal pay for work of equal value is particularly likely to be infringed in non-unionized situations (and in some unionized ones) where salary increases are based on subjectively evaluated considerations (merit, performance) rather than on objective criteria such as seniority.

Finally, percentage increases in salaries increase wage differentials whereas across-the-board dollar increases decrease the wage gap between the highest and lowest paid employees. For example, in grocery stores, cashiers (largely women) have traditionally earned much lower wages than grocery clerks (mostly men) despite the fact that they perform work that is of objectively equal if not greater value. The wage gap between the two groups was over \$1 an hour in most stores in 1972. Since then, the union that represents

most grocery store employees in large chain stores, the United Food and Commercial Workers, has maintained a consistent policy of bargaining for across-the-board dollar increases. In 1984, the wage gap between the two groups should be down to about 38¢ an hour in most stores certified with the UFCW.<sup>8</sup>

### **b) Remedies**

The "Equal Wage Guidelines" adopted under the Canadian Human Rights Act succinctly describe the factors to be taken into account in order to determine whether employees are doing work of equal value (skill, effort, responsibility, and working conditions), as well as defining factors that may justify a wage differential without being considered discriminatory. Presumably, an affirmative action program would require the employer to adhere explicitly to the principles stated in section 11 of the CHRA and in the equal wage guidelines.

There are a number of ways in which equal pay measures might be implemented. The most all-encompassing one would be to require the employer to proceed to a complete job evaluation of all the jobs in its establishment, using a job evaluation plan in line with CHRA equal wage guidelines and agreed to by any unions whose members would be affected. Once this process was completed, the employer would be compelled to adjust all its salary and benefit scales, without lowering any of the wages already paid to its employees.

A somewhat more modest proposal would be to have the employer go through the same process, but only for certain specific jobs—either comparing jobs having a high concentration of female employees with jobs having a high concentration of male employees, or scrutinizing jobs identified by the union or the Commission as being "problematic" in that they appear to be of similar value but not to be equally remunerated.

Although it is certainly beyond the scope of this paper to analyze job evaluation programs in any detail, it is useful to have some basic idea of what is involved.<sup>9</sup>

Every job evaluation system has three stages: job analysis, job evaluation, and establishment of wage scales. At the job analysis stage, one draws up a description of the tasks that the job encompasses.

The job evaluation step is the most complex part of the process. First, one will have to decide whether the same criteria will be applied to all employees in the workplace, or whether different criteria will be applied to different occupational groups, such as manual and clerical workers. Surprisingly, it would appear that it may be disadvantageous to clerical workers (therefore, generally to women) to apply the same criteria to both groups. The reason for this is that when one compares, for example, effort required for manual jobs, it will consistently be greater than that required for clerical jobs. Likewise, working conditions for manual workers are likely to be more obviously unpleasant. In both cases, manual workers would therefore get a higher point rating (for effort and working conditions), whereas this is probably not a fair comparison.

The solution recommended in the CUPE affirmative action manual is to use a separate job evaluation plan for clerical and manual workers, in order to establish relative value of jobs within each grouping, and then to establish a single salary scale for the two groups.

Assuming that the relevant factors that will be considered are skill, effort, responsibility, and working conditions, each factor will be divided into degrees, to which points are assigned. The points are weighted, and the number of points are translated into group levels. At each stage of the process, of course, there are a number of implicit value judgments involved concerning the intrinsic value of the different factors, and distortions can easily creep in. This indicates how vital it is that employee representatives be involved in this process and have a determining voice in the weighting of various factors, for the person who performs a task is the one who is most familiar with all the facets of the job and who can really evaluate the complexity and importance of each element of the job. Moreover, since it is possible that jobs may be under-evaluated in order to keep down salary levels, it is essential to have employee representatives present as a counterbalance.

Finally, once all the jobs in the workplace have been grouped and ranked according to their relative value, the groups must be attached to a salary scale. Usually, the way this is done is to choose certain "benchmark" jobs. The salary attached to the benchmark job—for example, "receptionist", in the case of clerical employees—is determined largely on the basis of salaries received in the general labour market. The other jobs covered by the job evaluation plan are then assigned salaries based on their relative value in relation to the receptionist job. This final step of course tends to maintain wage gaps between predominantly female and predominantly male jobs.

Application of equal pay principles would mean that, instead of following this last step, one would take the benchmark position for clerical workers (e.g., receptionist) and assign to it the salary attributed to the same-level benchmark position for manual workers (e.g., general labourer). Needless to say, the economic consequences of the application of this apparently simple principle—which is the "law of the land", at least at the federal and Quebec level—are quite staggering.

For a detailed and fascinating discussion of the use of job evaluation programs in the context of affirmative action programs, one may read "Equal Opportunity at work—a CUPE affirmative action manual" at pages 128-150.<sup>9</sup>

Another crucial problem related to the equal pay question is that of the wages (both salary and marginal benefits) of part-time workers. In view of the fact that about 70 per cent of part-time workers are women, and that most part-time workers receive proportionally lower salary rates and are often not eligible for various marginal benefits, this would certainly be a very important area for affirmative action. The problem has been very fully canvassed very recently by the federal Commission of Inquiry into Part-time Work.

### **c) Impact of Legislation**

It is worthwhile noting that, because the principle of "equal pay for work of equal value" is expressly enshrined in the CHRA, it is more likely that it can be validly imposed through contract compliance mechanisms than certain other affirmative action measures, because collective agreement provisions incompatible with this principle would be presumptively invalid in Quebec and at the federal level.

Furthermore, measures aimed at achieving equal pay for work of equal value are, of course, legal and not subject to attack as reverse discrimination in enterprises coming under federal or Quebec jurisdiction.

So far as other provincial human rights laws are concerned, it is fair to state that measures designed to achieve equal pay for work of equal value are compatible with these laws. In other words, the fact that other provincial laws contain "weaker" equal pay clauses (of the type "equal pay for substantially similar work") does not bring them into conflict with the federal standard.

I can see no reason why "equal pay for work of equal value" measures would come into conflict with any federal or provincial employment standards or labour relations laws.

#### **d) Impact of Collective Agreements**

In principle, the objective of "equal pay for work of equal value" is certainly compatible with union objectives. Indeed, the whole thrust of union collective bargaining is to rationalize salary scales and to ensure that employees are paid a uniform wage based on objective criteria, rather than having their salaries vary depending on the subjective evaluation of their immediate supervisor.

In and of itself, unionization tends to help reduce the wage gap between male and female employees. Statistics Canada data for 1981 indicate that not only were wages higher for unionized employees than for non-unionized employees in absolute terms, but that the difference between men's and women's wages were less. Thus, hourly wage rates for non-unionized women represented 74 per cent of the hourly wages of non-unionized men, whereas unionized women earned hourly wages equivalent to 86 per cent of those earned by unionized men. (This study, of course, does not take into account the distribution of men and women in each category, but is still indicative of certain trends.<sup>10</sup>)

Union struggles to improve working conditions often coincide with the principles of equal pay for work of equal value (as in the example given above concerning UFCW negotiation policies concerning across-the-table dollar wage increases to reduce wage gaps between cashiers and grocery clerks). One case where these principles were specifically made a union demand is that of the strike in early 1981 by the 10,000 municipal workers of the Greater Vancouver Regional District. The Union demanded that clerical workers be paid the same entry rate as outside labourers and that increment steps that were applicable to clerical workers during their first five years of employment be eliminated.

After a fairly lengthy strike, the employees were unable to impose recognition of the principle of equal pay for work of equal value. However, they were able to eliminate the lowest pay grades; the lowest paid employees received 6.8 per cent wage increases, whereas the highest paid ones received only 0.2 per cent, thereby reducing the wage gap.<sup>11</sup>

Implementation of an "equal pay for work of equal value" scheme may, however, involve a clash with particular provisions of existing collective agreements. An obvious example would be a case where the collective agreement already provided for a job evaluation plan. If this particular job evaluation plan was not acceptable to the Commission because it

perpetuated systemic discrimination, there would be a clash between the job evaluation plan proposed by the Commission and the existing one. The plan contained in the collective agreement would normally prevail in such a case, unless the enterprise came under federal jurisdiction. In this latter hypothesis, there would probably be grounds for a complaint that the existing job evaluation was contrary to section 11 of the CHRA and therefore void. (In the case of an enterprise under Quebec jurisdiction, there might also be grounds for a complaint.)

If there is no job evaluation program, the changes resulting from the affirmative action program are still liable to clash with existing collective agreement provisions, for reasons explained in Section II of this paper, i.e., the wage scale must be considered as a whole, which establishes the relative value of jobs and the corresponding wages, rather than simply defining a minimum wage. However, much will depend on the precise wording of the collective agreement: some agreements indicate that the wages may be considered to be simply minimum standards.

In practical terms, of course, it may well be that no one will file a grievance, since the employer would have agreed to the affirmative action program by contract and all employees would have equal or higher salaries.

The major problems in implementing this type of program are liable to be practical and economic ones rather than legal ones.

As mentioned earlier, the economic implications of implementing an "equal pay for work of equal value" scheme are likely to be major. It seems fairly clear that if, as in the example given earlier, you tell an employer that he can no longer base his "benchmark" salary for clerical workers on market place levels, he can legitimately protest that he will no longer be competitive. Presumably this may be overcome by having a graduated calendar of implementation of full equality.

From a union point of view, one concern may be that the employer might argue, at the negotiating table, that he is devoting all his available money to raising lower level salaries and that there is nothing left for medium and top wage earners and little for any other marginal benefits. To express it otherwise, the union may legitimately feel that there are other priorities equally as important, or more important, than the equal pay issue, and that they want to make sure that they are able to negotiate for other benefits.

Additionally, there may be problems related to the fact that the employees who would benefit from equal pay measures may be in a separate bargaining unit or (particularly if they are private-sector office workers) be non-unionized. Unionized workers may feel a legitimate resentment at having to pay union dues and perhaps go on strike in order to win wage increases and then have other employees "come along for a free ride" by having their salaries "equalized". An even more serious problem is the fact that this type of measure may be perceived as discouraging non-unionized employees from organizing themselves collectively, inasmuch as they would get the benefits of unionization (higher salaries) without sharing the cost of the struggle to obtain them.



## 2. Hiring Policies

### a) The Current Situation

There are basically two types of problems that prevent target group members from being hired for jobs where they are currently under-represented (which I will designate as "non traditional jobs"). The first type of problem is that there may be irrelevant or unnecessary entry requirements that are inherently discriminatory toward target group members. Classic examples are the height and weight requirements for entry into the police force which are inherently discriminatory toward women and members of shorter races, and which have now been proved to be irrelevant to the person's potential for efficiency as a police officer. Another example is a requirement that a person hired as a janitor in a factory should possess a diploma in mechanics, on the pretext that the mechanic's job is in the line of progression, if in fact the company doesn't have a policy of promoting its janitors to become mechanics or if it commonly gives them thorough on-the-job training.

Also in this category are problems arising from the fact that hiring is generally a discretionary process, and therefore consciously or unconsciously discriminatory attitudes may influence the decision.

The second type of problem is of a different nature and arises when target group members are in fact unable to meet *bona fide* occupational requirements, whether because of lack of training, lack of aptitudes, or a disability. The solution to this type of problem will more likely be to subsidize general vocational or professional training, in order to encourage on-the-job training and changes in job design, rather than to modify hiring policies as such.

### b) Remedies

The simplest type of remedy in a situation where target group members are under-represented in certain job categories is to impose a program whereby the employer undertakes, over a period of a defined number of years, to give preference to target group members in hiring so that the proportion of target group members in these job categories is equal to their proportion in the labour force.

If the company has problems recruiting enough target group members, it may be necessary to look at entry requirements (tests, diplomas, prior experience) to determine whether they are really relevant to the job, and to eliminate all non-essential requirements. It might also be necessary to develop hiring procedures that minimize management discretion and to develop non-discriminatory attitudes among those responsible for hiring.

On the other hand, if job applicants from target groups are in fact unable to meet *bona fide* job requirements, one may be led to conclude that the various levels of government should encourage and fund training for target group members so that they may acquire the necessary skills. In the case where disabled persons are unable to meet *bona fide* job requirements, it may be necessary to redesign the job (this matter will be dealt with at greater length in the section concerning ergonomics).

### c) Impact of Legislation

Federal and provincial employment standards laws and labour relations laws contain no relevant provisions regulating hiring, and therefore there would be no clash with such laws.

### d) Impact of Collective Agreements

Hiring is normally an exclusive management prerogative and there is therefore little likelihood of affirmative action hiring programs coming into conflict with collective agreement provisions.

The only case where such a conflict would arise is where the collective agreement provides that employees will be hired through the union hiring hall. Such provisions are common in the longshoring industry and in the building trades. In such situations, the affirmative action plan could not be implemented unless the union agreed to collaborate in implementing it.

## 3. Promotions, Transfers, and Seniority

### a) The Current Situation

Although affirmative action policies related to hiring are certainly important in attempting to overcome the effects of systemic discrimination, their effect is limited. This is especially true in view of the current economic situation of high levels of unemployment, few new permanent jobs being created, and where technological change is likely to cause further layoffs. It is therefore particularly important to develop programs that will encourage lateral and vertical mobility of target group members who are already employed within the enterprise, in order to ensure access to non-traditional jobs and to promotions.

So far as women are concerned, more particularly, several types of barriers may impede their mobility within the enterprise. One of the problems is the way career ladders are structured. In many jobs where there are a large proportion of women, there is very little room for either vertical or lateral mobility. Thus, in many enterprises, a secretary's job is a "dead-end" job. A secretary will not be considered eligible for a promotion to administrative assistant of the person she is working for, despite the fact that she is familiar with the job and may well be qualified to perform the work.

Another problem is that most enterprises simply do not encourage lateral mobility for their personnel, presumably on the basis that it is expensive to give people the training that will permit them to develop different skills and aptitudes than those that they have hitherto developed in the course of their normal work. In-house training is most commonly given upon hiring (in order to mold new employees to the company's requirements and to ensure that they are familiar with specific company practices), on the one hand; and to employees who are considered "management material" in order to prepare them for promotion, on the other hand. The decision as to whether employees will be eligible for this latter type of training tends to be a particularly discretionary one.

As mentioned in the section dealing with hiring policies, another problem that limits access to promotions and transfers is the fact that management may often require that applicants possess qualifications or prior experience that

may not be actually relevant or necessary to the performance of job duties, but that screens out a number of valid candidates, particularly women.

This problem overlaps with the question of lines of promotion (career ladders), insofar as the employer requires prior experience in a specific job as a prerequisite to applying for a promotion to another job, which may well eliminate otherwise qualified candidates who do not happen to be in the line of promotion.

A particularly blatant example of this form of discrimination is found in banks, where bank tellers (mostly women) are virtually never considered for promotion to the job of accountant (predominantly men), despite the fact that there is an appreciable overlap of the skills and abilities required for the two jobs.

Another factor that may limit lateral (and sometimes vertical) mobility is that employees belong to different bargaining units or that seniority is on a departmental or classification basis.

Seniority rights are commonly exercised on an establishment basis, on a bargaining unit basis, on a departmental basis, or on a classification basis. When seniority rights are defined on an establishment basis, employees who wish to move from one bargaining unit to another (or from a non-unionized job to a unionized one) carry their seniority rights with them. They can, therefore, compete with bargaining unit employees for promotions or job vacancies on an equal footing, according to the number of years of service that they have worked for the employer. In this type of set-up, seniority will commonly be defined as "the length of service with the company" or "the length of service since last hire".

When seniority rights are exercised on a bargaining unit basis, a departmental basis, or a classification basis, employees originating from inside the enterprise who do not belong to the bargaining unit, or the department, or the classification (as the case may be) will not benefit from any recognition of their seniority rights. They will, therefore, be treated as if they were new employees when they apply to fill a vacant position in the bargaining unit, department, or classification. These three types of seniority provisions are thus clearly less conducive to employee mobility than the enterprise-wide type of seniority clause.

Affirmative action programs aimed at improving job mobility are all the more important in that lack of such a program tends to nullify gains that are made through affirmative action hiring programs. In a recent study, Brigid O'Farrell and Sharon Harlan analyzed the situation prevailing in an electrical products plant (in the United States) after three years of implementation of an affirmative action program designed to increase the number of women in non-traditional factory jobs. The study indicated that although the program had been successful, in that the number of women occupying non-traditional jobs had doubled, there was a certain tendency toward creation of new job ghettos. The authors noted that women had been hired into the lowest paid jobs in the plant. More importantly, these jobs tended to be dead-end, in that the career ladder was very short, and therefore there was very limited potential for access to more qualified and better paid jobs.<sup>12</sup>

## b) Remedies

There are a whole panoply of remedies that may be envisaged to resolve systemic discrimination in the area of promotions and transfers.

One type of remedy is to eliminate irrelevant prerequisites that are required for access to certain jobs (whether access is by way of promotion or transfer). As was discussed in earlier sections, this would presumably be done through a process of job analysis, where one would look at the actual tasks involved in performing the job and eliminate any prerequisites not directly related to performance of the jobs, or else make them more flexible, e.g., by indicating that relevant prior experience may replace a diploma. At the same time, one could open up career ladders, particularly by ensuring that the prior experience required for access to the job is in fact indispensable to permit efficient performance of the job.

One problem that may arise if management has sole control over this process is that management may attempt to use the fact that the qualifications required for access to the job are less stringent as a pretext to lower the salary. As a general rule, management has the prerogative of creating new classifications through combining job duties formerly performed by employees in different classifications, by changing job content, etc. In general, management can unilaterally set wage rates for these new classifications. Few collective agreements limit management rights to create new classifications and to determine wage rates. On the other hand, if management in fact maintains the same job duties and simply changes the title of the classification, the employee performing the job might have a legitimate grievance if the employer attempted to lower wages solely on the pretext that the qualifications required for access to the job are less stringent.

Another remedy in this area is in-house training. This might take the form of on-the-job training after a promotion or a transfer has been awarded. This presupposes that the employee already met the basic job requirements before promotion or transfer and is perfecting his or her skills. It also presupposes that the company has a policy of promoting or transferring employees who need some training before being fully able to perform all their new job duties, rather than imposing optimal performance of all new job duties as a prerequisite for access to the job.

Another measure that may complete this form of promotion or transfer system is to have a trial period during which the newly appointed employee has a chance to become familiar with the job, before having to meet normal performance requirements.

If the employer wishes to maintain a system where employees are not eligible for transfers or promotions unless they are already fully qualified, it may be necessary to set up special "pre-training" courses that are designed particularly for women (the classic example would be to give basic technical or mechanical training to women applying for non-traditional technical jobs).

As mentioned above, seniority rights that can be exercised throughout the enterprise tend to be more conducive to employee mobility (particularly lateral mobility) than clauses whereby seniority rights can only be exercised on a bargaining unit, departmental, or classification basis. It is probably desirable to encourage management and unions to move

towards enterprise-wide (or at least bargaining unit-wide) exercise of seniority rights. As I will examine in somewhat more detail further on in this paper, the changeover from one seniority system to another is liable to be a long and complex process. As an interim measure, it may be possible to envisage limited transfer rights between bargaining units, for example (although this may also raise serious difficulties).

Another mechanism for improving job mobility is to improve the clauses governing promotion and transfer in the collective agreement. As already mentioned in Section II of this paper, one important way of lessening discrimination is to limit the discretionary element involved in making decisions about promotions and transfers and to ensure that objective criteria are dominant. Thus, a clause in a collective agreement indicating that "Seniority prevails if the employee is able to meet the basic requirements of the job" is preferable to a clause providing that "Seniority will govern where candidates are equally qualified". Likewise, one efficient way of ensuring that job prerequisites are actually necessary and relevant to the job is to negotiate a clause such as the following one: "Qualifications required for access to any position within the Company must bear a reasonable relationship to actual job content. The onus is on the employer to prove that the qualifications required are reasonable and necessarily related to performance of the job."

Finally, another affirmative action mechanism may be to give preference to target group members when there are vacancies to be filled until a certain target is reached.

### c) Impact of Legislation

Under Quebec labour legislation, the only way to modify the scope of the bargaining unit is by applying to the labour commissioner between the ninetieth and the sixtieth day before expiry of the collective agreement. The labour commissioner will then decide if the proposed bargaining unit is appropriate and whether the union still has majority support.

In all other Canadian provinces and at the federal level, voluntary recognition of the bargaining agent by the employer is valid. The parties can therefore agree to broaden the scope of the collective agreement by amending the terms of the recognition clause contained in the agreement. However, the parties obviously cannot thereby intrude on the boundaries of another bargaining unit.

In practical terms, changing the scope of the bargaining unit to any significant degree is likely to involve a major upheaval in the labour relations between the parties. The scope of the bargaining unit cannot realistically be changed unless the union has the support of the majority of employees in the entire group it seeks to represent. If there are two or more separate bargaining units represented by two different bargaining agents, one would have to envisage either a form of merger of the two union locals or abdication of one union in favour of the other—either option being so unlikely that it is futile to deal further with the practical difficulties involved in implementing such an option. Moreover, it is a virtual certainty that the employer will not in any way encourage or even tolerate a significant broadening of the scope of the bargaining unit to include significant numbers of hitherto non-unionized employees.

It is somewhat less unrealistic to envisage the possibility that two bargaining agents, representing two separate bargaining units within the same enterprise, might agree to include in their respective collective bargaining agreements some form of inter-unit transfer mechanism. This may be easier if the two bargaining units are represented by the two locals of the same union. Again, however, particularly in times of recession and layoffs, each bargaining agent will have the legitimate concern (and indeed the legal responsibility) to defend the interests of its own members. A scheme that would imply that any significant proportion of employees from outside the bargaining unit would be permitted to compete for bargaining unit jobs, with some form of recognition of seniority within the company, will mean that bargaining unit employees may lose their chance for a promotion or, worse yet, be laid off. One has to assume that a bargaining agent will be extremely reluctant to accept any type of program that will mean that the employees it represents are penalized. Not only does the bargaining agent have the legal duty to defend the interests of the employees it represents; it is a voluntary organization that runs the risk of having its status as bargaining agent revoked if it loses majority support.

In her research paper prepared for the CLC, Hana Aach cites an example of difficulties that may arise when unions attempt to implement affirmative action measures that affect seniority lists. In 1974, CALFAA (Canadian Air Line Flight Attendants' Association) negotiated the merging of the separate seniority lists established for pursers and flight attendants into a single seniority list and establishment of a single wage rate. The two groups were covered by a single collective agreement but had until then been covered by separate seniority lists; the employer had had a consistent policy of hiring only men for the higher-paid purser job and only women as flight attendants.

At page 22 of her paper on "Unions and Affirmative Action", Hana Aach describes as follows the difficulties related to implementation of these measures:

*The clause was easily negotiated because of the threat of human rights legislation finding earlier provisions illegal. However, implementation was more difficult. The union was able to obtain membership support for the change only by including it in a negotiating package that featured several more popular advances. Actual merging of the two seniority lists took five years, and caused considerable upheavals and dissension among workers.*

*In an attempt to be fair to everyone, the union established special status with protection from layoff for all pursers and women who had worked as acting pursers. On the basis of seniority, flight attendants could bid on job openings in the purser category, and transfer without losing their accumulated seniority. Pursers who had previously enjoyed advanced seniority status consequently found themselves competing with flight attendants of long experience, and ranked far lower on the seniority list.*

*Since all benefits, shifts and flight routes were decided according to seniority, pursers*



*experienced a tremendous and sudden change in working conditions as a result of the broadened seniority base, even though their job security was protected.*

#### **d) Impact of Collective Agreements**

Virtually all collective agreements contain provisions that in some way define seniority lists and accrual of seniority; the criteria to be considered (seniority, skill, and ability) for promotions; and the procedure to be followed when there are vacancies (job posting). Lateral transfers are often not specifically regulated; when they are voluntary, the provisions applicable to promotions are liable to be relevant.

Affirmative action programs that affect these areas are therefore likely to collide with the provisions contained in collective agreements in one way or another (and this will vary depending on the precise terms of the collective agreement and the nature of the affirmative action policy).

On the other hand, assuming that the employer has already agreed to affirmative action measures affecting these areas, it may well be possible to enlist union support for such measures, which could lead to the parties agreeing to include new provisions in the collective agreement. Very simply, measures that increase employee rights in general are obviously much more likely to gain support than those that are solely to the advantage of target group members, whereas measures that may have a detrimental effect on some of the employees in the bargaining unit are unlikely to be accepted by the bargaining agent. For example, it is highly likely that a bargaining agent would be happy to replace a "relatively equal skill and ability" promotion clause with a "basic requirements" promotion clause. Likewise, few unions would hesitate before agreeing to add to the existing promotion clause a provision putting the onus on the employer to prove that qualifications required for a promotion are job-related. On the contrary, one may assume that the employer will be reluctant to accept such a measure, even at the price of losing a federal contract.

The results of the affirmative action program implemented at American Telephone and Telegraph in the United States in the 1970s are enlightening. Although the employer consented to a major affirmative action program concerning recruiting and promotions (under threat of imposition of a mandatory program), AT&T steadfastly refused to change its "relatively equal" promotions clause to a "basic requirements" clause, although this was a major bargaining demand of the bargaining agent during this same period. AT&T also consistently refused proposals submitted by the union at the bargaining table that would provide for vacancies to be posted throughout the AT&T network. In other words, although AT&T was ready to agree to a certain number of temporary or punctual changes in its personnel administration policy—some of them quite major—it continued to refuse to submit to proposals that would imply forfeiting its management prerogatives in a more general and permanent fashion.<sup>13</sup>

Conversely, unions are likely to oppose measures whereby non-bargaining unit employees compete with bargaining unit members for promotions (for example).

Finally, matters such as defining what qualifications are required for access to a job, career ladders, and the availability of in-house training are most commonly matters of

exclusive management prerogative and not regulated by collective agreement. Again, however, in each case one has to study the precise terms of the collective agreement in order to determine whether or not it contains provisions that regulate these matters.

### **4. Job Design and Ergonomics**

#### **a) The Current Situation**

As a direct result of management's desire to achieve maximum productivity at the lowest possible cost, most jobs are designed to be performed by people in top physical form working at the optimum tempo.

This requirement tends both to be detrimental to the health and safety of all employees and to screen out women and disabled persons from access to many jobs.

A telephone repairman, for example, may be regularly required to carry and manipulate a 77-pound, 8-foot wooden ladder. He may also be regularly required to work on telephone poles, leaning on a body belt while he may have to stretch and twist in order to reach the wires that need to be repaired. This type of work is obviously very demanding physically, and, in the long run, is liable to cause severe back strain, discal hernia, etc., for any person doing the job.

Additionally, these physical requirements are likely to screen out disabled persons. More particularly, repairmen who become disabled (chronic back strain, discal hernia) because of the hazards inherent in the job may be subject to being discharged because they are unfit to work.

Some of the tasks detrimental to health and safety involved in this example may be very difficult to change. Others, however, may be much simpler. For example, it would not seem unduly difficult to build a ladder out of some lighter material, so that it would weigh less than 77 pounds, and which would continue to meet other safety requirements (such as being a non-conductor, to avoid electrocution).

#### **b) Remedies**

Remedies designed to make jobs more accessible for women and disabled persons may take many forms. In some cases it may require redesigning the job (lowering the maximum lifting requirements, assigning two employees to perform certain demanding tasks). It may mean equipping employees with better tools (a mechanical or manual lift, for example). It may also mean changing the method of performing the work and the tempo at which it is carried out (rest periods for people working on visual display terminals to avoid eyestrain, for example).

#### **c) Impact of Legislation**

Measures in this field may overlap with programs set up under occupational health and safety legislation, but would be unlikely to conflict with it, given that both programs would be aimed at achieving the same results. Although there might be specific cases where provincial occupational health and safety regulations might prescribe different minimal health and safety requirements for a particular task, or cases where local joint committees for health and safety might have adopted a "prevention program" that would differ from measures prescribed by the federal government, direct conflict would probably be rare. On the other hand, it would be

highly desirable to coordinate efforts in this area with provincial or federal occupational health and safety commissions (as the case may be), in view of their expertise in the field.

#### **d) Impact of Collective Agreements**

It is very uncommon for methods of work, equipment, and precise health and safety precautions to be regulated by the collective agreement. At most, the collective agreement will prescribe rest periods, a general obligation for the employer to provide employees with safe working conditions, and perhaps an obligation for the employer to provide basic safety equipment, such as steel-capped boots and safety goggles.

Generally speaking, this type of measure is likely to gain broad union support, as long as there are mechanisms that ensure that management does not create special "light" tasks for women and disabled persons by transferring the work to other employees. To create a special category of jobs with lighter duties by transferring some of the tasks to other employees would not only create legitimate employee resentment and resistance, but would also be grounds for a grievance claiming a higher rate of pay for able-bodied men doing the more strenuous but similar task (thereby creating new job ghettos).

### **5. Maternity Leave and Parental Leave**

#### **a) The Current Situation**

The combined effect of employment standards legislation and the Unemployment Insurance Act is that most enterprises in Canada allow their female employees approximately 17 to 19 weeks of unpaid leave, during which time the employee receives 15 weeks of unemployment insurance benefits. Certain collective agreements may provide for better conditions, which may include paid maternity leave (the employer pays the difference between unemployment insurance benefits and a certain percentage of the employees' salary) and the possibility of taking extended maternity leave of up to one or two years, but this is as yet uncommon.

One major problem is that, unless specifically provided for in the collective agreement, seniority does not accrue during maternity leave. In practical terms, this means that a woman who decides to have a child must accept that she will probably fall behind other employees on the seniority list and therefore be liable to be penalized in relation to promotion, layoffs, choice of vacations, and so forth.

There is no legal provision for paternity leave, and those collective agreements that provide for it tend to define a one-day or three-day period of leave, the purpose being to enable the father to attend at the birth of his child. However, there is currently no provision for men to take leave in order to participate in childcare, thereby reinforcing the model whereby the mother is solely responsible for bringing up children and discouraging sharing of parental responsibilities.

#### **b) Remedies**

The remedies are fairly simple in conceptual terms, the main problem being that to improve maternity benefits may be a disincentive to hiring women. Major remedies are to provide for paid maternity leave, i.e., a system whereby the employer makes up the difference between unemployment insurance benefits and the employee's salary; accrual of seniority benefits during the basic maternity leave period; possibility for women who wish to leave the workforce for an

extended period (e.g., two years) to bring up children to maintain their seniority if they wish to return to work at the end of the period (bridging); providing for paternity or parental leave.

#### **c) Impact of Legislation**

All employment standards legislation throughout Canada provides for maternity leave, but there is certainly no difficulty in compelling employers to provide better conditions than those contained in employment standards legislation.

#### **d) Impact of the Collective Agreement**

Any affirmative action measure concerning accrual or maintenance of seniority during maternity leave is likely to collide with the provisions of the collective agreement concerning seniority, if the affirmative action measures provide for something different from what is contained in the collective agreement.

On the other hand, it is probably possible for the employer to unilaterally improve monetary benefits conferred during maternity leave without contravening the collective agreement. Provisions for maternity leave may be more readily considered to be minimal standards than wage rates, for if you increase the salary level for a particular classification, you change its relative value in relation to other jobs on the salary scale, whereas maternity leave benefits would more likely be considered separately from other benefits conferred by the collective agreement.

### **6. Return to Work Rights for Work Accident Victims**

#### **a) The Current Situation**

At present, employees who suffer from varying degrees of chronic disability following work accidents or occupational disease are rarely protected by law or by collective agreement from being discharged for disability.

Section 61.4 of the Canada Labour Code, for example, provides that an employer may not discharge an employee solely because of absence due to illness or injury if

- 1) the absence does not exceed 12 weeks or
- 2) the employee is undergoing treatment and rehabilitation at the expense of a worker's compensation authority.

What this means, however, is that an employee who is left with a certain degree of permanent disability, after having undergone treatment and rehabilitation, is subject to be discharged when he attempts to return to work on the grounds that he is no longer able to meet job requirements.

Should the discharge be grieved and go to arbitration, it will be upheld if the employer proves that the employee was unable to maintain a normal level of productivity and assiduity and that there is no reasonable likelihood that his condition will improve. Arbitrators have consistently taken the position that the employer has no social responsibility toward disabled persons and has no duty to offer them a less demanding job within the company, unless there is a clause in the collective agreement expressly compelling the employer to do so. Even if the union proves that there were other jobs available within the company that the grievor could have

performed, the arbitrator is powerless to compel the employer to offer the job to the grievor (absent a specific provision in the collective agreement, which is very rare).

The union position on this question is that the employer does have a social responsibility towards employees who are chronically disabled following work accidents or occupational diseases. This social responsibility is based on the fact that the employer chooses to have employees work in hazardous working conditions, with an unduly high potential risk of causing employee disability, because it would be too costly to make the work environment safe. It is therefore reasonable that when an employee does succumb to the hazards inherent in the workplace, the employer should contribute some of the money that it has saved by tolerating an unsafe work environment toward providing a job for the disabled employee. (This is apart from the question of compelling the employer to invest more money in eliminating at the source working conditions that are detrimental to health and safety.) However, few unions have succeeded in negotiating clauses protecting disabled employees' right to return to their former job or be transferred to another job.

#### **b) Remedies**

A number of remedies may be envisaged that would better protect the rights of persons who become disabled because of their working conditions. To a large extent, such measures could be an extension of existing guidelines under the Canadian Human Rights Act concerning *bona fide* occupational requirements in the case of physical handicap.

A first measure would be to guarantee that an employee cannot be discharged while he is undergoing treatment and rehabilitation at the expense of a workers' compensation authority. If, at the expiry of this period, the employer contends that the employee is unable to return to his former job, the employer would be subject to section 8 through 11 of the CHRA Guidelines concerning *bona fide* occupational requirements. In other words, the onus would be on the employer to prove that "no method of accommodation exists that would permit the handicapped person to perform the job in a safe and satisfactory manner". Should the employer demonstrate that the employee was not able to perform job duties, the employer would be compelled to offer the employee other vacant positions within the enterprise, with some form of recirculating procedure (employee's salary maintained at its former level even if the new job is lower on the wage scale and frozen at that level until other employees in his new classification catch up to him). Should there be no suitable vacant positions available at the time, the employee would have the right to be laid off (rather than discharged) for a certain period of time, with recall rights if a job became available.

In other words, an employer could not discharge an employee on the grounds of disability unless it proved that the employee was incapable of performing any of the existing jobs within the company and that it was not reasonably possible to adapt the employee's former job so that he is able to accomplish it.

A further measure to lessen discrimination suffered by disabled persons would be vocational training or ergotherapy funded by the federal government or on-the-job re-adaptation training provided by the employer.

#### **c) Impact of Legislation**

The measures outlined above would not clash with any existing federal or provincial legislation. Federal funding of a vocational training or ergotherapy program might overlap with existing programs set up under occupational health and safety legislation, but probably not to any great extent, for, unfortunately, little is currently being done in this area.

Quebec's new Bill 42, "An Act concerning work accidents and occupational diseases" (still at a preliminary stage), will, if adopted in its present form, guarantee broad return-to-work rights for employees who undergo work accidents or occupational diseases, including priority access to other vacant jobs in the establishment if the employee is unable to perform his former occupation (sections 145 to 170, Bill 42).

#### **d) Impact of Collective Agreements**

As mentioned above, few collective agreements contain any specific clauses concerning the right of a disabled employee to return to work. An affirmative action measure protecting an employee against discharge while undergoing treatment and rehabilitation and putting the onus on the employer to prove that no reasonable accommodation can be made permitting the employee to return to his former job would almost certainly be compatible with most collective agreements. Likewise, a clause putting the onus on the employer to demonstrate that he has made all reasonable efforts to find the employee an alternative job within the enterprise before firing him would be compatible with existing collective agreements.

On the other hand, it may be more complex to implement a provision whereby a disabled employee would have priority over more senior employees for a job vacancy (if the disabled employee is unable to perform his former job).

### **IV. EMPLOYEE PARTICIPATION IN THE IMPLEMENTATION OF AFFIRMATIVE ACTION PROGRAMS**

In order to ensure that affirmative action programs are effectively implemented by the contractor, it will be important to set up some form of joint employer-employee committee to monitor and direct the introduction and ongoing functioning of these new policies. The question of the composition, role, and powers of such committees is an extremely complex and important one which would merit being studied in detail. In this paper, I shall, however, limit myself to a brief description of the functioning of joint committees set up under the Quebec Occupational Health and Safety Act as being an interesting model of statutorily-imposed joint committees within the workplace.

#### **1. Quebec Occupational Health and Safety Joint Committees**

One of the most sophisticated examples of joint committees imposed by law wherein employees may exercise a certain decisional power is the system set up under the Quebec Occupational Health and Safety Act. The Act was adopted in 1979, but the sections concerning joint committees only came into effect in autumn 1983, so it is impossible to evaluate whether the system is actually workable. I will, therefore, simply summarize the legal provisions that define the structure and powers of these committees.

The powers and structure of the joint committees (called health and safety committees) are set out in sections 68 to



86 of the Act. A health and safety committee may be set up in any establishment that belongs to a designated sector and where there are more than 20 employees. The committee may be set up at the initiative of a bargaining agent, the employer, or a certain percentage of employees.

At least half of the members of the committee must be employee representatives, the other members being employer representatives. The number of employee representatives is defined by regulation: two if there are less than 50 employees, three if there are 51 to 150 employees, five if there are 151 to 500 employees, and so on to a maximum of 11 (unless the parties agree on a different number).

When a single bargaining agent represents all the employees of the establishment, it designates all the employee representatives on the committee.

If there is a single bargaining agent and a certain number of non-unionized employees, the bargaining agent gets the majority of seats and the rest of the seats go to the representatives of non-unionized employees.

If there are several bargaining agents, they may agree on the distribution of seats. If they fail to agree, the regulations provide for a somewhat complex system whereby each bargaining agent gets a number of seats that is roughly proportional to the number of employees it represents.

If there are several bargaining agents plus a certain number of non-unionized employees, all the non-unionized employees are considered to form a "unit" and are represented on a proportional basis, using the system described in the preceding paragraph.

The non-unionized employees elect their representatives by secret ballot at a general assembly specially called for this purpose. The bargaining agents determine their own procedure for designating their representatives, as does management.

Management representatives have one vote and employee representatives have one vote. If employee representatives do not agree among themselves, the position that is supported by a majority of employee representatives is deemed to constitute the employee position. The same rule applies to management representatives.

The health and safety committee exercises the following functions:

- 1) it chooses the "company doctor";
- 2) it approves the health care program prepared by the company doctor;
- 3) as part of the preventive health and safety program (which I will further discuss below), it sets up education and information programs concerning occupational health and safety;
- 4) it chooses the individual safety gear that will be used by the employees;
- 5) it conducts studies aimed at identifying health and safety risks within the workplace, keeps records concerning work accidents and occupational diseases occurring in the workplace, and so on.

If the committee fails to reach agreement on matters over which it has decisional powers (items 1 to 4), the two parties exchange written arguments concerning the question and, if

the disagreement persists, the matter is referred to the Commission, which renders a final and executory decision.

The health and safety committee is only one element of an elaborate structure set up by the Act, which I will attempt to describe briefly.

In the establishments where a health and safety committee exists, one or several "prevention representatives" are designated among the employees. The same rules applicable to the designation of employee representatives on the health and safety committee apply here. The "prevention representative" has three major functions:

1. to conduct inquiries concerning work accidents;
2. to accompany the Commission inspector when he inspects the workplace;
3. to be present when an employee exercises his right to refuse unsafe work, to discuss with management whether the work is in fact dangerous, to identify means of solving the problem, and to call in the Commission inspector if there is disagreement concerning the validity of the employee's refusal to work.

The "prevention representative" has certain rights to paid educational leave for training sessions concerning occupational health and safety. He receives his full salary while exercising these functions and has legal protection against management reprisals (discharge or discipline), as do employee representatives on the health and safety committee.

The employer has the duty to draw up a "preventive health and safety program" which will ensure that the appropriate measures are implemented so that the establishment meets all the relevant health and safety standards (established by regulation). The program will therefore cover methods of work, machines, equipment, workplace design, etc. The health and safety committee decides what individual safety equipment must be used by employees and designs educational and information programs concerning occupational health and safety. The health and safety committee may also make recommendations concerning the rest of the "preventive health and safety program". The program, along with the recommendations of the health and safety committee (if any), shall be transmitted to the Commission, which may modify the program or require the employer to draw up a new program.

In addition to the foregoing structures, management and unions may set up "sectorial associations", which cover each sector of economic activity in Quebec. These associations are set up in the following manner: one or several bargaining agents representing employees in that sector may conclude an agreement with one or several employer organizations representing employers of that sector in view of setting up the "sectorial association". The agreement must be approved by the Commission, which ensures that the parties are representative, that there is an appropriate dispute resolution mechanism, and so on. There is a single "sectorial association" in each sector of activities.

Each "sectorial association" receives an annual subsidy from the Commission and provides information, educational, research, and consultative services to the employers and employees who belong to the sector.

## 2. A Few Working Hypotheses Concerning Employee Participation in the Implementation of Affirmative Action Programs

Although the participation mechanisms set up by the Quebec Occupational Health and Safety Act indubitably constitute an interesting model, one must not lose sight of the fact that there are several important distinctions between the implementation of an occupational health and safety program and that of an affirmative action program. The major difference affecting employee participation is that, whereas it is clear that the improvement of occupational health and safety conditions is in the interests of all employees, the same cannot be said of affirmative action programs. Certain types of affirmative action measures may be in the interests of all employees in a given enterprise, such as promotion clauses that limit management discretion; others may benefit solely target group members, but do not prejudicially affect any other employees—maternity leave, for example; still others may benefit target group members to the detriment of other employees, such as preference for target group employees in matters of promotion over more senior employees.

I venture to suggest that the most fundamental requirement to ensure employee support and participation in the implementation of affirmative action programs is that these programs focus primarily on measures that both tend to remedy the effects of systemic discrimination by improving the situation of target group members and tend to improve the working conditions of employees in general. These measures might well be supplemented by certain measures designed to meet certain specific needs of target group members. Measures that may be detrimental to other employees should be avoided.

If these conditions are met, it is likely to be considerably easier to enlist the support and participation of organized employees. (The situation of non-organized employees is somewhat different and I will deal with it further on.) As was mentioned in section I of this paper, it is essential to gain the support of both the union and management for the affirmative action programs, as many of the measures contained therein are likely to clash with existing collective agreement provisions. The consent of both the union and management are necessary to modify any of the terms of the collective agreement. Presumably, the hope of obtaining a contract with the federal government will act as an incentive to encourage both groups to amend the collective agreement so that it will be compatible with the proposed affirmative action measures.

An important factor liable to limit the participation of non-unionized employees in any form of joint committee is simply

that they generally do not have effective means of protection against management pressure or reprisals should they take a position that conflicts with that of management (which is almost inevitable), reprisals which are particularly likely to occur if the employee representatives on the joint committee try to organize support among the employees for their position. Non-unionized employees may have no access or limited access to arbitration in case of discharge, and none in case of harassment or disciplinary measures in most jurisdictions throughout Canada. Furthermore, even when they have access to legal remedies, they generally have to pay all the legal fees resulting from the exercise of such remedies, which may well be prohibitive.

To help resolve this particular problem, it might be useful to foresee some specific remedy available to members of joint committees for the implementation of affirmative action programs who allege that they have been harassed or disciplined because of their activities or opinions relating to such a committee.

The joint health and safety committee as described in the Quebec Occupational Health and Safety Act is probably a useful model that might be adapted to the affirmative action context. It will probably be desirable to require that both management and bargaining agent or employee representatives include a reasonable proportion of target group members.

The main function of such a committee would presumably be to design a program aimed at implementing the objectives of the affirmative action program and defining precise target dates. If the contract with the federal government contained an undertaking to implement "equal pay for work of equal value" guidelines over a five-year period, for example, the committee would have to agree on a job evaluation manual and decide on a schedule for the evaluation phase and for the salary adjustment phase. Such a program would presumably have to be approved by the Commission.

The most difficult questions that arise in relation to such a scheme are the following ones: who decides when the parties fail to agree? Are they compelled to submit the dispute to the Commission for a binding decision, or to a third party chosen by the parties? What happens if one or both of the parties refuse to take the necessary steps to amend the collective agreement (where necessary) or simply fail to implement the affirmative action measures?

In order to develop answers to these questions, it will be essential to continue the process of consultation with management, unions, and other employee organizations, as well as doing further research concerning existing models of joint decisional bodies within the workplace.

## NOTES

1. Walter S. Tarnopolsky, *Discrimination and the Law*, 1982, Richard De Boo Ltd., particularly at Chapter 111.
2. *Commission du Salaire minimum v. Bell Telephone Co.*, 1966, S.C.R. 767.
3. René Dussault, *Traité de droit administratif canadien et québécois*, 1974, Presses de l'Université Laval, page 882.
4. *Construction Montcalm Inc. v. Minimum Wage Commission*, (1979) 1 S.C.R. 754, at pages 770-771.
5. *Tandy Electronics v. United Steelworkers of America 80 CLC 14,017*; in the matter of the Digby Municipal School Board, et. al., as yet unpublished decision of the Supreme Court of Canada dated October 12, 1983.
6. *Canadian Human Rights Commission Annual Report 1980*, pages 23 and 51.
7. Walter S. Tarnopolsky, *Discrimination and the Law*, 1982, Richard De Boo Ltd., at page 420.
8. Hana Aach, *Unions and affirmative action*, unpublished discussion paper prepared for the Canadian Labour Congress, March, 1983.
9. Elizabeth Plettenberg and Margot Trevelyan, *Equal opportunity at work—A CUPE affirmative action manual*, Canadian Union of Public Employees Education Department, 1976.
10. Hana Aach, *Unions and affirmative action*, *supra*, pages 140-144.
11. *Idem*, pages 53-60.
12. Brigid O'Farrell and Sharon Harlan, *Job integration strategies: today's programs and tomorrow's needs*, Working paper for the workshop on job segregation by sex, Committee on women's employment and related social issues, N.H. Research Council, May, 1982—quoted in an as yet unpublished study prepared by Hélène David for the Institut de recherche appliquée sur le travail under the interim title *L'égalité en emploi pour les femmes en usine*.
13. Hélène David, *L'égalité en emploi pour les femmes en usine* (interim title), as yet unpublished study prepared for the Institut de recherche appliquée sur le travail.





## THE SOCIAL COSTS OF DISCRIMINATION IN CANADA

Morton Weinfeld

### Sommaire

Les arguments contre la discrimination peuvent se ranger en deux grandes catégories: ceux fondés sur les principes ou les valeurs et ceux fondés sur les calculs utilitaires. La première catégorie comprend les principes de la morale, de la justice et de la loi. Ainsi, on peut considérer la discrimination comme immorale selon ses croyances religieuses ou personnelles, et pour ceux qui ont de telles croyances, faire preuve de discrimination est un comportement répugnant. Elle est injuste, car elle frappe les innocents. Ces arguments ne sont généralement pas justifiables du point de vue des sciences sociales, et ils ne découlent pas de recherches dans ce domaine. Ils peuvent être contestés en y opposant des valeurs différentes ou des principes universellement reconnus.

Les arguments utilitaires contre la discrimination font valoir qu'elle nuit à la société. À long terme, et malgré les fluctuations à court terme, la société perdra au change. L'argument idéal contre la discrimination serait celui qui montre qu'à la longue, ou avec les calculs nécessaires à l'appui, la société se porterait mieux s'il n'y avait pas de discrimination. Ceux qui invoquent les valeurs humaines pour condamner la discrimination font aussi valoir qu'une société se portera mieux, du point de vue moral et spirituel, sans discrimination.

Du point de vue utilitaire, la discrimination entraîne des coûts économiques et sociaux. Par coûts économiques, on entend les pertes matérielles découlant d'une mauvaise répartition des ressources et qui entraînent une baisse de la productivité et de l'avoir général, en plus d'autres conséquences néfastes pour la conjoncture économique. Par coûts sociaux, on entend les pertes, autres que matérielles, que subissent les groupes concernés ainsi que la société dans son ensemble par suite de la discrimination. À l'encontre des coûts économiques, les coûts sociaux sont beaucoup plus difficiles à mesurer en dollars. Il se peut que l'aspect économique des coûts sociaux soit impossible à évaluer, ou que l'incidence des coûts économiques se manifeste indépendamment des coûts sociaux initiaux.

Dans l'exposé suivant, je n'essaierai pas de faire des distinctions très précises entre coûts sociaux et coûts économiques indirectes, tout comme je me garderai bien de proposer des chiffres exacts. Qui plus est, comme les coûts sociaux englobent la qualité de la vie, notamment la santé du corps social, j'aborderai forcément le domaine des jugements de valeur et des principes. Essentiellement, toutefois, je tenterai de présenter la situation pour ce qui est des coûts considérables engendrés par la discrimination en

### Summary

Arguments against discrimination can be classified into two rough categories: those based on values or principles, and those based on utilitarian calculations. The first category would include principles of morality, law, and justice. Thus discrimination can be considered immoral based on religious or secular convictions, and for holders of such views is an intrinsically repugnant act. It is unjust, as it penalizes people who have committed no crime. Such arguments generally fall outside the purview of social science, and do not usually rest on the findings of social science research. They can be challenged on the basis of competing values or first principles.

Utilitarian arguments against discrimination assert that it is generally dysfunctional for the societies that engage in it. Over the long run, and despite short-term fluctuations, the costs to the society will exceed any benefits. The ideal argument against discrimination would be one that demonstrated that in the long run, or with the appropriate calculations, society would be better off in conditions of non-discrimination. Adherents of the value-based critique would also argue that a society is better off in an ethical and spiritual sense under conditions of non-discrimination.

One can differentiate two types of utilitarian costs of discrimination: economic and social. Economic costs refer directly to material losses ensuing from a non-optimal allocation of resources, leading to lower productivity, reduced wealth, as well as other externalities that adversely affect economic life. Social costs of discrimination are primarily non-material costs incurred both by victimized groups and society as a whole as a result of discrimination. They differ from economic costs in that they may be more difficult to quantify, in dollar terms, than economic costs. This may be because the economic dimension of the social costs may be impossible to measure, or because the incidence of the economic loss occurs at several removes from the initial social cost.

In the following presentation, I will not attempt to maintain too rigid a line between social costs and indirect economic costs, though I will in general refrain from efforts at precise quantification. Moreover, since social costs include measures of the quality of life, such as the civic health of the body politic, I will of necessity enter the domain of value judgement and principle. For the most part, however, I shall try to make the case concerning the extensive and excessive costs of discrimination relying on social scientific, empirical evidence, drawn from both the Canadian and international experience.

m'inspirant des preuves sociales, scientifiques et empiriques, relevées au Canada et à l'étranger.

À tout prendre, je crois que les données sur les coûts sociaux (et, d'après ce que j'en sais, les coûts économiques aussi) de la discrimination suffisent pour la condamner, quelle que soit l'analyse utilitariste dont on s'inspire. Même si ce n'était pas le cas, c'est-à-dire s'il était possible de montrer que les avantages matériels l'emportent sur les coûts dans une mesure certaine, la discrimination n'en serait pas moins inacceptable pour des raisons morales et de valeurs fondamentales.

On balance, I believe that the evidence concerning the social costs (and from what I know of it, the economic costs as well) of discrimination is sufficient to indict the practice of invidious discrimination on the basis of any accurate utilitarian, functional calculus. But even if this were not the case, if somehow it might be shown that the material benefits of discrimination exceed the costs in some aggregate sense, discrimination would remain unacceptable on the basis of fundamental values and moral principles.



## THE SOCIAL COSTS OF DISCRIMINATION IN CANADA

Morton Weinfeld\*

### I. DEFINING TERMS AND SETTING PARAMETERS

#### A. Social Costs

The term "social" connotes non-economic. Some social indicators can be defined independently of our ability to assign monetary value to them. Good physical or mental health, clean air, open spaces, safe streets, the enjoyment of good books, films, or music, the use of available liberties of speech, assembly, religion, etc., all add to the quality of life enjoyed by citizens. Efforts can be made to assign some monetary value for some of these things, as in the cost to society of illness measured both in lost economic productivity and usage of health care resources, but these figures obviously do not capture the human cost of illness. Similarly, we fail when we assume that the "value" of listening to a recording of Glenn Gould or Ray Charles is somehow related to the monetary cost of the record.

Social costs may be more or less direct, depending on the timing of their appearance following episodes of discrimination. Social costs of discrimination may ensue as a result of immediate or cumulative economic costs of discrimination. For example, a victim of racial discrimination who suffers unemployment will first experience economic loss (as will the society as a whole, in terms of lost production and welfare expenditure), which may be followed by stress-induced alcoholism, which in turn may lead to other social costs related to crime, family disruption, medical treatment, etc.

Social costs are also in many cases societal costs. Thus discrimination may prove costly to the very stability or integrity of a society as a whole. While most of the social costs that we shall enumerate fall on the victims of discrimination, the most serious costs are societal, potentially affecting the lives of all citizens.

#### B. Discrimination

This report is concerned primarily with discrimination and not with prejudice. Prejudice can be defined as a set of attitudes, discrimination as an action or actions (including deliberate or inadvertent inaction) that have an identifiable outcome. Most social scientists operate with a rough or implicit causal model in which prejudice against a minority group leads to or is expressed by acts of discrimination. It is true that in some cases prejudicial attitudes are learned in the process of socialization, from childhood through adolescence, producing adults who act on the basis of their acquired prejudices (e.g., negative stereotypes). Yet it should be noted that in a real sense acts of discrimination, or indeed the consequences of these acts, themselves nurture and sustain the environment in which prejudice can flourish. For example, a society that has a rigid caste or apartheid system may keep a minority group in conditions of poverty and

backwardness; the results of this discrimination in turn help perpetuate racist feelings of the inferiority of the minority group. Thus the link between prejudice and discrimination is best seen as circular.

Societies cannot legislate against individual prejudice. At best the state can attempt to change the climate of opinion through indirect interventions, such as controls on the dissemination of hate literature (itself controversial legislation in Canada), the actions of school boards and ministries which attempt to promote understanding and tolerance in school, various public relations activities of ministries or agencies promoting multiculturalism, or of human rights commissions, and some control on the content of the telecommunications or film industries.

It is important to recognize that both prejudice and discrimination can exist independently of the other. Prejudicial feelings can remain internalized or even expressed verbally, but never translated into explicit action in the public domain. On the other hand, discrimination can operate without any deliberate prejudicial underpinning.

Discrimination can be considered as both an act of commission and an outcome of acts of omission or structural features of a society. The classical definition of discriminatory acts involves clearly identifiable episodes with specified victims and victimizers. Such acts can range from a pogrom or a lynching to a denial of a job or service in an establishment for reasons of race or other ascriptive characteristics. For example, a hotel manager would tell a non-white there were no vacancies, only to welcome a white lodger shortly thereafter. Proving discrimination in this way has required using the rules of evidence, including witnesses to the specific act.

Such acts are illegal in Canada, as in most Western liberal-democratic societies, and thus the more prevalent form of discrimination is structural or institutional. In part this discrimination can be understood as the legacy of previous acts of discrimination, and that is why simply equalizing opportunity is insufficient to achieve equality of outcome for some groups. Extra measures must be taken as compensation for those societally imposed handicaps of the past, which continue to affect opportunity in the present. In addition, this discrimination can comprise traditionally accepted ways of educating, hiring, promoting, or remunerating people that inadvertently have the result of excluding various groups from desired social roles or occupations. Buildings inaccessible or educational materials unavailable to disabled people; old-boy networks; admissions criteria that penalize groups which include poor or culturally dissimilar people, and fail to recognize achievements and qualities of a different nature; hiring criteria that presume certain jobs may go only to men, or to people of certain height or weight, or with a college degree, where these may not be bona fide requirements but rather traditional screening devices—are all examples of structural or institutional discrimination.

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How do we know when discrimination has taken place? Acts of commission can be established through testimony of the victim and witnesses. The major way of establishing the occurrence of *structural* discrimination is the investigation of the degree of statistical under-representation of minority groups in designated positions, and inferring the operation of structural barriers when such under-representation exceeds certain statistical levels, e.g., less than 25 per cent of engineering students are female, or less than two per cent of doctors are non-white, etc. (Whether in fact statistical under-representation is a result of subtle discrimination or freely expressed preferences of minority groups is another question.) Other objective measures of discrimination are the tallies found in reports of federal and provincial human rights commissions, which investigate reported complaints of discrimination, though these are a small fraction of discriminatory acts that take place. All of these measures are objective, in that they are empirically verifiable by all.

There is also a subjective dimension to the measurement of discrimination, namely the perception of the victim. Surveys commonly ask members of minority groups whether they have been victimized themselves by discrimination, and whether their group suffers from discrimination. Perceived and actual discrimination may be independent of each other. Some people may perceive discrimination where none has occurred, while others may remain unaware, even naively so, that they have been its victim. In this report I shall be dealing with discrimination as acts that affect employment and that determine access to work and the quality of work experience, and as social structural barriers that generate negative outcomes though not necessarily through identifiable acts.

### C. Employment

This report is concerned primarily with discrimination that affects employment, broadly defined. As such it omits discussion of other sectors of society in which racism and sexism operate, such as the media, schooling, culture as both daily life and high culture, and the polity. There are social costs of discrimination that occur in all these areas, and indeed many of these are similar to those that affect the workplace.

Discrimination in employment can occur in five ways:

1. Underpayment, when minority group members are paid less for similar work or, in its more controversial formulation, work of equal value.
2. Underemployment, when minority group members are constrained to work either part time all year round, or seasonally, or when they must accept work far below the level of their qualifications.
3. Underskilling, when minority group members are prevented from achieving the skills or qualifications commensurate with their abilities and desires.
4. Unemployment.
5. Exclusion from participation in the labour force.

Moreover, it should be noted that employment of any type, when it occurs, is typified by certain features of the work environment, ranging from lack of safety to slurs, derogatory remarks, or gestures from clients, co-workers, or superiors. To the extent that these affect members of minority groups, we consider them also as a form of discrimination in employment, with clear social costs.

The focus of this report is the social cost of discrimination and not its cause. Surprisingly, the voluminous social science literature on minority groups, prejudice, and discrimination deals far more in causes than in consequences of such discrimination. More is known about the bigot than about the victim. There are very few studies, clinical and especially non-clinical, that analyze consequences of discrimination for representative samples of minority groups, using as controls minority group members who have not been so victimized. Much research rests on the supposition that simply being a member of a minority group is *ipso facto* a case of being a victim of discrimination. This ignores the important fact of variation in individual experience within minority groups. Another reason for the neglect of systematic studies of consequences of discrimination may be the assumption that consequences are self-evidently negative and, in societies like Canada, adequately measured in socio-economic statistics on income, employment, and other indicators. At any rate, the evidence on social cost will in many cases have to be constructed from an amalgam of related studies rather than from research findings that address the issues head on.

## II. SOCIAL COSTS: AN OVERVIEW

Let me state boldly that the appropriate social scientific studies that could effectively estimate the social consequences of discrimination in employment for victims have simply not been done, and thus the data do not exist. Let me describe briefly how an ideal study on such an issue might look.

Imagine a very large random sample of the Canadian adult population, which would include within it sufficiently large sub-samples of men and women, all visible minorities, and the disabled. Through properly constructed and administered questionnaires or interviews, we would elicit the following information:

1. Control variables such as respondents' age, marital status, parental socio-economic background, and educational attainment. (This list, like those below, is not exhaustive.)
2. Explanatory variables such as previous and current occupational status (including whether unemployed or in the labour force); income; reports on conditions of work and particularly any episodes of prejudice or discrimination encountered; measures of overall job satisfaction; (and, as long as we are dreaming, how about confidential reports from co-workers about each respondent, designed to measure any prejudicial feelings).
3. Outcome variables such as psychometric and other measures of mental and physical health, including frequency of smoking, drinking, deviant or anti-social behaviour; drug abuse; quality of marital life, measures of children's development, including aspirations; self-identity, including ethnic identity, pride, and self-esteem; social and political attitudes.

Using the appropriate statistical techniques, we could then try to identify any negative outcomes of work-related discrimination, the latter measured both by simple status as a member of a minority as well as reported experiences.

Unfortunately, no studies even begin to approach remotely these desiderata. Thus I have had to take my evidence where I could find it. I have looked at studies of the negative outcome of stress (including work-related stress and that of

severe ethnic victimization) and argued that minorities in general are likely to experience more stress. Failure to cope with or adjust to such experienced stress leads to negative outcomes for the individual and society.

The research picture is somewhat better on the negative societal outcomes, notably on the democratic quality of civic life, but still far from satisfactory.

We have less data in Canada than is desirable on the question of the relation (for majority group members) between the holding of prejudicial views, and specifically the practice of discrimination in employment, and the holding of anti-democratic attitudes or engaging in anti-social behaviour in Canada. Thus I have had to rely on interpretations of history, as well as early empirical studies of prejudice in the United States.

#### A. The Physical and Mental Health of Victims of Discrimination and their Families

The experience of discrimination, whether as one distinct episode, or a series of interrelated events stretching over some period of time, can be understood as a stressful event, or stressor. A stressor may be physiological, e.g., extreme cold, or psychosocial, ranging from the trauma of an event such as a flood or fire, to being evaluated in an important examination or being rejected by some person or institution (Lazarus, 1966, 47).

Drawing from the work of both Lazarus (1966) and Dohrenwend and Dohrenwend (1969), we can conclude that experiences of employment discrimination due to membership in a minority group based on race, sex, or disability constitute examples of psychosocial stressors. These are likely to be associated with a variety of mental and physical health outcomes commonly associated with stress.

"Frustration" and "threat" are important components of psychological stress (Lazarus, 1966 p. 49). The experience of threat in turn may be due in part to objective danger and in part to the subjective perceptions (appraisal) or expectations on the part of individuals. Among the most common responses to stress are anxiety, anger, and depression. It is important to note that stress need not always lead to maladjustment. Individuals and groups may vary in their capacity to react to or cope with stressful events. Indeed, it is conceivable that the experience of stress may produce beneficial results for individuals or groups, acting as a mobilizing agent for human resources or a force for growth (Lazarus, 1966, p. 71). We recognize this possibility in popular idiom when we describe someone "rising to the occasion", or "bringing out their best" in moments of crisis. This would certainly apply to successful individual members of minority groups who may see discrimination as a challenge to be overcome. At the group level, some minority groups, notably Jews and Orientals, may have developed cultural and social responses to victimization that have served, collectively, as a prod or springboard to greater achievement (Bonacich and Modell, 1980; Light, 1972; Van den Haag, 1969). While Jews and certainly Japanese have experienced substantial discrimination in twentieth century Canada, they are also the two ethnic groups with the highest average income as of 1971 (Li, 1980).

The key, then, is the ability of individuals to respond to stressful situations. Aggression, avoidance, or preparation

against harm represent different coping strategies. Palliative approaches to victimization include displacement, repression, denial, or projection. Some of these approaches may be more suitable for different types of stressors, or different groups or individuals. The experience of discrimination could also have contradictory effects on the ethno-racial or personal identity of the victim. On the one hand, a response may be denial of membership or self-hate (Lewin, 1948); on the other hand, they may be forms of ethno-centrism and reinforcement of in-group ties and insularity (Levine & Campbell, 1972). Even the desire to overcome adversity and still succeed may lead to negative traits such as enhanced striving or symbolic status-seeking (Allport 1954, Ch. 9). In general, failures of adjustment to stress may lead to the following consequences:

1. Functional disorders such as affective psychoses, schizophrenia, paranoia, and depression;
2. Neuroses, including anxiety, hypochondriasis, amnesia, and phobias; and
3. Personality disorders, including passive-aggressive personality, anti-social patterns such as addiction and alcoholism and the paranoid personality (milder than full-blown paranoia) (Lazarus, 1966).

Each of these is a social cost—a cost to the individual victim and to the families of victims, and a social and economic cost to society in devising treatments for these afflictions.

We do not have rigorous scientific studies that investigate directly the link between the experience of employment discrimination by a minority, subsequent stress, and the development of negative mental health outcomes. However there is a substantial body of indirectly related research that suggests strongly that such a link exists. Studies beginning with Kornhauser's (1965) research on Detroit auto workers have found that the quality of work experience is clearly related to the mental health of workers. Looking at measures of anxiety, self-esteem, hostility, sociability, overall life satisfaction, and personal morale, Kornhauser found that better mental health is found in workers who are more satisfied with their job experience, and whose jobs involve greater skill, responsibility, and variety (Ch. 4.5). Approaching the same question from a macro-economic and macro-sociological perspective, Brenner (1973) has found that variations in the level of economic activity are directly and causally associated with levels of mental hospital admissions. (Ironically, Brenner found that lower status minority groups are least sensitive to economic downturn leading to increased mental illness as they, by dint of their pre-existing lower social status, have least to lose in periods of rising unemployment (pp. 143-152).)

An example of this relation is the research relating work experience and alcoholism. The traditional position based on clinical and non-clinical research has linked negative work experience, such as alienation or stress, with alcoholism (Parker and Brody, 1982). One recent study has challenged this pattern of findings. Seeman and Anderson (1983) in a study of 450 employed males in Los Angeles found a positive association between level of drinking and social involvement with friends on the job, and no link between job dissatisfaction and drinking. An explanation of these conflicting findings might be that drinking may mean different things in different social contexts, and that the well-known phenomenon of co-



workers sharing some drinks during or after work ought to be distinguished from excessive drinking as a response to work stress.

What is important for the purpose of this report is that minorities are likely to experience more stressors than members of majority groups. Dohrenwend and Dohrenwend (1969) conclude that "both the frequency and severity of stress situations are greater for Negroes than for their white class counterparts".

What can we say about the intensity and severity of any of the psychological disorders that result from stress? Dohrenwend and Dohrenwend (1969) have reviewed the literature examining the onset and duration of disorders as these relate to stressful events. Much of the research deals with combat, notably soldiers experiencing war neuroses and their post-war adjustment. Other studies have examined reactions to events as diverse as the Coconut Grove fire in Boston or the death of President Kennedy. They conclude that in the majority of cases psychological symptoms that developed in response to a stressful event disappeared spontaneously within a limited time after the termination of the event, even when a serious loss had been suffered. There was, however, almost always a minority for whom this was not true (p. 114).

There is also a substantial body of research on the effects of extreme stress or victimization, dealing with the phenomena of natural disasters and incarceration as a prisoner of war or inmate of a concentration camp during the Second World War. Clearly, we are far removed from the issue of employment discrimination when we discuss such potentially life-threatening stressors. On the other hand it is difficult to estimate the effects on a minority person of repeated rejections or disappointment in the workplace, but these may assume major significance in the lives of people so victimized. Unfortunately for our concerns, the literature in the emerging sub-discipline of victimology is addressed primarily to the etiology of victimology, rather than the long-term consequences for victims (Parsonage, 1979; Viano, 1976). The bulk of the evidence that we have deals with major, non-routine events, in the absence of more precise studies of the consequences of victimization. The closest analogue might be the studies of victimization by crime; the findings of the few studies of consequences are inconclusive as to whether victims display more fear or distrust following victimization than non-victims (Kilpatrick et al, 1979; Smith, 1976; Thomas and Hyman, 1977).

A review of the epidemiology of health effects of disasters has found evidence of some psychological impairment in the post-disaster period (Logue et al., 1981). Disasters include events such as the Three Mile Island nuclear scare, Hurricane Agnes (122 dead), the Love Canal incident in New York, etc. It seems clear that a variety of post-event negative consequences were experienced. However, the reviewers note that only in one case, that of the 1972 Buffalo Creek flood in West Virginia, has there been a demonstrated link between disaster and severe psychopathology (p. 154). The major effects lasted for periods of months. For example, average perceived duration of the recovery time for survivors of Hurricane Agnes was about 18 months (p. 154).

A great deal of clinical research deriving from the psychological, psychiatric, and social work professions has been

done on victims of extreme stress, such as survivors of the Holocaust. Investigators have identified a "survivor syndrome" which includes the traits of anxiety, paranoia, depression, and emotional depletion. In addition, psychosomatic disease, disturbances in cognition, and occupational and interpersonal maladjustment have been reported. This work is summarized in Dimsdale (1981), Krystal (1968), and Krystal and Niederland (1968). Similarities between survivors of Nazi persecution and survivors of Hiroshima have also been identified (Lifton, 1967).

Studies of non-clinical populations have also been done on Jewish survivors with no control group (Matussek, 1975), on Norwegian non-Jewish survivors with a control group (Eitinger and Strom, 1973), on Jewish survivors in Israel (Antonovsky et al., 1971; Klein 1971) and in Canada (Eaton et al., 1982; Weinfeld et al., 1981). Most of these studies demonstrate physical or emotional impairment, or both, though some found modest or no significant differences between survivors and controls for some measures, most probably reflecting successful adjustment to the massive trauma. Finally, it should be noted that these negative sequelae of stress themselves may have negative consequences or correlates, which ought to be included as social costs, as in the well-established link between depression and sexual dysfunction (Beck, 1967, pp. 34-35). It should be noted that the studies of Jewish survivors are relevant to the focus of this report because the victims were pre-selected and penalized on the basis of an ascribed (not achieved) characteristic, as are the members of the four groups in this study.

In summary, I am arguing that the experience of discrimination in employment is a stressful event or series of events. Minorities are particularly likely to experience such stress. This stress requires appropriate coping responses, or psychological adjustment. Where such responses are not forthcoming, a series of physical and mental health consequences are likely to ensue, which adversely affect the quality of life of the victims, their families, and society as a whole. In addition, workers who are suffering the effects of stress may be less productive economically. While the duration and intensity of such consequences of discrimination are unknown, clinical studies of severe to extreme stress suggest that negative consequences of modest duration are likely; to the extent that the stressor repeats itself, the consequences will last all the while longer.

## **B. Democratic Life and Civil Liberties**

### **1. The Historical Record**

The second major cost of discrimination is both actual but perhaps more dramatically potential. Citizens and societies who practise or condone discrimination threaten to undermine the democratic foundations of the polity. The denial of equality and justice to members of a minority group imperils the rights and liberties of all members of the society, including those of the bigots themselves. Thus the price of discrimination may be paid not only by the victims, but by everyone. There is a clear link between tolerance towards and rights of minority groups in liberal-democratic societies, and the civil liberties of individuals and the democratic quality of the society. Justice Thomas R. Berger expressed the link as follows:

*Mass deportations, terror and torture, racial prejudice, political and religious persecution, and the destruction of institutions from which people derive their sense of identity are assaults upon human dignity and the human condition that are odious to men and women everywhere. In the Western democracies, we especially cherish representative institutions and the rule of law, democracy and due process. These traditions affirm the right to dissent: in politics, in religion, in science and in the arts. We conceive of these rights as individual rights, but they are much more than that. They are the means whereby diversity is maintained, and whereby minorities can thrive (1982, p. xi).*

*This book has told the story of minorities and dissenters. Yet their story is a story that affects us all. All of us are conscious, in one way or another, of limitations to our freedom, even at its furthest periphery, and we may feel inhibited by them. Who can tell when the periphery will cease to be the periphery? When does a limitation of freedom at the periphery cut into the blood and bone of a free society? In matters related to civil liberty, an attack on the periphery is as serious as an attack on the heartland. As F.R. Scott has said, "No citizen's right can be greater than that of the least protected group."*

*The confrontations between the institutions of the state and minorities and dissenters reveal the true face of Canadian democracy. They have shown that we must establish safeguards—stronger than those that have existed in the past—to protect minorities and the rights of dissenters... (Ibid., p. 255).*

To what extent is this true? Can a society not oppress or discriminate against a minority while retaining full democratic rights for the majority of citizens? To address this question, I shall review historical, international, and Canadian evidence which bears directly and indirectly on this question.

Historically, one can argue that democratic forms of government and notions of individual rights and freedoms evolved in tandem with recognition of the need for tolerance toward minorities and of minority rights in general. To be sure, the processes were uneven, with setbacks or lags along the way. Ancient Athens pioneered in the development of modern democratic practice while maintaining its status as a slave society. Both the United States and the United Kingdom evolved democratic political systems, as well as ideas of civil liberties, at the same time that slavery remained legal and, in North America at least, aboriginal peoples were systematically victimized. But in these cases the declared commitments to basic principles of civil liberties or human rights inexorably seemed to undermine the continuation of a regime of intolerance.

In continental Europe, societies such as Holland in the sixteenth and seventeenth centuries pioneered in the articulation of both religious tolerance and early democratic practice, while the French Revolution not only established the rights of men and citizens but extended these rights to actual

minorities such as the Jews, in 1791. In the twentieth century, we have in Nazi Germany perhaps the major, prototypical example of the link between individual freedom and tolerance for minorities. The Nazi regime did away with all the rudiments of democratic politics and civil and legal rights as we know them — free elections, free press and assembly, a free and impartial judicial system — while at the same time laying an ideological and practical groundwork for physical assaults on a wide range of minorities. Thus it is not coincidental that in a society that was the antithesis of a democracy, where individual rights and freedoms were nil, we have systematic attempts at genocide directed at Jews mainly, but at gypsies as well. The Third Reich also imprisoned and tried to eliminate a host of other minority groups, including homosexuals, the severely disabled (in the Nazi euthanasia program), and developed a racial doctrine which clearly designated peoples such as blacks and Slavs (along with Jews and gypsies) as racially inferior, and helped justify brutality and occasionally mass murder directed at the Slavs. Thus political opponents of the regime — communists, socialists, liberals, conservatives, theologians, and others — found themselves sharing fates similar to those victimized by ascription alone. Moreover, the extraordinarily sexist Nazi view of women (i.e., the state-sponsored breeding program) meshed well with this configuration of beliefs.

Ponder the social cost to Germany and the Germans of this experiment in extreme "discrimination": hundreds of thousands of dead and wounded Germans, including many civilians; severe privation during the last years of the war and after; cities turned to rubble; and, perhaps most serious, a nation politically divided into two opposing states (Barnet, 1983).

Today, even more than in the recent past, as countries such as Canada and the United States continue to make amends for historic wrongs, it seems that societies where democratic practice and civil liberties operate both in theory and practice are societies where minorities enjoy greater freedom and security. South Africa boasts some of the trappings of western parliamentarism and democracy, but even white freedoms are severely circumscribed, as are those of non-whites. The Soviet Union is another society that boasts a paper constitution but where both individual freedoms and those of groups — Jews, Ukrainians, militant Christians — are regularly curtailed. And looking at the developing world, where with some exceptions societies are not ruled democratically, we find minorities in the most precarious position of all: think of the Chinese boat people fleeing Vietnam, the Indians of Guatemala, or the Bahais in Iran. China, in a manner similar to that of the Soviet Union, permits neither individual civil rights nor democracy as we understand them, nor authentic expression of minority rights and powers by non-Han minorities, such as the Tibetans or the Mongolians on the Chinese perimeter. Minorities, like individuals, are controlled by and subservient to the state (and Party).

In North America in the twentieth century, there is some evidence that suggests that within a generally democratic system with a tradition of civil liberties, threats to individual rights and freedoms are more likely to come from groups more intolerant of minority rights. One exhaustive study of right-wing extremism in the United States has surveyed groups ranging from the Ku Klux Klan of the 1920s, the neo-

fascist movements of Gerald L. K. Smith and Father Charles Coughlin in the 1930s, through McCarthyism, the John Birch Society, and the supporters of George Wallace in the 1960s (Lipset and Raab, 1978).

The authors describe these right-wing movements, whether movements of the "never hads" or the "once hads", as being intrinsically "monist" in ideology, and antipathetic to any form of pluralism. "Nativist bigotry" is identified as one element of the monistic model (*ibid.*, p. 433). Such groups typically displayed a weak commitment to democratic principles, notably rights of free speech, as well as prejudice toward minority groups. The authors conclude that prejudice does not usually cause such extremist movements, but that it plays a role in the emerging ideologies. By the 1960s some groups, such as the John Birch Society or the supporters of George Wallace's presidential campaign of 1968, eschewed overt appeals to racial bigotry, but articulated anti-black positions through policy positions, e.g., opposition to busing and to welfare cheats, and strong support for "law and order", which lent themselves to racial interpretation on the part of the constituency. Similarly, while these movements did not openly espouse anti-democratic positions, i.e., doing away with constitutional liberties such as free speech, their rhetoric often hinted at their true constitutional leanings, as when George Wallace promised to "teach political dissenters a lesson" (Lipset and Raab, 1978, p. 171).

What conclusions can we draw from general Canadian social and political history about the link between the health of our democracy, including individual rights and freedoms, and treatment of minority groups?

Thomas Berger's (1982) review of the major transgressions of minority rights and rights of dissent in Canada suggests that there have been such links. We can look at the separate school issue, both in Manitoba in the 1890s and in Ontario in 1912 (regulation 17, passed by the Ontario Department of Education, stipulated that English only was to be the language of public schooling, which was legal since section 93 of the BNA Act dealt only with religious rights). In both cases, anti-French and anti-Catholic Orange sentiment played a role, if in differing degrees. While the Ontario episode did not involve apparent illegality, the Manitoba case offers an example of clear violation of law by the state (finally so identified by the Supreme Court in 1979) motivated by the animus of prejudice. Moreover, the Manitoba crisis placed severe stress on the practice of Canadian federalism, as well as the rule of law.

Betcherman's (1975) study of fascism in Quebec, Ontario, and the Prairies in the 1930s also demonstrates the co-existing themes of anti-Semitism, anti-liberalism, and anti-democratic ideology in these small but vociferous movements. Indeed, analysts of Quebec society have noted that anti-Semitism and xenophobia characterized traditional French-Canadian society until well past the Second World War (Milner and Milner, 1973). With modernization and enhancement of democratic life in the post-Duplessis Quebec came also a greater tolerance for and openness to minority groups.

## 2. Social-Psychological Evidence

A different approach to the same issue can be found in the research tradition usually dated from the publication of *The*

*Authoritarian Personality* (Adorno et al., 1950) studying the link between prejudice, personality traits, and non-democratic (authoritarian) attitudes and predispositions. The methods used in this tradition are usually those of large-scale survey research or smaller-scale human laboratory experiments. Subjects provide information on their attitudes toward various minority groups, and commitments to democratic procedures and values, and respond to psychometric tests designed to measure those traits hypothesized to be part of a personality syndrome of authoritarianism.

The argument is that prejudiced personalities — no matter how they are created — are also likely to be susceptible to non-democratic, demagogic appeals that we might term authoritarian. Thus, for example, they might be less tolerant of dissenters' rights, or non-conformity generally. Gordon Allport (1954) summarized this view as follows:

*Living in a democracy is a higgledy-piggledy affair. Finding it so, prejudiced people sometimes declare that America should not be a democracy, but merely a "republic". The consequences of personal freedom they find unpredictable. Individuality makes for indefiniteness, disorderliness, and change.*

*To avoid such slipperiness the prejudiced person looks for hierarchy in society. Power arrangements are definite — something he can understand and count on. He likes authority, and says that what America needs is "more discipline"....*

*This need for authority reflects a deep distrust of human beings.... we noted the tendency of prejudiced people to agree that "the world is a hazardous place where men are basically evil and dangerous." Now, the essential philosophy of democracy is the reverse. It tells us to trust a person until he proves himself untrustworthy. The prejudiced person does the opposite. He distrusts every person until he proves himself trustworthy.*

*To the prejudiced person the best way to control these suspicions is to have an orderly, authoritative, powerful society....*

*Our portrait of the prejudiced personality (called by some authors "the authoritarian personality") is based largely on the results of recent research. While the outlines of the pattern are clear, the weighting and interlocking of evidence are not yet complete. Contrasting with the authoritarian type, investigators report an opposite pattern of correlated qualities that comprise what is sometimes called a "democratic," a "mature," a "productive," or a "self-actualizing" personality (pp. 382-383).*

The researchers working in the tradition of *The Authoritarian Personality* posited the existence of a prejudiced or authoritarian personality, which was rooted in conditions of a repressive childhood. Repression in childhood, usually because of overly strict parents, led to a high degree of insecurity in adult life. The characteristics of this adult personality have been listed by Allport as ambivalence toward parents; moralism; dichotomization; a need for definiteness; externalization of conflict; institutionalism; and authoritarianism. Thus there is a need for authority to resolve ambiguities and quell insecurities.



The findings of *The Authoritarian Personality*, and particularly the instrument that measures authoritarianism, the F scale, have been the subject of much methodological criticism. Milgram (1963) has argued that the study is flawed, as his laboratory research found that propensity to obey authority and suspend moral judgement can be found almost universally distributed across sub-groups of the population. Others have argued that many of the instruments used to measure predisposition to authoritarianism in fact measure cognitive sophistication, or intelligence, and not predisposition to prejudice (Hyman and Sheatsley, 1954). In *The Authoritarian Personality* studies, a small sample was used and no strong educational differences were found on F-scale scores, but Hyman and Sheatsley did find F varying with education. Others have argued that the emphasis by Bettelheim and Janowitz (1964) and Adorno and his colleagues on the determining variable of individual childhood experience is misplaced, and that prejudice is more properly understood as something that is learned during socialization, imbibed from the external environment (Williams, 1964; Selznick and Steinberg, 1969). This latter argument helps explain the association between higher levels of education and lower levels of expressed prejudice found in almost all studies.

Despite these methodological and etiological debates, there remains a persuasive pattern of findings that link prejudice to weak commitments to civil liberties and/or democratic values. In their national survey of Americans in 1964, Selznick and Steinberg (1969) found that people scoring high on anti-Semitic measures also scored lower in terms of knowledge of the U.S. Constitution and tolerance for cultural diversity, the latter measured by the five following items:

1. *Would you be in favor of a law saying that groups who disagree with our form of government could not hold public meetings or make speeches, or opposed to it?*
2. *Would you be in favor of a law saying that the President must be a man who believes in God, or opposed to it?*
3. *Suppose a man admitted in public that he did not believe in God. Should he be allowed to hold public office?*
4. *Foreigners who come to live in America should give up their foreign ways and learn to be like Americans.*
5. *Persons who insist on wearing beards should not be allowed to teach in public schools.*

They argue that rather than a causal relation, the elements of simplism (the simplism scale is a condensed and revised version of elements of the F scale, pp. 139-143), intolerance of cultural diversity, and anti-Semitic prejudice form a syndrome. The syndrome encompasses a "primitive cognitive style, ignorance of democratic norms, a blaming and apocalyptic orientation toward social reality, rejection of civil libertarian principles, intolerance of cultural diversity, and anti-Semitic prejudice. All these are highly interrelated; all are most often found among the least educated segments of the population" (p. 156). They disagree with the assumption of *The Authoritarian Personality* that all individuals are presumed to be exposed equally to all strains in the culture and thus individual personality explains prejudice. They argue that people are exposed differentially to the "ideal culture"

(modernity, science, democratic values) and the more authoritarian "traditional" culture.

Bettelheim and Janowitz (1964) in their study of returning veterans of the Second World War likewise found that anti-Semitic intolerance was related to certain anti-democratic traits of respondents. Intolerant veterans were more likely to reject both major U.S. parties and the existing political system, expressing "a desire for action which could be characterized as explosive and chaotic, but without stable direction" (p. 193). In addition the authors found that the intolerant group "showed a lack of identification with national symbols" (p. 194), and intolerant men were more likely to "desire to abandon political decisions to other men..." (p. 197).

Other studies note similar findings. Williams, in his review of a series of surveys conducted throughout the United States on the issue of ethnic and racial prejudice, found that while high authoritarianism did not always correlate with a high degree of racial prejudice, it tended to enhance the likelihood of ethnic prejudice (1964, pp. 90-94). Feelings of anomie and authoritarianism were found to be associated with racial prejudice (Roberts and Rokeach, 1956). Among the traits found to be associated with higher levels of racial prejudice were beliefs in strict and unquestioning obedience for children, severe punishment for sex offenders, moralistic condemnation of people who do not live upright lives, a generalized distrust of others, feelings of discomfort with strangers, and high levels of personal frustration (Williams, 1964, p. 109).

Martin's (1964) study of adults in Indianapolis distinguished between the prejudiced and tolerant personality in similar fashion. Those who were tolerant of minorities were found to be less suspicious, anxious, and hostile, more flexible in perception and cognition, and less authoritarian.

Indirect evidence also suggests that tolerance for minorities and support for civil liberties may be related. Stouffer's (1955) classic studies of commitment to civil liberties, and a major replication in the 1970s (Nunn et al., 1978), have found consistently that tolerance for all manner of non-conformity and dissent is highly associated with education. This close link has also been found consistently between education and racial-ethnic tolerance. (Recent researchers have attempted to discount the link between education and racial tolerance, arguing that the findings of most surveys measure commitment to abstract principles, rather than specific behaviours or commitment to actual policies (e.g. busing, or affirmative action) designed to help minorities (Jackman, 1978). But here the issue may be the legitimate role of government, rather than racial tolerance.)

Unfortunately, we do not have a comparable body of Canadian research on this particular question. However Kalin (1981), commenting on the findings of a national survey on attitudes to multiculturalism sponsored by the federal government (Berry et al., 1977), has argued that among some Canadians we find a combination of pride in one's own ethnic identity, a sense of economic or cultural insecurity, and a lack of tolerance for other ethnic groups, which may comprise a "syndrome of authoritarian personality" (p. 147).

More relevant is the research by Henry (1978). In her study of racism in Toronto, based on a random survey of 617 white Torontonians, Henry included a measure of authoritarianism,

a "shortened version of the F scale — designed to measure an anti-democratic ideology", and "5 other questions related to authoritarianism" (p. 60). She found a very high correlation between racism and authoritarianism. As she writes, "almost half of the very racist group is very high in authoritarianism" and "almost all of the non-authoritarians are very tolerant with respect to racism" (p. 61).

In summary, I would argue that the sentiments quoted earlier by Justice Berger concerning the relation between tolerance for minorities and the health of democracy and civil liberty in Canada are far more than platitudes. They are supported by a review of international social and political history, the Canadian experience in the twentieth century, and the findings of social psychology and other social scientific studies.

### C. Socio-Political Stability and Integrity

A potential cost of discrimination, particularly if directed against visible minorities and native people, is the threat of urban disorder — violence — on the one hand, and secessionism or political disintegration on the other. This then is another way in which discrimination may weaken the democratic quality of life and the social order. Indeed, this was the conclusion of the Report of the National Commission on Civil Disorders in the United States (known as the Kerner Commission) in 1968, following the series of racial disorders that hit American cities in the summer of 1967. The issue can be summarized by quotation from the summary of the Kerner Report: "Discrimination and segregation have long permeated much of American life; they now threaten the future of every American. ... To pursue our present course will involve the continuing polarization of the American community and, ultimately, the destruction of basic democratic values" (p. 1).

Obviously Canada has far to go before it will reproduce the massive conditions of poverty and social pathology associated with American inner cities and racial ghettos. But Canada may well be headed down that road. Ethnic and racial segregation is a fact of life (Balakrishnan, 1982; Kalbach, 1981). In Toronto and Montreal, there are already clear areas of residential concentration of non-white minorities, notably West Indians and Haitians, often in working or lower class

areas typified by below average housing. Similar concentrations of urban Indians exist in western Canadian cities. Moreover, Indian reserves are also a form of residential concentration that may at some future point erupt in anger and despair. High schools, shopping malls, and neighbourhood parks in both Montreal and Toronto have been the scene of racially motivated violence, though accurate figures are unavailable. That more violence has not erupted among Canadian urban non-whites and on native reserves should not make Canadians smug.

Secessionism can be interpreted, *inter alia*, as a collective strategy for responding to a cumulative experience of discrimination. Who knows if independence would today be an option for Quebecois had the relations between the two major linguistic cultural groups evolved on a more equal footing over the decades? Canadian native people, and certainly native leadership, seem to have evolved towards accepting some notion of autonomism as the solution for many native problems. How far these notions or plans for autonomy will be pressed is as yet unclear, and will depend on further constitutional negotiation. Some plans include calls for recognition of native sovereignty in some form. Whether these new political aspirations can (or ought to) be deflected is of course not to be resolved here. But certainly no one can be puzzled if native people feel profoundly alienated from a society that has so victimized them over the centuries, not only economically but politically and culturally as well. There is a limit to the amount of fragmentation or decentralization that the Canadian polity can absorb, while remaining a viable entity. Happily, the evidence to date (Gibbins and Ponting, 1978) reveals that no significant backlash has yet developed among white Canadians to the demands of native people.

The threat of urban or reserve linked violence, and the threat of secessionism, are two other (potential) costs of discrimination.

### D. Loss of Undeveloped Talent

It is clear that vast stores of talent and creativity lie unused or underused among the ranks of disabled persons, non-whites, and women. White able-bodied males hold no monopoly on talent, and in any case represent a minority of the population. If discriminatory barriers to achievement and self-actualization would be removed, all of us would benefit in ways that are impossible to calculate.

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## ECONOMIC COSTS OF EMPLOYMENT DISCRIMINATION

Naresh C. Agarwal

### Sommaire

Les minorités visibles ont une place très importante dans le marché du travail. Aujourd'hui, les femmes représentent plus de 40 % de la population active. Au cours des 20 prochaines années, on prévoit que leur proportion passera à 50 %. La proportion des autochtones a également beaucoup augmenté. Seulement 30 % des autochtones en âge de travailler faisaient partie de la population active en 1961, mais ce chiffre atteignait 54 % en 1977-1978. «L'explosion démographique» autochtone des années 50 et 60 portera la population d'âge actif à environ 200 000 dans les années 80. Quoique des données ne soient pas recueillies systématiquement sur les autres groupes minoritaires (par exemple, ceux originaires du Tiers Monde et les personnes handicapées), on croit que leur nombre est considérable. Les travailleurs des groupes minoritaires constituent une importante réserve de travailleurs productifs, mais celle-ci est sous-utilisée. En témoignent le cantonnement professionnel des travailleurs des groupes minoritaires dans des emplois peu productifs exigeant peu de compétences et leur taux de chômage plus élevé. Pour des raisons d'égalité et d'économie, il faut que ces groupes soient traités équitablement sur le marché du travail. La sous-utilisation des travailleurs des groupes minoritaires peut coûter cher à l'économie du pays: taux national de productivité moins élevé, marché du travail inefficace, taux accru d'inflation et hausse excessive des frais associés aux programmes d'assistance sociale. Si des politiques ne sont pas adoptées pour intégrer davantage les travailleurs des groupes minoritaires au marché du travail, ces coûts augmenteront assurément à l'avenir. Bref, de telles politiques sont justifiées pour des raisons économiques et d'équité.

### Summary

Visible minority groups occupy a very critical position in the labour market. Today, women comprise more than 40 per cent of the total labour force. In the next 20 years, this share is expected to rise to 50 per cent. Labour force participation of native people too has shown significant increases. Only 30 per cent of working-age native people were in the labour force in 1961, but this rose to about 54 per cent in 1977-78. The native "baby boom" of the 1950s and 1960s will increase the working-age population by about 200,000 in the 1980s. While systematic data on other minority groups (such as people with Third World origins, disabled) are not available, it is believed that they too form a sizable number. While minority-group workers represent a vast productive pool, at present this pool is underutilized. This is reflected in the occupational segregation of minority workers into a narrow range of low-skill, low-productivity occupations and in higher levels of unemployment. Equity considerations require that these individuals receive a fair deal in the labour market. Economic considerations require the same. Underutilization of minority workers can entail significant economic costs in terms of lower national output, labour market inefficiency, and higher inflation, as well as excessive welfare costs. Unless policies are developed to integrate minority workers more fully into the labour market, these costs are likely to escalate in the future. In short, development of such policies is justified both on equity as well as economic grounds.



# ECONOMIC COSTS OF EMPLOYMENT DISCRIMINATION

Naresh C. Agarwal\*

The rising labour force participation of women and other minority groups in the labour force has brought the issue of the discrimination they face in the labour market to the forefront. An impressive volume of literature has emerged on this issue over the past several years. Calls for elimination of employment discrimination against minorities have been made largely on equity and social justice grounds. Thus it is argued that equally qualified workers should receive equal treatment in the labour market regardless of their sex, colour, or ethnic origins.

There is, however, another perspective—economic—that can justify elimination of employment discrimination against minority groups. The present study employs this perspective.

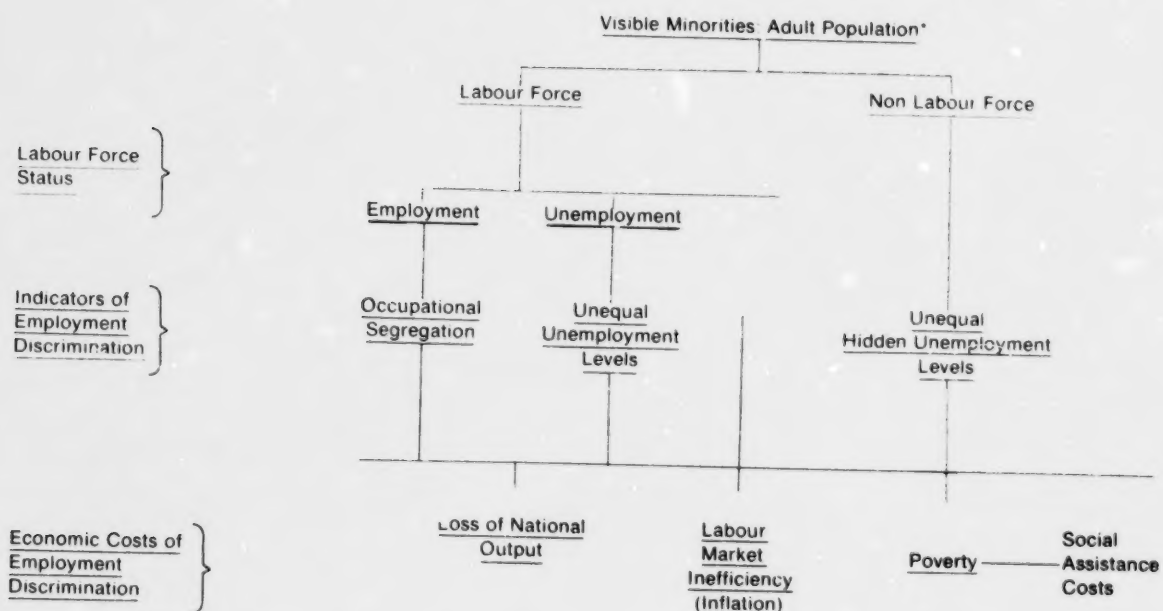
It argues that employment discrimination entails significant economic costs to society. These costs already appear to be significant, and as the minority share of the labour force increases they will become even more so. Figure 1 shows an overview of the economic costs involved. Employment discrimination can be reflected in occupational segregation and in unequal unemployment and hidden unemployment levels. Such underutilization of the minority labour force can cause a serious loss of potential national output. It can also prevent the labour market from efficiently correcting demand and supply imbalances in the "bottleneck" industries and occupations. This in turn can cause higher rates of inflation in the economy. Employment discrimination can also produce a higher incidence of poverty among minority workers, necessitating higher social assistance costs.

In what follows, each of the economic costs listed in Figure 1 is discussed in detail. Empirical evidence and research studies from Canada and other countries are reviewed.

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FIGURE 1

## Economic Costs of Employment Discrimination: An Overview



\* Civilian, non-institutionalized population



# I. OCCUPATIONAL SEGREGATION AND LOSS OF NATIONAL OUTPUT

## A. Evidence of Occupational Segregation

In Canada, the last two decades have witnessed a dramatic increase in the employment of visible minorities, reflecting the large increase in their labour force participation rates. But such increased employment has tended to remain segregated in a limited number of occupational categories. This is most evident in the case of women. The employment-population ratio<sup>1</sup> for women has risen from .276 in 1961 to .460 in 1982, representing an increase of 66.7 per cent. This means that the proportion of women in the working-age population who actually have jobs has increased by nearly two-thirds since 1961. This is in contrast to men, whose employment-population ratio has declined from .731 in 1961 to .684 in 1982, that is, the ratio for males has decreased by 6.4 per cent. While female employment has increased significantly in Canada, it continues to be segregated in a relatively few occupations. Table 1 shows occupational distribution by sex based on the monthly Labour Force Survey conducted by Statistics Canada. In 1975, about 63 per cent of employed women were concentrated in clerical, sales, and service occupations. The percentage was practically the same in 1982. In contrast, only just over 10 per cent of employed women in 1975 held jobs in the male-dominated occupations such as processing, construction, transportation, material handling, and other crafts. About the same percentage was still true in 1982.

A similar picture of occupational segregation emerges from the census. As Table 2 shows, 55.2 per cent of female employment in 1971 was concentrated in clerical, sales, and service occupations. The percentage increased to 60.1 in 1981. If teaching and health occupations from the broad category "professional and technical" in Table 2 are also included, about 70 per cent of employed women would be

accounted for in 1971 and about 74 per cent in 1981. Occupational categories are also broken down to finer levels in the census data. Table 3 lists the top 10 jobs for women, as per the 1981 Census. An even clearer picture of occupational segregation of women appears from these data. As is evident, 42.2 per cent of the female employed labour force in 1981 was concentrated in just 10 jobs. What is more, most of these jobs are among those at the lower end of the occupational hierarchy. Comparing the list of top 10 jobs between 1971 and 1981 censuses, one finds a striking stability. Nine of the top 10 jobs are common between the two censuses.<sup>2</sup> The 10 jobs listed in Table 3 accounted for 40.6 per cent of the total female employed labour force in 1971, compared to 42.2 per cent in 1981. Thus the occupational segregation of women seems to have actually increased somewhat between 1971 and 1981.

The occupational segregation of women into relatively limited and generally low-level jobs has persisted despite their rising education levels and their increasing economic need for work. Empirical studies show that education has played a significant factor in increasing female labour force participation. For example, over the period 1975-80, the largest increase in participation rates occurred among women with some post-secondary education, followed by women with high school education (Swan, 1981). Enrolment statistics also point to a similar trend. For example, between 1971-81, full-time enrolment of women aged over 24 years increased by 70 per cent and part-time enrolment by 146 per cent. The corresponding figures for men were 35 per cent and 55 per cent respectively (Statistics Canada, 1983). Along with their rising education, women are under greater pressure than ever before to put this education to their best economic use. "The economic necessity of work is obvious for the 40% of the female labour force that is single, separated, divorced or widowed. The contribution of the income of married women to families is also of major importance. The National Council

TABLE 1  
Occupational Distribution by Sex: Labour Force Survey Data

| Occupations                                 | % of Employment |        |        |        |        |        |
|---------------------------------------------|-----------------|--------|--------|--------|--------|--------|
|                                             | Female          |        |        | Male   |        |        |
|                                             | 1975            | 1980   | 1982   | 1975   | 1980   | 1982   |
| Managerial, Professional, Etc. <sup>1</sup> | 23.5 %          | 23.9 % | 26.0 % | 20.6 % | 22.3 % | 23.8 % |
| Clerical                                    | 36.1            | 34.6   | 34.0   | 6.9    | 6.3    | 6.4    |
| Sales                                       | 10.4            | 10.4   | 10.1   | 11.5   | 10.4   | 10.8   |
| Service                                     | 16.6            | 18.1   | 18.2   | 9.7    | 10.1   | 10.7   |
| Primary Occupations <sup>2</sup>            | 3.1             | 2.9    | 2.8    | 8.8    | 8.5    | 8.0    |
| Processing, Etc. <sup>3</sup>               | 8.1             | 7.5    | 6.4    | 20.2   | 20.6   | 19.8   |
| Construction                                | 0.1             | 0.2    | 0.2    | 10.9   | 10.0   | 9.3    |
| Transportation                              | 0.4             | 0.6    | 0.5    | 6.3    | 6.4    | 6.0    |
| Material Handling & Other Crafts            | 1.8             | 1.8    | 1.8    | 5.2    | 5.3    | 5.1    |

1. Includes managerial and administrative, natural sciences, social sciences, religion, teaching, medicine and health, artistic and recreational occupations.

2. Includes farmers, farm workers, fishermen, trappers, hunters, loggers, quarrymen, and related.

3. Includes processing, machining, product fabrication, assembly, repairing, etc.

Source: Statistics Canada, *The Labour Force*, December 1980 and 1982, Catalogue No. 71-001. 1975 data from Statistics Canada, *Labour Force Annual Averages*, 1975-1978, Catalogue No. 71-529.

**TABLE 2**  
**Occupational Distribution by Sex: Census Data, 1971 and 1981**

| Occupations                                  | % of Employment |        |       |        |
|----------------------------------------------|-----------------|--------|-------|--------|
|                                              | 1971            |        | 1981  |        |
|                                              | Male            | Female | Male  | Female |
| Managerial                                   | 5.5 %           | 2.0 %  | 8.5 % | 4.2 %  |
| Professional & Technical <sup>1</sup>        | 10.0            | 17.7   | 12.2  | 19.2   |
| Clerical                                     | 7.6             | 31.7   | 6.8   | 35.1   |
| Sales                                        | 10.0            | 8.4    | 9.4   | 9.6    |
| Service                                      | 9.2             | 15.1   | 9.5   | 15.4   |
| Primary Occupations                          | 9.9             | 3.7    | 8.2   | 2.3    |
| Processing, Machining, & Product Fabricating | 17.5            | 7.6    | 19.1  | 7.3    |
| Construction                                 | 9.9             | 0.2    | 10.5  | 0.3    |
| Transport                                    | 5.8             | 0.3    | 5.9   | 0.6    |
| Material Handling                            | 2.9             | 1.4    | 4.2   | 1.7    |
| Other Crafts                                 | 1.7             | 0.5    | 1.6   | 0.6    |
| Occupations not classified elsewhere         | 2.6             | 0.7    | 2.1   | 0.6    |
| Occupations not stated                       | 7.4             | 10.7   | 3.6   | 3.7    |

1. Includes natural sciences, social sciences, religion, teaching, medicine and health, artistic, and recreational occupations.  
 Source: Statistics Canada: 1981 *Census of Canada*, Catalogue No. 92-920. (1971 Census figures are reproduced in this volume.)

**TABLE 3**  
**Top Ten Jobs for Women in Canada, 1981**

| Jobs                                    | Number of Females Employed | % of Total Female Employment | Female % of Job |
|-----------------------------------------|----------------------------|------------------------------|-----------------|
| 1. Secretaries & Stenographers          | 368,025                    | 7.6 %                        | 98.9 %          |
| 2. Bookkeepers & Accounting Clerks      | 332,330                    | 6.9                          | 81.9            |
| 3. Salespersons/Clerks                  | 292,915                    | 6.0                          | 59.4            |
| 4. Tellers & Cashiers                   | 229,325                    | 4.7                          | 92.7            |
| 5. Waitresses & Hostesses               | 200,710                    | 4.1                          | 85.7            |
| 6. Nurses                               | 167,710                    | 3.5                          | 95.4            |
| 7. Elementary & Kindergarten Teachers   | 139,620                    | 2.9                          | 80.4            |
| 8. General Office Clerks                | 115,015                    | 2.4                          | 80.5            |
| 9. Typists and Clerk Typists            | 102,970                    | 2.1                          | 97.8            |
| 10. Janitors, Charworkers, and Cleaners | 96,735                     | 2.0                          | 41.2            |
|                                         | 2,045,355                  | 42.2                         | 79.1            |

Source: Statistics Canada, 1981 *Census of Canada*, Catalogue No. 92-920.

of Welfare has estimated that 51% more two-spouse families would be poor if wives did not work outside the home" (Swan, 1981, p. 22). Both the rising level of education and the increasing economic necessity for work imply that supply-side factors may not be very powerful explanations of the occupational segregation of women. Instead, demand-side factors such as stereotyping of women with respect to their suitability for various occupations and discriminatory hiring policies may be more important explanations. For example, a recent survey of male and female post-secondary graduates shows that the largest occupation for female graduates with specialization in business/commerce/management fields

was clerical; for comparable male graduates, the largest occupations were managerial and sales (Statistics Canada, 1980).

Information on occupational distribution of other visible minority groups while limited, points to similar conclusions. Frideres (1974) has examined data on occupational distribution of native Indians (males only) from 1931 to 1961. He found that native Indians were under-represented in white-collar jobs and over-represented in primary and unskilled jobs. The same picture emerges when one examines data from the 1971 Census. As shown in Table 4, compared to the national average, native Indians are over-represented in

the primary and labouring occupations. In white-collar jobs such as managerial, professional, and clerical, they are grossly under-represented. Recently, the Native Council of Canada and the Canada Employment and Immigration Commission (1977) conducted a national survey of Métis and non-Status Indians. The survey found that native Indians were highly concentrated in low-skill, low-pay, low-entry-level occupations. The same pattern of employment was found in another recent study of native Indians in the Winnipeg labour market (Clatworthy, 1981). Perhaps a major explanation of occupational segregation of native Indians lies in their substantially lower education and occupational skills. But even when they possess these characteristics, they may not be able to capitalize on them to the extent other groups in the labour market can. The evidence from the above-mentioned Winnipeg study indicates that Status Indian women with higher education suffer greater employment barriers than those with less education. Recent surveys by the Canadian Civil Liberties Association also point to discrimination in hiring of native Indians in Kenora, Sault St. Marie, and Fort Frances, all with significant Indian populations. The Kenora survey conducted in 1978 found only two native people employed in 14 retail businesses employing a total of 350 persons. In addition, no native was employed in any of the five banks in Kenora, which employed a total of 67 employees. Similar patterns were found in the other two surveys (Indian and Northern Affairs Canada, 1980).

TABLE 4

**Occupational Distribution: Native Indians  
and Nationwide, 1971**

| Occupations                                    | % of Employment |            |
|------------------------------------------------|-----------------|------------|
|                                                | Native Indians  | Nationwide |
| 1. Managerial, Administrative & Related        | 1.5 %           | 4.3 %      |
| 2. Professional & Technical                    | 7.5             | 12.7       |
| 3. Clerical & Related                          | 7.0             | 15.9       |
| 4. Sales                                       | 2.6             | 9.5        |
| 5. Service                                     | 12.2            | 11.2       |
| 6. Primary Occupations                         | 16.1            | 7.7        |
| 7. Processing, Machining & Product Fabricating | 10.4            | 14.2       |
| 8. Construction Trades                         | 9.8             | 6.6        |
| 9. Transport                                   | 3.5             | 3.9        |
| 10. Material Handling & Related                | 3.0             | 2.4        |
| 11. Other Crafts                               | 0.7             | 1.3        |
| 12. Labourers                                  | 2.2             | 0.9        |
| 13. Other Occupations                          | 1.1             | 1.0        |
| 14. Occupations not stated                     | 22.4            | 8.5        |

Source: Statistics Canada, 1971 *Census of Canada*, Catalogue Nos. 92-920 and 94-734.

As indicated earlier, Third World immigrants have come to constitute an important component of the visible minority group in the labour market. No comprehensive data are available on occupational distribution of this sub-group. Some information is, however, available through a longitudi-

nal survey of immigrants conducted by the Canada Employment and Immigration Commission (Saunders, 1975). The survey collected data from a random sample of immigrants entering Canada in each of the years 1969, 1970, and 1971. The data pertains to the labour market experience of immigrants during their first three years in Canada. Tables 5 and 6 present relevant data from this survey. The data in Table 5 show that compared to the immigrants from other countries, the Third World immigrants are under-represented in occupations such as managerial, professional/technical, and craftsmen. They seem to be over-represented in clerical and service occupations. These occupational differences exist despite the higher educational qualifications of immigrants from Third World countries compared to those from other countries. The percentage distribution of Third World immigrants across the three educational categories 1-5 years, 6-10 years, and 11 years or more was 1.5, 36.8, and 61.7 respectively. The corresponding distribution for immigrants from other countries was 13.8, 38.4, 47.8 respectively (Saunders, 1975, Table 1).<sup>3</sup> Table 6 shows the percentage of immigrants who were not in occupations of their choice. The figures are considerably higher for Third World immigrants compared to other immigrants. While both groups of immigrants improved their position after three years, the improvement is somewhat smaller for those from the Third World. The survey found that major reasons cited for not being in occupations of their choice were: lack of Canadian experience, qualifications not recognized, and qualifications not accepted. About 50 per cent of the respondents in the Third World group cited these reasons after being in Canada for six months. Even after being in Canada for three years, 46 per cent of the group still faced the same hinderances. In contrast, the percentage of immigrants from other countries who cited these reasons was much smaller—29.7 after six months and 28.8 after three years. Similar results were found in a more recent survey of the immigrant population in Metropolitan Toronto (Sharma, 1980).

#### B. Loss of Potential National Output

Given that women and other minority workers face considerable occupational discrimination in the labour market, the question that arises is: what is the impact of such discrimination on national output?

Conceptually, the answer to the above question is available from the so-called "crowding" hypothesis. This hypothesis can be traced to Fawcett (1918), who argued that employers and unions denied women access to high-skilled, high-paid occupations. Women were, thus, crowded into a few and generally low-skilled, low-paid occupations. A few years later, Edgeworth (1922) formalized the crowding hypothesis in neo-classical terms. According to this formulation, the overcrowding of minorities into a limited number of jobs would tend to drive the marginal productivity of labour in such jobs to abnormally low levels. The reverse would be true in those jobs that are reserved for the majority group. Implicit in the crowding hypothesis is the notion of inefficient allocation of resources. Due to occupational segregation, the low-level jobs may exist in greater than optimum number and may employ many minority workers who otherwise may be qualified to hold higher-level jobs. By the same logic, occupational segregation may also cause the high-level jobs to exist in smaller than optimum number, and in some cases



**TABLE 5**  
**Immigrants by Country of Origin and Occupation after 6 Months and 3 Years**

| Occupations              | Third World      |                  | All Others       |                  |
|--------------------------|------------------|------------------|------------------|------------------|
|                          | After 6 Months   | After 3 Years    | After 6 Months   | After 3 Years    |
| Managers                 | 2.6 %            | 2.7 %            | 4.6 %            | 6.5 %            |
| Professional & Technical | 23.2             | 25.0             | 28.5             | 30.5             |
| Clerical                 | 11.7             | 13.2             | 4.6              | 4.7              |
| Sales                    | 3.6              | 3.6              | 2.9              | 3.2              |
| Service & Recreation     | 15.6             | 12.1             | 10.3             | 6.2              |
| Craftsmen                | 20.7             | 20.6             | 26.3             | 23.7             |
| Other                    | 22.6             | 22.8             | 22.8             | 25.2             |
| Total                    | 100.0<br>(2,142) | 100.0<br>(1,885) | 100.0<br>(3,641) | 100.0<br>(3,211) |

Source: Reproduced from Saunders (1975).

**TABLE 6**  
**Immigrants by Country of Origin not in Occupations of their Choice**

|                | Third World | All Others |
|----------------|-------------|------------|
| After 6 months | 47.1 %      | 36.6 %     |
| After 3 years  | 34.3        | 24.7       |

Source: Reproduced from Saunders (1975).

such jobs may employ less than qualified majority workers. If occupations were desegregated, resources would be reallocated toward more productive uses. Labour would move from low-productivity jobs to higher-productivity jobs. Such reallocation of resources would result in higher national output.

Empirical studies have employed the above framework in assessing the economic cost of occupational segregation. Such studies attempt to estimate what the total output would have been if equally qualified majority and minority workers had equal occupational distributions. The estimated output is then compared to the actual output, and the excess of estimated over actual is taken as a measure of the economic costs of occupational discrimination. It should be noted here that these estimates should be treated as upper bounds because the observed differences in the occupational distributions between majority and minority workers may not entirely result from discriminatory access to occupations. These may partly reflect differences in occupational preferences between the two groups.

No empirical study has been published in Canada on this subject. In the United States and Britain, only a handful of studies have been undertaken. These studies are reviewed in detail below. The conclusions of these studies should be quite relevant for the Canadian situation. Many comparative studies have indicated that the labour market experience and occupational status of minorities are largely similar across

Canada, the United States, and Britain (Gunderson, 1982; Jain and Sloane, 1981).

Two empirical studies of economic costs of employment discrimination are available from the United States—the first by the Council of Economic Advisors (Economic Report of the President, 1965) and the second by Bergmann (1971). According to the first study, "Discrimination against minorities—Negroes, Puerto Ricans, Spanish-Americans, Indians, and others—has significant costs. It is estimated that society loses up to \$20 billion per year of potential production as a result of employment discrimination and poor educational opportunities for non-whites" (Economic Report of the President, 1965, p. 167). Assuming that the data in the study related to the year 1964, the estimated loss would constitute about 3.86 per cent of the national income. It is difficult to analyze this estimate as the study does not provide any information on how the estimate was arrived at. Two points, however, should be noted:

- The estimate of \$20 billion includes the effects of both employment discrimination and poor educational opportunities. The latter, while important, occurs outside the labour market. It is generally referred to as pre-entry discrimination.
- The study focuses on only non-white members of the minority workforce. It therefore excludes the most important component of this workforce—white female workers, who in 1964 constituted about 30 per cent of the U.S. labour force. If they too were included in the study, the estimated loss of output due to employment discrimination would have been much higher.

Bergmann (1971) also investigated the adverse impact of employment discrimination on national income. Her study focuses on black workers in the U.S. Its empirical analysis relates to the year 1967. According to Bergmann, the adverse impact of employment discrimination against blacks depends on the size of the black labour force relative to the restrictions on hiring them. Let us suppose that blacks are allowed to enter only one occupation, i.e., janitors, and that

the number of blacks was larger than the number of janitors demanded in a colour-blind economy. In order to clear the market for the janitorial labour into which blacks are forcibly crowded, the marginal productivity of labour would have to be pushed to an abnormally low level. By the same logic, the marginal productivity of labour in jobs reserved for whites would be abnormally high because of the exclusion of the black workers.

Implicit in the above example is the notion of inefficient allocation of productive resources. Due to occupational segregation, the low-level jobs ("black jobs") may exist in greater than optimum number and may employ many black workers who otherwise may be qualified to work in higher level jobs ("white jobs"). At the same time, occupational segregation may also cause the higher-level jobs to exist in smaller than optimum number and in some cases even employ less than qualified white workers. Clearly, if occupations were to be desegregated, the resources would be reallocated toward more productive uses. Labour would move from low-productivity jobs to high-productivity jobs. Such reallocation of resources should result in higher national income.

Bergmann in her study carries out a simulation exercise to estimate what the national income would have been in 1967 if occupations were desegregated and workers employed according to their productive qualifications. The exercise is carried out holding constant the total number of jobs in the economy and the number of white and black workers employed. By doing so, the exercise can examine the unique effects of occupational desegregation and the resulting reallocation of resources. The exercise employs an involved mathematical procedure and a given value of the elasticity of substitution.<sup>4</sup> It also makes the following assumptions: a) both white and black workers are paid wages equal to their marginal productivity of labour so that the former can be used to approximate the latter; and b) white and black workers with equal education are perfect substitutes for each other in the production process. Quality of education and other human capital factors are thus not taken into account. Given these assumptions, the results of the Bergmann study are summarized in Tables 7 and 8. The results shown relate to a range of values of the elasticity of substitution between different kinds of labour. Because it is difficult, *a priori*, to justify any particular value for this elasticity, Bergmann uses a

range. However, Bergmann appears to assume that the normal range of this parameter lies between 0.25 to 3.00 and thus provides results only for these values.

TABLE 7

## Post-Integration Changes in National Income

| Elasticity of Substitution | Increase in National Income (%) |
|----------------------------|---------------------------------|
| 0.25                       | 0.16                            |
| 1.00                       | 0.59                            |
| 3.00                       | 1.41                            |

Source: Adapted from Bergmann (1971).

Table 7 shows that if occupations are desegregated, the increase in national income can be as high as 1.41 per cent.<sup>5</sup> This translates to about \$9 billion for the year 1967. It should be noted that as a result of desegregation some white workers may move from their current high-level jobs to low-level jobs and consequently suffer losses in income. Bergmann, however, estimates such income losses to be trivial. The income losses range from 0.4 to 8.9 per cent for male workers and 0.6 to 14.0 per cent for female workers. For the majority of male and female workers, figures closer to the lower limit are applicable. The income gains for blacks are, however, substantial, ranging from 40.4 to 60.1 per cent for males and 34.9 to 54.6 per cent for females. Table 8 shows the occupational shifts that will occur as a result of occupational desegregation. Consistent with the "crowding" hypothesis, the number of low-level jobs in which black workers were previously segregated will decline, and the number of high-level jobs previously reserved for white workers will increase.

Bergmann's estimate of the economic cost of employment discrimination appears to be significantly smaller than that provided by the President's Council of Economic Advisors (CEA)—1.41 per cent (or less) of national income compared to 3.86 per cent of national income. It should be noted that the CEA focused on all non-whites including blacks, Puerto Ricans, Spanish-Americans, Indians, and others. Bergmann

TABLE 8

Post-Integration Occupational Shifts  
(In millions of jobs)

| Type of jobs          | Actual<br>in 1967<br>(Pre-integration) | Post-integration           |       |       |
|-----------------------|----------------------------------------|----------------------------|-------|-------|
|                       |                                        | Elasticity of Substitution |       |       |
|                       |                                        | 0.25                       | 1.00  | 3.00  |
| Previously Black jobs | 6.33                                   | 5.77                       | 4.35  | 2.00  |
| Previously White jobs | 52.80                                  | 53.36                      | 54.78 | 57.13 |
| Total                 | 59.13                                  | 59.13                      | 59.13 | 59.13 |

Source: Adapted from Bergmann (1971).

considered only blacks. This, however, cannot account for the wide difference in the estimate of economic cost of discrimination between the two studies. Perhaps the CEA used a higher value of the elasticity of substitution in its computations than Bergmann. But since the CEA study does not provide any details, this speculation cannot be ascertained.

Recently, Tzannatos (1983) has attempted to estimate the economic cost of employment discrimination in the British labour market. He focuses on female workers, who constitute about one-third of the employed labour force in Britain. In the non-manual sector, the majority of women are concentrated in clerical occupations, while most men tend to be in managerial and professional occupations. In the manual sector, most women are in unskilled occupations while most men are in the more skilled jobs.<sup>6</sup> The conceptual framework, methodology, and the assumptions in Tzannatos are basically similar to those in Bergmann. These were discussed above and need not be repeated here. The results of Tzannatos' study are provided in Table 9. It should be noted that these results are based on the elasticity of substitution being equal to six. The data base employed in the study relate to the year 1976.

Table 9 indicates that the effect of occupational desegregation is to increase national income by 8.3 per cent. Underlying this overall change are the following disaggregate changes. First, the losses of income to men caused by occupational desegregation are very small, ranging from 1.2 to 5.0 per cent. The income gains to females are, however, substantial. They range from a low of 29.6 per cent to a high of 75.2 per cent. Table 9 also shows that after desegregation, total employment will decline in the previously female occupations and increase in the previously male occupations.

There is a remarkable similarity in the pattern of disaggregate results between Tzannatos' study for Britain and Bergmann's study for the U.S. In both studies, occupational desegregation results in insignificant income losses to the majority workers (males in Tzannatos and whites in Bergmann) but rather substantial income gains to the minori-

ty workers (females in Tzannatos and blacks in Bergmann). Again, consistent with the "crowding" hypothesis, occupational desegregation results in a decline in employment in the previously minority group dominated jobs and an increase in employment in the previously majority group dominated jobs. The two studies, however, differ significantly in terms of their overall result. The estimated gain in national income from occupational desegregation is 1.41 per cent or less in Bergmann, while as high as 8.3 per cent in Tzannatos. This difference may be explained by the following three factors:

- Tzannatos' reference group is female workers, who constitute 33 per cent of the total labour force included in the study. Bergmann's reference group, on the other hand, is blacks, who constitute only 10 per cent of the labour force included in the study.
- The extent of occupational segregation between sexes is greater than between racial groups. For example, Fuchs (1971) shows that occupational segregation in the U.S. between white males and white females is much higher than between white males and black males.
- Finally, Tzannatos uses a much higher value of the elasticity of substitution than Bergmann—six in the former compared to a maximum of three in the latter. While Tzannatos regards this high a value of the elasticity of substitution as normal, he does provide results using lower values of the elasticity. The estimated increases in national income with the elasticity of substitution equal to 1.0 and 3.0 are 2.4 per cent and 5.7 per cent respectively. In Bergmann, the estimated gains in national income for these values of the elasticity of substitution are 0.59 and 1.41 respectively. Considering the factors discussed in a) and b) above, these results appear to be quite consistent.

The estimates of economic cost of occupational segregation Bergmann provides for the U.S. and Tzannatos for Britain should be treated as upper bounds. These estimates indicate the possible gains in national income that are forgone due to occupational segregation of minority workers. Even if

**TABLE 9**  
**Post-Integration Changes in Income and Employment**

| Highest qualification level attained | Percentage change in:       |       |                          |                    |
|--------------------------------------|-----------------------------|-------|--------------------------|--------------------|
|                                      | Annual incomes of full-time |       | Employment in previously |                    |
|                                      | Men                         | Women | Male Occupations         | Female Occupations |
| Degree or equivalent                 | -1.2                        | 49.3  | 16.6                     | -90.2              |
| Higher education (below degree)      | -4.4                        | 29.6  | 42.1                     | -77.1              |
| GCE "A" level or equivalent          | -1.4                        | 58.9  | 17.8                     | -93.3              |
| GCE "O" level CSE grade 1            | -5.0                        | 75.2  | 47.2                     | -96.3              |
| CSE other grades                     | -3.9                        | 65.1  | 37.3                     | -94.6              |
| No qualifications                    | -3.9                        | 64.9  | 37.5                     | -94.6              |
| Change in output                     | 8.3                         |       |                          |                    |

Source: General Household Survey, 1976.

The above table is reproduced from Tzannatos (1983).



the employer demand for labour was sex/colour blind, to what extent occupational distribution would be actually desegregated would depend on supply-side decisions. Such decisions are constrained by preferences and rational household decisions. To the extent the observed occupational distribution of minorities reflects their rational occupational choices, the estimated gains in national income forgone will be smaller.

The question of the relative importance of taste versus discrimination in explaining the observed occupational distribution of minorities is a difficult one. Recently a U.S. study by Brown, Moon, and Zoloth (1980) attempted to examine occupational distribution of women controlling for the taste factor. The study starts out with the assumption that were it not for discrimination and differences in tastes, the occupational distribution would be the same for men and women with comparable personal characteristics. "Consequently, the ability to predict occupations for men accurately on the basis of their backgrounds and qualifications allows us to construct a hypothetical 'discrimination-free' distribution of occupations for women, but only if we assume that women's tastes for different occupations are the same as men's. If we include in this new simulation of occupations only those women whose tastes about work are likely to be most similar to men's then we can begin to identify the effects of discrimination on occupational attainment. The portion of the occupational distribution that we attribute to discrimination is a 'residual' since it represents those differences in occupation between the original distribution and the distribution simulated for career oriented women that are not explained by their socio-economic characteristics" (Brown, Moon, and Zoloth, 1980, p. 508).

Following the above approach, Brown, Moon, and Zoloth first developed a model to predict the male occupational distribution. The model used the following socio-economic characteristics: schooling, vocational training, labour market experience prior to current job, number of children, father's occupation when the individual was age 15, and urban or

rural residence at age 15. The coefficients of this model were estimated, using a sample of 2,277 white males aged between 45 and 59.<sup>7</sup> The coefficients were then applied to a sub-sample of 829 career women selected from a total sample of 1,968 women aged 35 through 49.<sup>8</sup> The career-oriented women include all females who are heads of households or who earn more than their spouses and have spent one-half or more of their potential working years in the labour force. The resulting simulated occupational distribution of women is shown in Table 10, along with the actual occupational distribution for women as well as men. Comparing the actual occupational distribution of men and women, the familiar pattern appears again. More than 50 per cent of all males are in the managerial and crafts occupations, compared to 6.8 per cent of all females. On the other hand, 40 per cent of all females are in the clerical occupations, compared to only 5.1 per cent of all males. Of greatest interest to us here are the differences between the actual and the simulated occupational distributions of women. The simulated distribution for the full sample of women (row C) shows much higher percentages in the managerial and crafts occupations and much lower percentages in the clerical and service occupations than the actual distributions of occupations (row A). Similar differences, though somewhat smaller, still exist when only the career women are included in the simulation exercise (row B compared to row A). These marked differences between the actual and simulated occupational distributions of women are "residual", i.e., these cannot be explained by socio-economic characteristics of women, even including the taste factor. Brown, Moon, and Zoloth attribute these differences to the employment discrimination that women face in the labour market. Similar conclusions are also reached in a more recent study by Meyer and Maes (1983). They compare the detailed occupational distributions of young<sup>9</sup> and old female workers and find a remarkable similarity between the two. Given that women's tastes and preferences have changed dramatically over the past decades, this similarity can only indicate occupational segregation that women continue to face in the labour market.

**TABLE 10**  
**Actual and Predicted Occupational Distributions**  
(in Percentages)

|                                              | Professional<br>& Technical | Managerial | Clerical | Sales | Crafts | Operatives | Service | Laborers |
|----------------------------------------------|-----------------------------|------------|----------|-------|--------|------------|---------|----------|
| <i>Women</i>                                 |                             |            |          |       |        |            |         |          |
| A. Actual                                    | 12.1                        | 5.3        | 40.0     | 7.5   | 1.2    | 16.4       | 14.8    | 2.7      |
| B. Predicted for career women <sup>1,2</sup> | 10.0                        | 17.0       | 27.1     | 6.7   | 8.7    | 16.9       | 10.6    | 3.1      |
| C. Predicted for all women <sup>2</sup>      | 8.6                         | 37.8       | 6.9      | 3.4   | 18.2   | 19.5       | 1.7     | 3.9      |
| <i>Men</i>                                   |                             |            |          |       |        |            |         |          |
| D. Actual                                    | 9.1                         | 25.5       | 5.1      | 4.7   | 25.6   | 18.5       | 5.0     | 6.4      |

1. Includes the total sample of 1,968 women, but only the 829 career-oriented women were redistributed according to the model.  
2. Two statistical procedures were used in prediction analysis — Discriminant Analysis and the Multinomial Logit Analysis. The results using these two procedures were almost identical. Hence the results using only Discriminant Analysis are shown here.

Source: Adapted from Brown, Moon, and Zoloth (1980).

To summarize, the empirical studies reviewed above show that female and other minority workers face considerable occupational segregation and that this segregation has significant economic costs measured in terms of the loss of potential national income.

### C. Economic Cost of Occupational Segregation to Employers

So far we have reviewed only the macro studies of economic cost of employment discrimination. Two micro, employer-level studies are also available on the subject; these are reviewed in this section. The first study relates to the American Telephone and Telegraph Company (AT&T). The study by Ashenfelter and Pencavel (1976) is based on the theory of the economics of discrimination as advanced first by Gary Becker (Becker, 1971). According to this theory, a discriminatory firm has a distaste for employing minority workers and as such perceives a cost associated with hiring them. This cost can be measured in terms of a coefficient called  $d$ . A discriminatory firm acts as if  $w(1+d)$  were the net wages paid to the minority workers. Let us say that the market wage rate for female workers is \$4 per hour and the discrimination coefficient for a firm is 20 per cent. In this case, the firm would act as if the wage rate for female workers was  $4(1+.20) = \$4.80$ . This implies that the firm would be willing to hire male workers even if they were more expensive. In our example, the firm would rather hire male workers at wage rates of up to \$4.80 than hire female workers at \$4. Clearly, if the firm were to end its discriminatory policy, its costs of production would go down. The size of the cost reduction will depend, among other things, on: a) the value of the firm's own discrimination coefficient  $d$  (the higher the coefficient, the higher the likely cost reduction); and b) the behaviour of other discriminatory employers in the market. If they too end discrimination at the same time, the cost reduction will be lower.

The Ashenfelter and Pencavel study employs the above framework to assess the impact of employment discrimination against women on AT&T's cost of production. Specifically, the study seeks to answer the question: "By what amount will the firm's costs be lower in the absence of discriminatory employment decisions on the part of its management?" The study relates to the year 1970. As a first step, the study analyzes the extent of occupational segregation in AT&T. It shows that, in 1969, males constituted 99.9 per cent of the job category titled "foreman of telephone craftsmen among construction installation and maintenance employees". In comparison, practically 100 per cent of "experienced switchboard operators" were female workers. The study then goes on to estimate the effect on costs of production if occupational distributions were to become non-discriminatory. The estimation process necessitates the modeling of an appropriate production function, that is, the technical input-output relationship for AT&T. Based on prior empirical research, Ashenfelter and Pencavel assumed a linear homogenous production function to be a good approximation for AT&T. Such a production function indicates that if each factor input is increased by a given proportion, then output will increase in the very same proportion. Given this assumption, an econometric procedure was employed to estimate the change in costs of production that will result

from substituting female workers for male.<sup>10</sup> The results of this exercise are shown in Table 11. They show that the end of discriminatory employment practices in entry-level jobs will result in a reduction of .77 per cent in AT&T's average costs. If such practices were to end in all non-management jobs, the average costs would go down by an additional 1.52 per cent (to 2.29 per cent). Finally, the average costs would go down by another 1.62 per cent (to 3.91 per cent) if employment discrimination were to end in all jobs, management and non-management. It should be noted here that these estimates are based on the assumption that other discriminatory employers in the market do not end employment discrimination at the same time as AT&T. As explained earlier, if this assumption does not hold, the cost reduction will be smaller. Hence the estimates in Table 11 should be treated as representing the higher limit.

TABLE 11

#### Estimates of Percentage Decline in Average Costs

| Type of job category<br>in which females<br>replace males | % Decline in<br>Average Costs |
|-----------------------------------------------------------|-------------------------------|
| Entry-level jobs                                          | 0.77                          |
| All non-management jobs                                   | 2.29                          |
| All jobs                                                  | 3.91                          |

Source: Ashenfelter and Pencavel (1976).

In a more recent study, Dunnette and Motowidlo (1982) have attempted to estimate what discriminatory employment practices might cost the employer. Their study relates to a large U.S. organization;<sup>11</sup> it focuses only on the management and supervisory positions. Conceptually, the study starts out with the basic premise that discriminatory employment policies are not only unfair to the individuals affected but also represent costly inefficiencies in the utilization of human resources. Costs of recruitment, training, and career orientation are much greater when artificial constraints are imposed on the size of the population from which the job applicants may be drawn. Additionally, persons selected and placed in jobs are likely to include more unqualified persons when such constraints are imposed than when all potentially qualified candidates are considered. Dunnette and Motowidlo then go on to estimate the likely magnitude of such costs of occupational sex discrimination in the management and supervisory positions in the organization in question. The estimate is based on the following assumptions concerning the company situation in 1981:

- The company has 8,500 supervisory and management jobs with the following distribution across five levels of management: 60%, 25%, 11%, 2.5%, and 0.5% in levels 1 through 5 respectively.
- Each year, roughly 750 vacancies arise at level 1.
- The organization uses an assessment procedure costing \$200 per candidate for filling vacancies at level 1. The procedure has a validity of .40. Male applicants tend to score higher than female.<sup>12</sup>
- Ten per cent of those selected into level 1 ultimately advance to level 3 after spending an average of three

years at level 1 and another 5 years at level 2. Twenty-five per cent of those selected into level 1 advance only to level 2 after spending an average of six years at level 1. Finally, 5 per cent of those selected into level 1 fail and after an average of two years at level 1 leave the organization or are demoted.

- e) An individual's net value per year to the organization at the first three levels of management is \$35,000, \$20,000, and \$10,000 respectively.

Given the above assumptions, Dunnette and Motowidlo develop two alternative scenarios for filling the 750 vacancies at level 1 that arise in the reference year 1981: Scenario A, where the company considers and assesses only male applicants — 2,250 in number; and Scenario B, where an additional 2,250 women are also included in the selection process. The resulting computations for the two scenarios for the ensuing 10 years are shown in Table 12. As can be seen, when employment into level 1 is restricted to men only, a greater number of hirees fail, and also a smaller number are able to reach levels 2 and 3. When both men and women are included in the applicant pool, the situation is reversed. These differences are reflected in the estimated average net contribution figures for the two scenarios. Over a 10-year period, the net loss to the organization due to excluding women is estimated to be \$7,200 for each person hired in 1981. Dunnette and Motowidlo believe "that the estimate is really an extremely conservative one since we did not even try to estimate any of the costs due to many other accompaniments of generalized policies of sex discrimination, such as lower job satisfaction, increased turnover, costs of litigation, or the possibility of back pay awards to hundreds of persons".<sup>13</sup>

Overall, Dunnette and Motowidlo's study can be criticized for being oversimplified. Perhaps the assumptions made in the study were derived from an in-depth analysis of the

organization in question. But since no background information on the organization is provided, it is difficult to say how generalizable the estimates are for other organizations. The study does, however, serve to illustrate how the cost of employment discrimination can be estimated, and that in many cases these costs can be quite substantial.

## II. UNEQUAL UNEMPLOYMENT AND LOSS OF POTENTIAL NATIONAL OUTPUT

### A. Evidence of Unequal Unemployment

This section provides data on the unemployment experience of various minority groups relative to appropriate majority groups in the labour force. Female workers have traditionally experienced higher unemployment rates than male workers. The differential, however, appears to be narrowing. As is evident from Table 13, the female unemployment rate was consistently higher than the male rate over the 1976-1981 period. If one excludes the year 1979, the unemployment gap tended to reduce over this period. Thus, the female unemployment rate exceeded the male rate by 33 per cent in 1976 but only by 17 per cent in 1981. In 1982, the female unemployment rate was marginally lower than the male rate. Table 14 recomputes the unemployment rates by taking into account the discouraged workers who stop looking for work because they believe no work is available in the market. If a job offer is made to such a worker, it will be accepted. The official definition of the unemployed includes only those workers who are actively looking for work. Thus the official unemployment statistics exclude discouraged workers. Table 14 shows the number of such workers by sex and the resulting adjusted unemployment rates if these workers were counted as unemployed. As is clear, in four of the seven years, the differentials between the female and the male unemployment rates are wider in Table 14 compared to Table 13. This implies that, in general, the discouraged worker effect is more pronounced in the case of women than men.

TABLE 12

### A Comparison of Discriminatory and Non-Discriminatory Employment Policies in a Large U.S. Organization

|                                | Scenario A:<br>Men Only |                            | Scenario B:<br>Both Men & Women |                            |
|--------------------------------|-------------------------|----------------------------|---------------------------------|----------------------------|
|                                | Number                  | Total<br>Contribution (\$) | Number                          | Total<br>Contribution (\$) |
| <i>Position after 10 years</i> |                         |                            |                                 |                            |
| Level 3                        | 150                     | 30,000,000                 | 160                             | 32,000,000                 |
| Level 2                        | 270                     | 37,800,000                 | 380                             | 53,200,000                 |
| Level 1                        | 315                     | 31,500,000                 | 200                             | 20,000,000                 |
| Failed                         | 15                      | 150,000                    | 10                              | 100,000                    |
| <b>Total</b>                   | <b>750</b>              | <b>99,450,000</b>          | <b>750</b>                      | <b>105,300,000</b>         |
| Assessment Cost                |                         | 450,000                    |                                 | 900,000                    |
| Net Contribution               |                         | 99,000,000                 |                                 | 104,400,000                |
| Mean Net Contribution/person   |                         | 132,000                    |                                 | 139,200                    |

1. Given their differential scores on the assessment test, 470 men and 280 women are hired.  
Source: Adapted from Dunnette and Motowidlo (1982).



**TABLE 13**  
**Unemployment Rates by Sex, 1976-82**

| Year | Unemployment Rate |        | Ratio of Female to Male<br>Unemployment Rate |
|------|-------------------|--------|----------------------------------------------|
|      | Male              | Female |                                              |
| 1976 | 6.3               | 8.4    | 1.33                                         |
| 1977 | 7.3               | 9.4    | 1.29                                         |
| 1978 | 7.6               | 9.6    | 1.26                                         |
| 1979 | 6.6               | 8.8    | 1.33                                         |
| 1980 | 6.9               | 8.4    | 1.22                                         |
| 1981 | 7.1               | 8.3    | 1.17                                         |
| 1982 | 11.1              | 10.8   | 0.97                                         |

Source: Statistics Canada, *Labour Force Annual Averages*, 1975-1982, Catalogue No. 71-529.

Disaggregated analysis of unemployment rates reveals a more striking contrast between sexes. Table 15 shows unemployment rates for men and women by educational levels from 1979 to 1982. The general effect of education on unemployment rate is the same between the sexes; the higher the educational level, the lower the unemployment rates. But two important dissimilarities should be noted here. First, women have higher unemployment rate than men at each level of education, and second, the differential between the two is markedly higher at higher educational levels. For example, in 1979, the excess of female over male unemployment rate was about 20 per cent in the 0-to-8 years educational category. But the excess was as high as 117 per cent in the university level educational category. The same pattern of results also holds true for the other three years in Table 15.

Table 16 provides disaggregated picture of male and female unemployment rates by occupations for 1981 and 1982. It is evident that the unemployment rate is higher for women compared to men in practically each occupation. In 1981, 10 of the 20 occupations listed in Table 16 were such in which men and women each participated in large enough numbers for their respective unemployment rates to be computed in a statistically reliable fashion.<sup>14</sup> In all these cases,

female unemployment rates were higher than male rates, including in the traditionally female-dominated clerical and service occupations. In seven other occupations,<sup>15</sup> due to the small number of female participants, only the male and the total unemployment rates could be reliably estimated. In six of these seven occupations, the male unemployment rate was lower than the total unemployment rate. It implies that the female unemployment rate must have been higher than the male rate. In two other occupations — social sciences and medicine/health — only the female and the total unemployment rates could be reliably computed. In both these occupations, the unemployment rate for women was higher than the total rate. This implies that the female unemployment rate must have been higher than the male rate in these two cases as well. It is thus clear that unemployment rates for women exceeded those for men in almost all occupations in 1981. The same finding also holds true for 1982.

Data on unemployment of minority workers other than women is rather sparse. The Department of Indian and Northern Affairs has attempted to estimate the unemployment rate for native Indians in Canada. According to these estimates, the unemployment rate for native Indians was 12.3 per cent in 1961 and about 18 per cent in 1978-79, compared to the national rate of 3.9 per cent and 8 per cent respectively (Department of Indian and Northern Affairs, 1970 and 1980). In 1977, the Native Council of Canada and the Canada Employment and Immigration Commission (1977) jointly undertook a national survey of demographic and labour force characteristics of Métis and non-Status Indians. The survey found that the unemployment rate in this sub-group of the native population averaged around 33 per cent. More recently, Clatworthy (1981) completed a study of native people's employment and unemployment patterns in the Winnipeg labour market. Table 17 provides relevant data from this study. As is evident, native people's unemployment rates are markedly higher than the rates for the total city. In part, these wide disparities in unemployment levels between the native and general populations can be explained by differentials in their respective education levels. In the Winnipeg study, both sub-groups of Indians were found to have distributions that in comparison with the general population were

**TABLE 14**  
**Persons Believing No Work Available (PBNWA) and Adjusted Unemployment Rates by Sex, 1976-1982**

| Year | PBNWA                      |                              | Adjusted Unemployment Rate* |        | Ratio of<br>Female to Male<br>Adjusted Unemployment Rate |
|------|----------------------------|------------------------------|-----------------------------|--------|----------------------------------------------------------|
|      | Male<br>( <sup>000</sup> ) | Female<br>( <sup>000</sup> ) | Male                        | Female |                                                          |
| 1976 | 17                         | 16                           | 6.6                         | 8.8    | 1.33                                                     |
| 1977 | 22                         | 23                           | 7.6                         | 10.0   | 1.31                                                     |
| 1978 | 27                         | 25                           | 7.9                         | 10.2   | 1.29                                                     |
| 1979 | 24                         | 25                           | 7.0                         | 9.3    | 1.33                                                     |
| 1980 | 26                         | 27                           | 7.3                         | 8.9    | 1.22                                                     |
| 1981 | 30                         | 27                           | 7.5                         | 8.9    | 1.19                                                     |
| 1982 | 59                         | 51                           | 11.8                        | 11.8   | 1.00                                                     |

\*PBNWA were added to total unemployed and to total labour force before calculating the adjusted unemployment rate.  
Source: Statistics Canada, *Labour Force Annual Averages*, 1975-1982, Catalogue No. 71-529.

**TABLE 15**  
**Male and Female Unemployment Rates by Educational Levels, 1979-82**

| Year | Educational Level          | Unemployment Rate |        | Ratio of<br>Female to Male<br>Unemployment Rate |
|------|----------------------------|-------------------|--------|-------------------------------------------------|
|      |                            | Male              | Female |                                                 |
| 1979 | 0-8 Years                  | 8.3               | 10.0   | 1.20                                            |
|      | High School                | 7.5               | 9.8    | 1.31                                            |
|      | Some Post-Secondary        | 5.7               | 8.3    | 1.46                                            |
|      | Post-Secondary Certificate | 4.3               | 6.0    | 1.40                                            |
|      | University                 | 2.3               | 5.0    | 2.17                                            |
| 1980 | 0-8 Years                  | 8.6               | 10.0   | 1.16                                            |
|      | High School                | 8.1               | 9.4    | 1.16                                            |
|      | Some Post-Secondary        | 5.6               | 7.9    | 1.41                                            |
|      | Post-Secondary Certificate | 4.4               | 5.7    | 1.30                                            |
|      | University                 | 2.1               | 4.9    | 2.33                                            |
| 1981 | 0-8 Years                  | 8.9               | 9.9    | 1.11                                            |
|      | High School                | 8.3               | 9.4    | 1.13                                            |
|      | Some Post-Secondary        | 6.2               | 7.6    | 1.23                                            |
|      | Post-Secondary Certificate | 4.3               | 5.7    | 1.33                                            |
|      | University                 | 2.4               | 4.7    | 1.96                                            |
| 1982 | 0-8 Years                  | 13.5              | 13.1   | 0.97                                            |
|      | High School                | 13.0              | 12.2   | 0.93                                            |
|      | Some Post-Secondary        | 9.7               | 10.4   | 1.07                                            |
|      | Post-Secondary Certificate | 7.5               | 7.5    | 1.00                                            |
|      | University                 | 4.0               | 6.5    | 1.60                                            |

Source: Statistics Canada, *The Labour Force*, Catalogue No. 71-001, 1979-1983.

**TABLE 16**  
**Occupational Unemployment Rates by Sex**

| Occupations         | 1981 |        |       | 1982 |        |       |
|---------------------|------|--------|-------|------|--------|-------|
|                     | Male | Female | Total | Male | Female | Total |
| Managerial          | 1.7  | 3.5    | 2.2   | 3.0  | 5.1    | 3.7   |
| Natural Science     | 2.9  | —      | 3.2   | 5.9  | 9.6    | 6.4   |
| Social Science      | —    | 6.3    | 4.8   | 4.6  | 8.0    | 6.2   |
| Teaching            | 2.0  | 4.2    | 3.3   | 2.8  | 5.1    | 4.2   |
| Medicine/Health     | —    | 3.1    | 2.8   | —    | 4.2    | 3.8   |
| Artistic/Recreation | 8.0  | 9.3    | 8.5   | 9.5  | 10.8   | 10.0  |
| Clerical            | 6.0  | 6.3    | 6.3   | 8.8  | 9.0    | 9.0   |
| Sales               | 4.2  | 6.9    | 5.3   | 6.7  | 9.6    | 7.9   |
| Service             | 8.9  | 10.6   | 9.8   | 12.0 | 13.1   | 12.6  |
| Agriculture         | 5.4  | 6.1    | 5.5   | 7.7  | 7.6    | 7.7   |
| Fishing             | 11.0 | —      | 11.6  | 10.7 | —      | 11.0  |
| Mining              | —    | —      | 8.0   | 18.5 | —      | 18.7  |
| Forestry            | 23.2 | —      | 23.6  | 32.0 | —      | 32.3  |
| Processing          | 8.3  | 15.7   | 9.8   | 15.1 | 20.7   | 16.3  |
| Machining           | 7.3  | —      | 7.5   | 16.3 | 22.6   | 16.6  |
| Product Fabricating | 6.6  | 12.1   | 8.0   | 11.7 | 18.1   | 13.1  |
| Construction        | 12.3 | —      | 12.3  | 19.1 | —      | 19.1  |
| Transport           | 8.0  | —      | 8.3   | 12.3 | —      | 12.3  |
| Material Handling   | 11.2 | 14.0   | 11.7  | 18.0 | 18.9   | 18.2  |
| Other Crafts        | 4.2  | —      | 5.5   | 6.4  | —      | 7.4   |
| Total               | 7.1  | 8.3    | 7.6   | 11.1 | 10.8   | 11.0  |

Source: Statistics Canada, *The Labour Force*, Catalogue No. 71-001, 1981-1982.

markedly biased toward the lower educational categories (Clatworthy, 1981, p. 46). Thirteen per cent of the native population in Winnipeg had five years or less education compared to 4.8 per cent of the general population. In contrast, only 7.3 per cent of the native population had post-secondary education compared to 32.5 per cent of the general population. But a previous study of native Indians in an urban society (Stanbury, 1975) argued that variables such as education and length of time in the city did not have much impact on native employment.

TABLE 17

**Male and Female Unemployment Rates by Age,  
Winnipeg, 1980**

|                          | Unemployment Rate |        |           |        |
|--------------------------|-------------------|--------|-----------|--------|
|                          | 15-24 Years       |        | 25+ Years |        |
|                          | Male              | Female | Male      | Female |
| Status Indians           | 59.2              | 52.6   | 33.9      | 35.7   |
| Métis/Non-Status Indians | 31.8              | 46.7   | 14.7      | 30.5   |
| Total City               | 8.3               | 7.9    | 2.3       | 4.7    |

Source: Adapted from S. J. Clatworthy (1981)

The information on unemployment of workers with Third World origins is even more limited. A three-year longitudinal study of the labour market experience of immigrants (Saunders, 1975) was cited earlier in this paper. According to this study, the average unemployment rate for Third World immigrants six months after their arrival in Canada was 15.2 per cent over the 1969-71 period. The rate for non-Third World immigrants over the same period was considerably lower, 9.1 per cent. The marked initial inequality in the unemployment rate between the two groups tended to decline over the three-year period of the study. By the end of the third year, the unemployment rate for Third World immigrants was even slightly lower than for other immigrants. The duration of unemployment, however, continued to be higher for Third World immigrants than their counterparts from other countries. More recent unemployment data are available for Metropolitan Toronto. According to a report prepared by the City of Toronto, the unemployment rate among the population whose mother tongue was Indo-Pakistani was 12 per cent in 1976. This was twice the rate observed for all language groups taken together (City of Toronto, 1981).

### B. Unequal Unemployment and Loss of Potential Output

Economists have attempted for more than two decades to estimate potential gross national product (GNP). Potential GNP measures the output the economy would produce if the aggregate unemployment rate were at a full-employment level. The difference between potential and actual GNP at any point in time is known as the GNP gap. Some 20 years ago, Arthur Okun (1962) published an analysis on this subject and in the process enunciated what has come to be known as Okun's law. By relating the aggregate unemployment rate to the percentage GNP gap, the law provides a simple

approach to measuring the total economic cost of unemployment.<sup>16</sup> According to Okun's law, the percentage GNP gap is about three times the excess of the current unemployment rate over its full employment level. If the unemployment rate was one percentage point above its full employment level, the GNP gap would be about three percentage points.

Okun's law relates to the loss of GNP due to excessive aggregate unemployment. Our concern in the present paper is not with such unemployment *per se*. All groups in the labour force—minority or otherwise—are affected by such factors as lack of effective demand in the economy, seasonality of unemployment, lack of skills, and the like. Unemployment caused by such factors can be considered equal or non-discriminatory. But the minority groups in addition are also affected by discriminatory employment practices in the labour market. As was discussed in the preceding section, minority groups, especially women, suffer consistently higher unemployment levels than men in practically every broad occupational group. Our concern in the present paper is with the economic cost of such unequal or discriminatory unemployment. Following an approach similar to that underlying Okun's law, Lester Thurow (1969) estimated the impact on potential GNP of equalizing white and non-white unemployment rates in the U.S. economy for 1966. The unemployment rates for whites and non-whites were 3.40 per cent and 7.53 per cent respectively in that year. According to his estimate, if the two rates were equalized the GNP would increase by about one per cent. The estimate took into account the differences in the educational levels between the white and non-white labour force.

Using Okun's framework, a rough estimate can be made of the loss of potential GNP due to discriminatory unemployment that women face in the Canadian economy. Women are the most significant component of the minority labour force; besides, reliable labour force statistics are available only for women. The estimate provided here relates to the year 1977. Denton, Robb, and Spencer (1980) tested Okun's model on Canadian data for a 24-year period ending in 1977. Their results were virtually identical to the predictions of Okun's law. Specifically, the study estimated that if the overall unemployment rate was lower by one percentage point, GNP would have been higher by 3.3 per cent in 1977.<sup>17</sup> The male and female unemployment rates were 7.3 per cent and 9.4 per cent respectively. Let us assume that if women did not face labour market discrimination, their unemployment rate would have been lower by one percentage point to 8.4 per cent. Keeping in mind the evidence presented earlier, this assumption does not appear unreasonable. The female proportions of total labour force and total unemployed were .38 and .44 respectively in 1977. Given these proportions, a one percentage point decline in the female unemployment rate would mean a reduction of .4 percentage point in the 1977 overall unemployment rate, from 8.1 per cent to 7.7 per cent. Using as the basis the estimates provided by the Denton, Robb, and Spencer study cited above, a .4 percentage point reduction in the overall unemployment rate would have meant about 1.3 per cent higher GNP in 1977. One important qualification should be noted while assessing the loss of potential GNP due to unequal or discriminatory unemployment levels that minority groups face in the labour market. To the extent there is surplus of labour of all types and skills, eliminating such discriminatory unemployment would result in



a redistribution of income but in no real gain in GNP. Thus estimates of GNP gains from eliminating discriminatory unemployment assume that aggregate economic policies can be implemented that are specific enough to provide markets for the extra output gained by increased employment of minority labour force groups.

### III. EMPLOYMENT DISCRIMINATION AND LABOUR MARKET INEFFICIENCY (INFLATION)<sup>18</sup>

Full employment and price stability are two important goals of federal economic and labour market policies. But these goals may not always be mutually compatible. Conceptually, one might expect high rates of inflation to accompany high levels of employment. "The strong demand positions which are required to attain high levels of output and employment also tend to exert upward pressures on prices. In such circumstances, therefore, there are dangers of a broadening range of price increases as the economy reaches higher levels of activity. Bottlenecks tend to develop in the supplies of skilled manpower and particular items of machinery and investment goods, and prices and costs begin to creep up" (Economic Council of Canada, 1964, p. 104). What this implies is that attempts to reduce unemployment below a certain level would generate inflationary pressures in the economy. The level of unemployment at which such pressures are likely to appear is called the natural or full-employment unemployment rate.

Surveying the unemployment-inflation experience of the Canadian economy from 1952 to 1980, the Task Force on Labour Market Development in the 1980s (Canada Employment and Immigration Commission, 1981) found that since the mid-1960s "there has been a tendency for the unemployment rate to drift upward and for the rate associated with each successive peak in economic activity to be higher than that achieved at the preceding peak. In addition, the rate of inflation measured by the most commonly used indicator, the Consumer Price Index, has tended to increase since the mid-1960s" (p. 10). Thus it appears that since the mid-1960s, the natural rate of unemployment has tended to go up. In other words, inflationary pressures are beginning to be felt sooner, that is, at higher levels of unemployment today than in the mid-1960s.

A number of factors may have contributed to the apparent upward drift in the natural unemployment rate.<sup>19</sup> An important factor relevant to our purposes in the present paper is

the changing composition of the labour force in the Canadian economy. As Table 18 shows, women, especially adult women, are forming an increasing part of the total labour force. Adult women accounted for 20.8 per cent of the labour force in 1965; the percentage rose to 29.5 by 1982. With the female youth included, the total female percentage of labour force rose from 31.3 in 1966 to 41.1 in 1982. Concomitantly, the share of men, especially adult men, steadily declined over the same period.

While the proportion of women in the labour force increased over the 1966-1980 period, their integration into the labour market had been rather poor. As discussed earlier in this report, the unemployment rate for women had been systematically higher than men over this period. Also, women continued to be employed in the traditional female occupations in the service, sales, and clerical sectors. They did not make much headway in entering non-traditional, male-dominated occupations, even though in many such occupations labour shortages were experienced (Betcherman, 1980). Lack of appropriate training skills and discriminatory hiring practices and procedures may provide significant explanations for this limited progress.

In short, women have formed an increasing proportion of the labour force in recent years. Their lack of integration in the labour market therefore must have contributed to the worsening of the trade-off between unemployment and inflation.

A number of labour market projections have been made by various bodies in recent years.<sup>20</sup> According to these projections, while labour force growth will slow down, female participation will continue growing. Table 19 shows the projections made by the Department of Finance (Ciuriak and Sims, 1980) for the next two decades. These indicate that the labour force participation rate of women aged 20 and over could increase to as high as 61.1 per cent by 1990 and to 70.6 per cent by 2000. The projected participation rate of men shows a downward trend to 80.8 per cent by 1990 and 79.2 per cent by 2000.

A few demand-side projections are also available. According to the Economic Council of Canada's nationwide Human Resources Survey (Betcherman, 1980), employers experienced widespread shortages in the 1977-79 period in the high-skill-level blue-collar and white-collar jobs. Such shortages are expected to continue in the coming years. The Task Force on Labour Market Development in the 1980s

TABLE 18

#### Percentage Composition of Labour Force for Selected Age/Sex Groups

| Year | Women |       |       | Men   |       |       | Total |
|------|-------|-------|-------|-------|-------|-------|-------|
|      | Youth | Adult | Total | Youth | Adult | Total |       |
| 1966 | 10.5  | 20.8  | 31.3  | 13.7  | 55.0  | 68.7  | 100.0 |
| 1976 | 11.2  | 22.4  | 33.6  | 14.2  | 52.2  | 66.4  | 100.0 |
| 1974 | 12.1  | 24.0  | 36.1  | 15.0  | 48.9  | 63.9  | 100.0 |
| 1978 | 12.2  | 26.7  | 38.9  | 14.6  | 46.5  | 61.1  | 100.0 |
| 1982 | 11.6  | 29.5  | 41.1  | 13.4  | 45.5  | 58.9  | 100.0 |

Source: Statistics Canada, *Historical Labour Force Statistics 1966-82*, Catalogue No. 71-2001.

(Canada Employment and Immigration Commission, 1981) also developed projections of occupational imbalances for the 1980-90 period. Based on these projections, the Task Force concluded that, "There is concern, therefore, that the continued high concentration of women in service sector occupations, combined with high labour force growth, will result in a growing problem of unemployment among women, while simultaneously labour markets in occupations and industries which primarily employ men will become increasingly tight" (p. 60). Given these projections, the need for fuller integration of women into the labour force is obvious. Unless this occurs, the Canadian economy will likely have to tolerate even higher rates of natural unemployment and inflation in the future than in the past.

TABLE 19

**Past and Projected Participation Rates, Female and Male, Aged 20 and Over, Canada**

| Participation Rate* | Women |      | Men  |
|---------------------|-------|------|------|
|                     | Low   | High |      |
| 1953                |       | 23.0 | 86.4 |
| 1960                |       | 28.4 | 86.0 |
| 1965                |       | 33.1 | 84.7 |
| 1970                |       | 38.2 | 83.2 |
| 1975                |       | 43.9 | 82.4 |
| 1979                |       | 48.6 | 81.7 |
| 1985                |       | 55.6 | 81.5 |
| 1990                | 59.4  |      | 80.8 |
| 1995                | 62.6  | 61.1 | 80.0 |
| 2000                | 65.3  | 70.6 | 79.2 |

\*Estimates for years prior to 1975 have been adjusted to correspond to new Labour Force Survey definitions.

Source: Ciuriak and Sims (1980). Table reproduced from Swan (1981).

#### IV. SOME OTHER ECONOMIC COSTS OF EMPLOYMENT DISCRIMINATION

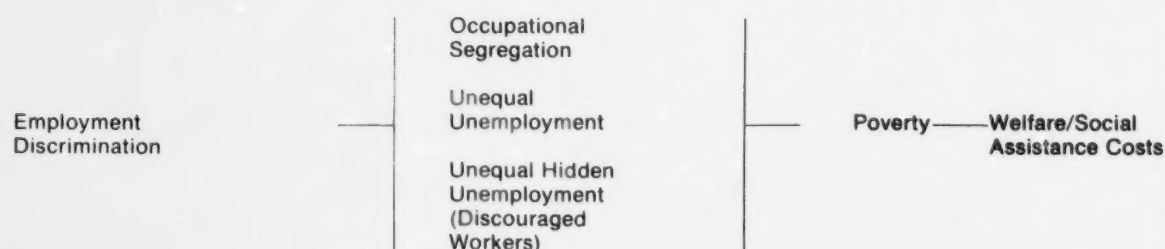
In this section, we briefly discuss another possible economic cost of employment discrimination. As a background, the relevant part of Figure 1 is reproduced below with minor modifications. Thus employment discrimination can affect minorities in three ways: segregation into low-level, low-pay jobs, disproportionately high unemployment rates, and high levels of hidden unemployment. These labour market experiences can increase the incidence of poverty among minorities, which in turn can lead to higher welfare costs. The linkages proposed here should be interpreted with caution.

Thus, it is not implied here that employment discrimination is the sole cause of poverty or that poverty is the only factor influencing social assistance costs. It is beyond the scope of the present paper to attempt to test these linkages empirically. Even if it were, any such attempt would be severely hampered by lack of data. In what follows we provide some general observations based on available data and empirical studies.

Albin and Stein (1977) have examined the impact of unemployment on welfare expenditures for the 1959-71 period for the U.S. economy. The study found a significant positive relationship between the two variables. The relationship found was, however, lagged in nature. The impact of unemployment on welfare expenditures tended to appear only after a quarter's delay; but once the impact appeared, it tended to remain significant over the next four years. Thus the study points to the possible long-run effects of unemployment on welfare expenditures. The study did include a number of other factors, including benefit levels and demographic characteristics of labour force, as control variables.

A recent report of the National Council of Welfare (1981) provides similar findings for the Canadian economy for the four-year period 1973-77. During this period in Canada as a whole, the percentage increase in those classified as other poor families<sup>21</sup> (42 per cent) paralleled the rise in the jobless rate (45 per cent). In many provinces, including Ontario, Nova Scotia, New Brunswick, and Quebec, the same relationship was found between the two variables. The majority of those classed as other poor families depend on provincial social assistance programs for a large part of their income. The number of welfare recipients rose from 1.2 million in 1973 to more than 1.3 million in 1977. On the one hand, rising unemployment in the economy makes it harder for employable welfare recipients to find jobs and get off welfare. On the other, it can add to the welfare rolls jobless workers who have exhausted or are about to exhaust their unemployment insurance benefits. According to the Report of the Interprovincial Task Force on Social Security (1980), 28 per cent of Canada's 636,000 welfare cases fell into the "unemployed employable" category.

The preceding analysis implies that since minority workers face more unfavourable labour market conditions, they would also suffer a higher risk of poverty. From the limited information available, it appears to be true. In its 1979 study on Women and Poverty, the National Council of Welfare (1979) found that three out of five poor Canadians are women and that 16 per cent of Canadian women live in poverty. Women heading single parent families run an extremely high risk of poverty. According to a 1977 Health and Welfare Canada



study (MacLeod, 1977), about two-thirds of single parents who were women had incomes below Statistics Canada's poverty line. An occupational profile of working poor women is also quite revealing. Thirty-two per cent of women heading working poor families in 1978 held clerical jobs and another 27 per cent held service occupations (National Council of Welfare, 1981).

Some information on poverty of native people is also available. In 1964, about 36 per cent of the native population was supported by social assistance, compared to 3.5 per cent of the national population. In 1974, 55 per cent of the total Indian population on reserves was receiving social assistance and a majority of these recipients were employable (Indian and Northern Affairs Canada, 1980). A recent study of native people in the Winnipeg labour market (Clatworthy, 1981) found that more than 70 per cent of native households in 1980 experienced incomes below the Statistics Canada's poverty line, and that a vast majority of these households were receiving social assistance.

## V. SUMMARY AND CONCLUSIONS

Visible minority groups occupy a very critical position in the labour market. Today, women alone comprise more than 40 per cent of the total labour force. In the next 20 years, this share is expected to rise to 50 per cent. From 1973 to 1982, women accounted for about 60 per cent of labour force growth in Canada. Over the 1980s, they are expected

to contribute more than 65 per cent. Labour force participation of native people has also shown significant increases. Only 30 per cent of working-age native people were in the labour force in 1961, but this rose to about 54 per cent in 1977-78. The native "baby boom" of the 1950s and 1960s will increase the working-age population by about 200,000 in the 1980s. In the western provinces, native people will account for 20 per cent of labour force growth (Canada Employment and Immigration Commission, 1981, p. 95). While systematic data on other minority groups (such as people with Third World origins, disabled) are not available, it is believed that they too form a sizable number.

Thus it is clear that minority group workers represent a vast productive pool and that this pool will grow even larger in the future. At present, these resources are underutilized. This is reflected in the occupational segregation of minority workers into a narrow range of low-skill, low-productivity occupations and in higher levels of unemployment. Equity considerations require that these individuals receive a fair deal in the labour market. Economic considerations require the same. Underutilization of minority workers can entail significant economic costs in terms of lower national output, labour market inefficiency and higher inflation, and excessive welfare costs. Unless policies are developed to integrate minority workers more fully into the labour market, these costs are likely to escalate in the future. In short, development of such policies is justified both on equity as well as economic grounds.



## NOTES

1. The employment-population ratio measures employment as a percentage of the working-age population.
2. From the list in Table 3 of top 10 jobs in 1981, only the job "Janitors, charworkers, and cleaners" did not make the list in 1971.
3. The data from the 1971 Census of Canada also support this finding. Third World immigrants who entered Canada between 1961 and 1971 tended to have higher educational levels than immigrants from the developed world. This difference was especially noticeable among males. For more details see Lanphier (1979).
4. The procedure involves the use of a variant of the constant elasticity of substitution (CES) production function. For details see Bergmann (1971).
5. In Table 7, as the elasticity of substitution increases, the gain in national income goes up. It is so because the higher the elasticity of substitution, the more slowly the marginal productivity of a given occupation changes, and hence the greater the gain from reallocating the black workers.
6. The pattern of occupational segregation of women has been remarkably stable since 1901. For details see Hakim (1980).
7. The model was found to predict men's occupational distribution very accurately.
8. The female sample is younger than the male sample. The authors argue that although some bias problem does arise from age difference between the samples, it should understate the effects of discrimination on occupational assignment of women since age tends to be positively correlated to occupational advancement.
9. Young workers were defined as those who finished their schooling within nine years of the date of the survey (1979) from which data were obtained for the present study.
10. The following equation was used:

$\Delta \ln(c/q) = w_1 \Delta \ln p_2 + \dots + w_n \ln p_n$  where  $\Delta \ln(c/q)$  is the proportionate change in average costs,  $\Delta \ln p_i$  is the proportionate difference between male and female market wage rates in each job category,  $w_i$  is the fraction of total costs that are paid to workers in each job category, and the subscripts 1 to n relate to n different job classifications.

11. The study does not provide any other detail concerning the organization.
12. Male applicants have a mean score of 3.00 and a standard deviation of 1.15, and female applicants a mean score of 2.70 and a standard deviation of 1.08.
13. Krzystofiak (1982) has attempted to estimate back-pay liability for discriminatory employment practices. A simulation model is developed which estimates these costs based on the decisions handed down by the courts in the U.S.
14. Managerial, teaching, artistic, recreation, clerical, sales, service, agriculture, processing, product fabricating, and material handling.
15. Natural science, fishing, forestry, machining, construction, transportation, and other crafts.
16. Total economic costs include output effects of unutilized labour force, changes in hours of work, changes in the efficiency of use of plant and equipment etc.
17. This translates to about a three percentage point reduction in the percentage GNP gap which is computed as:

Potential GNP-Actual GNP

————— x 100

Potential GNP

18. Analysis in this section is limited to women only due to lack of information on other minority groups.
19. A discussion of these factors is beyond the scope of the present paper. For a recent discussion on the subject see Canada Employment and Immigration Commission (1981).
20. The following labour force projections are available: Canada Employment and Immigration Commission (1980 and 1981), Ciuriak and Sims (1980), and Denton, Feaver, and Spencer (1980).
21. The report distinguishes between working poor and other poor. Working poor are those who obtain more than half of their income from employment. Other poor are those who obtain more than half of their income from non-work sources.

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PART IV

**COMPARATIVE PERSPECTIVES**





## IMPROVING EQUAL EMPLOYMENT OPPORTUNITY LAWS: LESSONS FROM THE UNITED STATES EXPERIENCE

Alfred W. Blumrosen

### Sommaire

La situation professionnelle des minorités et des femmes aux États-Unis s'est énormément améliorée depuis l'adoption de lois sur l'égalité en matière d'emploi. En 1980, par exemple, plus de 2 millions de membres des groupes minoritaires et 4 millions de femmes occupaient un poste dans une catégorie professionnelle plus élevée que celle à laquelle ils auraient appartenu selon la répartition professionnelle de 1965. Au cours de cette année-là, ils ont touché environ 25 milliards de dollars de plus qu'ils n'auraient reçus selon la répartition professionnelle de 1965.

Toutefois, les lois et programmes qui ont rendu possibles ces résultats aux États-Unis ont également engendré une grande polémique et de nombreux procès. Aussi, l'étude recommande que le Canada adopte des programmes qui seront efficaces mais moins controversés.

1. Par exemple, l'auteur recommande que le Canada oblige les employeurs à adopter des programmes d'action positive sans avoir à les trouver au préalable coupables de «discrimination». C'est justement la question de la «discrimination» qui a engendré tant de procès aux États-Unis. Les programmes d'action positive doivent comprendre des objectifs pratiques et des calendriers réalistes, eu égard aux conditions socio-économiques du Canada. Les objectifs et les calendriers doivent expirer à une date précise pour faire en sorte que la population active ne soit pas divisée en permanence selon la race et le sexe.

2. L'auteur recommande également, afin d'éviter des enquêtes administratives prolongées et inefficaces, que les cas isolés de discrimination soient soumis sans tarder à un agent qui entendra la cause et la «consignera» aux dossiers.

3. Il examine aussi les difficultés précises qui ont surgi aux États-Unis, notamment les écarts salariaux, l'ancienneté, les exigences du service, la grossesse, le harcèlement, la discrimination en raison de l'âge, et le rapport entre les lois relatives à l'égalité en matière d'emploi et les possibilités de formation professionnelle.

Les recommandations visant ces trois domaines s'appuient sur des analyses détaillées qui s'inspirent de la situation aux États-Unis.

### Summary

The occupational status of minorities and women in the United States has improved significantly under equal employment opportunity (EEO) laws. In 1980 alone, more than 2 million minority and 4 million female workers were in higher job categories than they would have been under the occupational distribution of 1965. In 1980, they earned approximately \$25 billion more than would have been the case under the 1965 occupational distribution.

In achieving these results, equal employment opportunity laws and programs in the United States have engendered much litigation and controversy. This paper recommends that Canada adopt programs that are likely to be effective without this extensive litigation and conflict.

1. It is, for example, recommended that Canada require that employers take affirmative action without any prior finding that the employer has engaged in "discrimination". The issue of "discrimination" has produced much litigation in the United States. "Affirmative action" should include a practical concept of goals and timetables adequately related to economic and social conditions in Canada. The goals-and-timetables program should be scheduled to expire at a definite time in the future in order to assure that the workforce is not permanently fragmented along the lines of race and sex.

2. It is also recommended that individual claims of discrimination be promptly submitted to a hearing officer for an "on the record" trial, in order to avoid prolonged and ineffectual administrative investigations.

3. The paper also examines specific problems that have arisen in the United States, including wage discrimination, seniority, business necessity, pregnancy, harassment, age discrimination, and the relation between EEO laws and job-training opportunities.

Recommendations in these three areas are supported by detailed analyses based on experience under United States laws.

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## IMPROVING EQUAL EMPLOYMENT OPPORTUNITY LAWS: LESSONS FROM THE UNITED STATES EXPERIENCE

Alfred W. Blumrosen\*

The United States has engaged in efforts to improve employment opportunities for members of disadvantaged groups since World War II.<sup>1</sup> Many programs and approaches have been tried; some proved enduringly useful, others of ephemeral value, and still others were not worthwhile at all. From 1945 to 1965, these efforts took the form of voluntary programs with virtually no law enforcement. The occupational status of minorities did not improve during this period. Since 1965 significant law enforcement efforts have been undertaken. These efforts induced massive change — some compelled but much "voluntary" — in industrial relations practices. During this period the occupational status of minorities improved dramatically, as Table 1 indicates:<sup>2</sup>

TABLE 1

Relation of minority to white participation  
rates, 1950-80

|                               | 1950  | 1955  | 1960  | 1965  | 1970  | 1975  | 1980  |
|-------------------------------|-------|-------|-------|-------|-------|-------|-------|
| Officials<br>and managers     | 21.5  | 20.7  | 21.5  | 23.4  | 30.7  | 39.2  | 43.3  |
| Professional<br>and Technical | 37.5  | 35.7  | 36.7  | 52.3  | 61.5  | 73.5  | 77.0  |
| Sales                         | 17.3  | 18.8  | 22.2  | 26.7  | 31.3  | 39.1  | 42.6  |
| Clerical                      | 25.3  | 34.5  | 46.2  | 50.3  | 73.3  | 86.7  | 98.9  |
| Craftsmen<br>(Skilled)        | 35.0  | 36.8  | 43.0  | 49.6  | 60.0  | 65.7  | 72.2  |
| Operatives<br>(Semi-skilled)  | 90.2  | 103.4 | 113.5 | 117.0 | 139.4 | 136.9 | 143.7 |
| Laborers<br>(Unskilled)       | 282.0 | 336.2 | 306.0 | 282.0 | 251.2 | 193.3 | 160.5 |
| Service<br>Workers            | 233.3 | 233.3 | 213.4 | 218.3 | 194.6 | 184.9 | 176.1 |

Data for 1950-65 from Statistical Abstract of the United States, 1966, page 229, for 1970-80 from Statistical Abstract of the United States 1981, page 401.

The net result of these programs was a peaceful social and industrial revolution. While minority unemployment rates and income remain at unacceptably high levels because of increased birth rates, the influx of new groups into the labour force, and delays in retirement, the occupational status of minorities has moved closer to the white workforce. As will be discussed later,<sup>3</sup> this improvement is the result of the development and enforcement of Equal Employment Opportunity (hereafter EEO) and Affirmative Action (hereafter AA) programs. While the United States and Canada are each unique in important respects, the similarities in cultural heritage, technology, and aspirations make an examination of the U.S. experience relevant to the evolution of programs in Canada.

### I. THE NECESSITY FOR LEGAL STANDARDS

The first conclusion to be drawn from the U.S. experience is that a "voluntary" program without firm roots in law will not achieve significant improvement for depressed groups.

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Many states and the executive branch of the federal government attempted to improve opportunities for minorities through "voluntary compliance" without significant enforcement actions between 1945 and 1965. But improvement came only after a federal statutory obligation and methods of enforcement were created in the Civil Rights Act of 1964 and an associated more powerful Executive Order was established. This experience has been discussed extensively in an article entitled "Six Conditions for Meaningful Self Regulation: lessons from Employment Discrimination Law".<sup>4</sup>

### II. LEGAL STANDARDS INFLUENCE VOLUNTARY PROGRAMS

The second conclusion is that there is an intimate relationship between legal standards and remedies that are imposed on employers and those that they adopt voluntarily. This was demonstrated after the decision of the Supreme Court of the United States in the landmark case of *Griggs v. Duke Power Co.*<sup>5</sup> *Griggs* established that practices that had "disparate impact" on minorities or women without business justification were illegal. This holding constituted a new definition of illegal discrimination, supplementing the previously understood concept of "intentional" discrimination.<sup>6</sup> After this decision the courts imposed major changes on the hiring and promotion practices of employers.<sup>7</sup> This in turn prompted other employers to adopt such changes without litigation.<sup>8</sup>

These changes included the introduction of recruitment and hiring programs, the review and modification of employment criteria and practices, a re-examination of promotion criteria and seniority systems, and the adoption of "goals and timetables" to ensure that minorities and women would be included in the workforce. Such extensive changes would not have been undertaken if the statute had imposed only the limited requirement that an employer avoid "intentional" discrimination. That requirement, standing alone, had little if any effect in changing employment systems in the United States between 1945 and 1964. At most it required employers to avoid crude forms of discrimination, but it did not prevent them from relying on discriminatory practices in other areas of society as a reason for denying employment opportunities.

For example, in *Griggs*, the employer claimed the right to use educational and test qualifications even though they screened out a higher proportion of minorities than whites because of restrictions on minority educational opportunities. This claim may have been recognized under the "intent" concept of discrimination, because it was based on good faith considerations. The "adverse impact" principle held that such "good faith" reliance was not a defense for practices with disparate impact. They were illegal unless required by business necessity. This decision forced employers to reconsider programs, systems, and practices which the narrower concept of discrimination would not have addressed.<sup>9</sup>

The adoption of the "disparate impact" definition of discrimination provided the foundation for major advances for

minority group members in the U.S. after 1964. However, because of its novelty, the "disparate impact" concept has spawned literally thousands of law suits, the publication of complex government regulations, and a steady stream of commentary and concern. The Law Reports of employment discrimination litigation since 1967 fill more than 30 volumes. The litigation costs to employers, employees, and the government are high. Many issues are litigated repeatedly. The federal government has sought to reduce litigation by publishing general rules concerning employment practices. But this has not reduced the volume of litigation.

Extensive litigation has been the price paid in the U.S. for the adoption and implementation of this novel and important concept. Private litigation has been necessary to implement the EEO program. It may be the inevitable cost of achieving improved opportunities for minorities and women in the U.S. This experience suggests that Canada should seek ways and means of achieving meaningful results without such extensive litigation.

### III. THE LEGAL BASES FOR AFFIRMATIVE ACTION

Under Title VII of the Civil Rights Act of 1964, a violation of the *Griggs* principle requires the employer to take "affirmative action" to remedy its illegal conduct.<sup>10</sup> Thus the *Griggs* principle, applied by courts, agencies, or by the employer without awaiting litigation, forms the legal foundation upon which affirmative action may be required by law or justified by the employer.<sup>11</sup> Therefore, a resolution of the issue of discrimination becomes crucial to the statutory program to improve opportunities for minorities and women.

In contrast, the Executive Order that regulates the employment practices of employers who contract with the government takes a different approach. Rather than treat "affirmative action" as a remedy for illegal discrimination, the Order imposes on government contractors a duty to take affirmative action independently of any finding of illegal discrimination.<sup>12</sup> This requirement is applicable to all work done by the contractor, not only work necessary to carry out the government contract. Thus the U.S. experience provides an opportunity to examine two different approaches to the concept of affirmative action, one a "remedial" approach and the other a direct application of the AA requirement.

Since government contractors are subject to the statutory disparate impact concept as well as the direct affirmative action requirement, it is difficult to separate the effect of the two programs. There are important differences in the enforcement of each program. The statutory program is applied through private law suits, including class actions, and through litigation by government. The Executive Order affirmative action principle is applied administratively through the Department of Labor by the conduct of periodic inspections called "compliance reviews". These are backed by an occasional use of administrative hearings that might lead to debarment as a government contractor.<sup>13</sup> Litigation and enforcement activity have been far more extensive under the statute than under the Executive Order.<sup>14</sup>

The primary value of this dual system for our purposes lies in the existence of detailed efforts at enforcement under both approaches. This means that regulations, enforcement procedures, and a wide body of experience has developed

under each approach. A statute based on the U.S. experience would draw on both approaches, while seeking to avoid the duplication and multiple efforts that the U.S. experience has generated.<sup>15</sup>

### IV. A STATUTORY REQUIREMENT OF AFFIRMATIVE ACTION

A statute built on this experience could achieve substantial results while avoiding the extensive litigation that has taken place in the United States. Such a statute would not copy the U.S. programs but rather would build upon experiences with them. Thus the statute would not repeat the experience of extensive litigation that is made necessary because proof of discrimination is a prerequisite to a requirement of affirmative action. Rather, it would require directly that employers take affirmative action as under the Executive Order.

A statutory requirement of affirmative action could be justified by a legislative type finding that members of the groups to be protected have suffered discrimination in many forms from diverse elements in the society, including employers. This "societal discrimination" would justify the creation of a legal obligation to take affirmative action to assure and improve opportunities for members of these groups.<sup>16</sup>

Under the U.S. Constitution, a statutory requirement of specific affirmative action—setting aside a percentage of contracts for minorities—has been upheld by the Supreme Court, which deferred to the Congressional judgement that this approach was necessary in order to eliminate the discriminatory impact of traditional business practices.<sup>17</sup>

In short, the "model" EEO statute of today would avoid the extensive litigation over "adverse impact discrimination" by imposing an affirmative action obligation directly on employers. This might be especially important in view of the decision in the religious discrimination case, *Canadian National Railway Corp. v. Canadian Human Rights Commission*, which refused to apply the adverse impact concept under Canadian law.<sup>18</sup> At the same time, the "model" EEO statute would avoid the risk of non-enforcement through government malaise that exists under the Executive Order program by providing for private enforcement, in appropriate cases, of the AA obligation.

If such a statute were adopted, the obligation to take affirmative action would exist without regard to facts concerning possible discrimination by the employer. Therefore, the facts concerning such discrimination would not have to be litigated. This approach is akin to the substitution of workers' compensation for negligence as the basis of employer liability for work injuries. When workers' compensation laws were adopted, the issue of negligence simply ceased to be central to the question of whether the employer was obligated to compensate for worker injuries.

The creation of the direct legal obligation to take affirmative action would represent an additional forward step in the broad sweep of efforts to improve conditions for members of groups that traditionally have been restricted. The first step, begun after the end of World War II, was to determine that intentional discrimination on the basis of race, colour, religion, national origin, or sex was illegal. The second step was to expand the law to prohibit practices of employers that converted discrimination in one sector of society into a denial

of opportunity in another. This was accomplished by statutory interpretation in the U.S. in the *Griggs* case. This development, in turn, was codified in the British Race Relations Act in the mid-1970s. The next step, suggested here, is to do away entirely with the necessity for proving any kind of discrimination as the basis for imposing an affirmative action obligation.

The approach suggested here would, of course, require a definition of the circumstances under which the AA obligation attached and what steps must be taken to comply with it. The U.S. experience with these matters is instructive as much on what to avoid as what to do.

#### V. APPLYING THE AFFIRMATIVE ACTION REQUIREMENT—THE BOTTOM LINE

Under the Executive Order, the obligation to take affirmative action attaches when minorities or women are "underutilized" in each job or job group in the workforce. "Underutilization" is defined as having fewer minorities and women than the proportion present in the "available labor force". "Availability", in turn, is defined by a complex "eight-factor" analysis that includes a consideration of various statistics concerning the labor force.<sup>19</sup> In addition, regulations require employers to analyze whether their specific employment practices have an adverse impact on employment opportunities of minorities and women.<sup>20</sup>

"Adverse impact" is said to exist when minorities and women are included in the workforce at a rate of less than 80 per cent that of white males.<sup>21</sup> This "80%" or "4/5ths" rule is a "rule of thumb" by which the federal government suggests that employers can determine when their practices require revision under either the Executive Order or statute. Where a practice or procedure does not meet this requirement, then, under federal regulations, the employer has the option of justifying the practice on the grounds of business necessity or revising the use of the practice so that it does not produce either "adverse impact" or "underutilization". This latter option is known as the "bottom line" approach. It has been adopted by the federal government in the exercise of its administrative discretion.<sup>22</sup> One Supreme Court opinion has cast some doubt on this approach as an authoritative interpretation of the federal statute, but it is applicable under the regulations of the Department of Labor and the Equal Employment Opportunity Commission.<sup>23</sup> The theory of the "bottom line" approach is to provide employers with a most important incentive to implement AA programs. That incentive is the freedom from detailed government regulations associated with the achievement of affirmative action results under the bottom line theory.<sup>24</sup>

#### VI. GOALS AND TIMETABLES

"Affirmative action" is defined in the Guidelines of the Equal Employment Opportunity Commission as "those actions appropriate to overcome the effects of past or present practices or other barriers to equal employment opportunity".<sup>25</sup> It encompasses a wide variety of conscious efforts to include previously excluded groups through recruiting, revision of hiring standards, making hiring decisions among qualified applicants so as to include members of these groups, and making conscious decisions with respect to such persons in connection with other employment decisions, including training and promotions. Frequently, these

kinds of AA will be sufficient to include those groups who have historically been restricted, so that more direct methods of affirmative action will be unnecessary. Examples of such programs that are not controversial in the U.S. include recruitment efforts and notification of vacancies directed to minorities and women.

These kinds of affirmative action programs have been upheld under the U.S. Constitution in the celebrated *Bakke* case.<sup>26</sup> There, the Supreme Court permitted "race conscious" programs to include minorities into medical schools. However, in a complex set of opinions, the particular program was held illegal because, in the view of one justice, it made race the exclusive criteria for consideration for admission. The crucial difference between the *Bakke* holding that a specific racially based "set aside" for medical school admission was unconstitutional and the *Fullilove* holding that a specific racially based minority business "set aside" was lawful probably lies in the process by which each program was created. In *Bakke*, the set aside program had apparently been adopted *sua sponte* by the faculty of the medical school. In *Fullilove*, the set aside program had been adopted by Congress after extensive hearings and debates and on a fully developed "legislative record". This difference suggests that there should be a carefully developed record demonstrating the need for AA programs that may impact significantly on existing expectations of whites/males in order to improve minority or female opportunity.

The AA program that most directly addresses the restriction or exclusion of members of certain groups is called, in U.S. parlance, "goals and timetables". Under this concept, employers are expected to increase their utilization of protected group members in accordance with numerical standards. These are not applied mechanically. The goals and timetables program seeks simultaneously to increase opportunities for members of protected groups and preserve for employers their necessary freedom to select qualified persons in a process that does not "unnecessarily tram" the expectations of white males.<sup>27</sup>

Programs that possess these characteristics have been upheld by U.S. courts. The most notable of these decisions is *Steelworkers v. Weber*. In *Weber*, the employer and union, under some pressures from the government under the Executive Order, adopted a training program for unskilled workers in which 50 per cent of the positions would be reserved for minorities until the minority participation in the skilled labor force equalled their proportion in the general labor force. This was challenged as reverse discrimination under the Civil Rights Act. The Supreme Court upheld the program because it was tailored to remedy a traditional restriction of minorities from skilled trades, did not preclude opportunities for whites, and was "temporary" in that it would not continue once the "racial imbalance" was corrected.

The court made clear that, in its view, there was a sharp difference between a program to correct imbalance, which was permissible, and a program designed to preserve a particular racial composition, which would not be proper. This same approach is embodied in the Affirmative Action Guidelines of the EEOC.<sup>28</sup> In addition, the Department of Labor has promulgated detailed regulations to enforce the AA obligation of government contractors, which will be discussed



below.<sup>29</sup> While the present administration has, in 1983, questioned this approach, it has not repealed the administrative regulations that embody it. We will now examine certain aspects of these regulations.

#### A. Determining "Underutilization"

The major flaws in the implementation of the affirmative action requirement of the Executive Order are (1) the difficulty in determining when the "underutilization" that triggers the requirement of "goals and timetables" exists and (2) the defining of "job groups" to which the goals are applicable. The government has not done an adequate job of establishing objective standards to identify the circumstances under which affirmative action should be taken and the extent of that action.

The "80%" rule discussed above is a step in that direction, but it does not operate when the pool of minority or female candidates is inadequate because of discrimination or the failure to take affirmative action. In that circumstance, it is necessary to determine "underutilization" by identifying the available pool of qualified minorities and women by an examination of "eight factors".<sup>30</sup>

These factors are to be "taken into account" by the employer in determining underutilization, but the regulations do not indicate how they are to be evaluated. Informal administrative efforts to simplify the eight factors have been nullified under the Administrative Procedure Act.<sup>31</sup> As a result, employer representatives and government officials engage in fruitless and frustrating wrangling over the components of the "eight factors". Proposed revisions in the regulations, which have not yet been adopted, would reduce these eight factors to three but would not eliminate the "guesswork" and hence the uncertainties and fertile ground for endless discussion that now exists. It would be a vast improvement over the present United States procedures for Canada to develop an objective standard to identify underutilization and avoid such wrangling.

The underlying problem in articulating a "goals and timetables" program is to set its objectives so that there will be improved employment for minorities and women without creating a racially or sexually stratified job environment, and with minimum direct government regulation. The U.S. Supreme Court has suggested a starting point from which to address the first aspect of the matter:

*...absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.*<sup>32</sup>

This suggests that population or labor force participation can constitute the first ingredient in setting a goal. But since the Court has also stated that AA should not "unnecessarily trammel" expectations of white employees, the goal must be tailored to recognize their expectations as well. In addition, it must recognize the need of the employer for qualified employees. Finally, it must have some "self liquidating" quality, so that it will not perpetuate a racially stratified job environment.<sup>33</sup> All of these considerations must be balanced in constructing a "goals and timetables" program. The principles for such a program are easy to state, although difficult

to implement because of the range of considerations that must be balanced. Some of these principles are:

1. The employer must be able to identify from readily available materials the goals expected of it. The employer should not have to either guess at what its goals are, or engage in extensive research in statistical materials or prolonged negotiation to identify them. Goals should be stated as a percentage or number of expected openings in a specified period of time.

2. The employer should have the opportunity to demonstrate that a particular goal is unfeasible given the specifics of the labor market in which it operates, but only if a "workable" goal is simultaneously adopted.

3. Job groupings to which goals attach should be the large "occupational categories" normally used for statistical purposes, unless the employer prefers smaller groupings. While a large job category, such as "office and clerical" workers, would appear to permit employers to "bury" minorities or women in the lower paying part of the category, the costs and uncertainties created by the attempt to impose an artificial set of smaller job categories are too great. The regulatory effort, instead of being furthered, is frustrated. Any unfairness that takes place within the large category can be addressed by the individuals involved through the filing of complaints. The "goals" program should not be expected to address all issues concerning discrimination.

4. The consequence of a failure to meet the goals without adequate justification must be serious, else there will be little incentive to comply with the requirement.

#### B. A Program Outlined

Within this framework, the following suggestions are made as a basis for development of a practical AA program:

1. The statute should impose on each covered employer the obligation to increase participation of protected group members at a maximum feasible rate.

2. The minimum feasible rate of improvement in participation of protected group members should be set by law or regulation at a percentage of openings per year in each general job category. Goals should be cumulative, in that if they are not met in any one year the "deficit" is added to the following year's obligation. No goal should be required for a job category in which protected groups constitute a defined "acceptable" percentage of protected group members.

3. Percentage increases are meaningful only if the starting base is itself significant. If the employer has no minorities or women, an increase of 5 per cent or 10 per cent will not accomplish anything. Therefore, there must be a "threshold" goal for employers who do not have significant numbers to begin with. Where the employer has not crossed this "threshold" it should be required to fill a substantial proportion (perhaps 50 per cent) of vacancies in each job category with protected class members until it reaches the threshold. This approach is consistent with the decision of the Supreme Court in *Steelworkers v. Weber*, which upheld a 50-50 training program where there were virtually no skilled minority workers.<sup>34</sup>

4. In meeting the goals, the employer need employ and promote only persons who are qualified as measured by lawful standards. Because the EEO laws have held qualification standards up to legal scrutiny, it has sometimes been argued

that, under affirmative action, unqualified persons must be hired. This is simply false. It is true that qualifications that exclude a higher proportion of protected group members than of whites and are not required by business necessity are illegal. But this illegality flows not from the affirmative action programs, but from the statutory principle explicated in the *Griggs* case.

In the early days of affirmative action, some few employers did "gamble" by hiring or promoting a few individuals without a reasonable expectation that they would be able to perform. This practice was discontinued by the mid-1970s. The hiring of persons unable to perform is not required by AA programs.

### C. Sanctions

Sanctions for failure to meet goals could include a monetary penalty. However, this might either produce much litigation or produce such small penalties that no pressure to comply is generated.<sup>35</sup> A second type of sanction would be to expose the employer to civil liability to persons who might have been included in employment if appropriate goals had been adopted and implemented.<sup>36</sup> A third type of sanction would be to place employment practices of the employer under the supervision of some outside official, such as a judge, special master, or administrative official. That official could then review personnel practices and order specific actions to be taken to meet the goals. The jurisdiction of that person would remain until either the goals had been met or the statutory obligation otherwise complied with.

This sanction may well prove so effective that it will rarely be invoked. The loss of control over hiring and promotion practices interferes with the employer-employee relationship. If employees believe that they owe their job to an outside source, rather than to their employer, they may be less enthusiastic in performance. Many employers believe this is the case. In addition, an official appointed to oversee the employer's practices may not understand business needs. Finally, employers are simply reluctant to have their decisions subject to any outside review. For these reasons, most employers would choose to meet goals rather than risk this sanction.

### D. Enforcement:

#### Private Initiative and Public Responsibility

U.S. experience demonstrates that vesting enforcement responsibility solely in public officials does not produce substantial results. The engine that has fueled the social change in the States has been the private cause of action, where plaintiffs' attorney fees are paid by the losing employer.<sup>37</sup> Individuals should be able to recover against employers who either intentionally discriminate, impose programs with unjustifiable adverse impact, or fail to adopt or implement affirmative action programs. In the last situation, plaintiff would have to show that the employer was obligated to have such a program and that plaintiff was in the class that would have benefited from it, and might have done so.<sup>38</sup>

### E. Time Limits

The statute should be limited by law to a period of years, possibly 15. This suggestion is not based on the assumptions underlying "sunset" laws which have been proposed in the

States which provide that legislation will become unnecessary after that time. Rather, the U.S. experience in the 15 years between 1965 and 1980 demonstrates that the nature of the problems changes drastically in that period. The early years under the Civil Rights Act involved questions of overt restrictions on minorities and women. In more recent years, more subtle and complex issues of wage disparities, sexual harassment, and "reverse discrimination" have become central.

Employers who comply with a "goals and timetables" program over 15 years will have dramatically increased the participation of minorities and women. At that time, new problems should be addressed, and there may be old solutions that should be set aside.

Perhaps most important, imposing a time limit on "goals and timetables" may relieve some anxieties about the programs.<sup>39</sup> One reason for resistance to affirmative action is a fear that it will continue long after the depressed conditions of protected groups have been corrected. The result would be a society in which race, national origin, or sex instead of diminishing in significance, would become more important. The end result of this would be precisely the racially and sexually stratified job environment that the law seeks to eliminate. The argument has some force, but the U.S. experience is that this type of program is necessary to provide meaningful improvement in minority and female opportunity. The legitimate concerns about the long-run effects of the program can be met by establishing a time limit on it at its inception. The time period must be sufficiently long so that employers will not attempt to "wait it out".

### F. Revised Basis for Future Programs: Records and Reports

Employers should be required to keep records concerning minority and female employment and to make periodic reports as required by government. The data generated by these reports not only assists in monitoring compliance, but will provide a base over time by which employer efforts can be compared.<sup>40</sup> Once such a data base is established, employers can be expected to reach levels of minority and female participation of at least the average, or perhaps of the "better" employers. This approach would automatically take into account labor market considerations. It is used indirectly in the U.S. in the "target selection" system of the Department of Labor. It has the advantage that the goals would be based on practical industrial experience.

The risk in this approach is that it may confirm existing discriminatory employment patterns. This can be avoided by using the "best" employer as a model, or by providing an "add on" or "threshold" goal as discussed above.

### VII. OBJECTIVE AND SUBJECTIVE STANDARDS

Much law in the U.S. has developed around the issue of justification for selection procedures that have adverse effect.<sup>41</sup> In "blue-collar" employment, employers have relied on a variety of screening devices, such as written tests and educational credentials. There are extensive federal guidelines concerning selection procedures as well as many decided cases.<sup>42</sup> These experiences give rise to the following suggestions:

1. Are tests used to rank order, or identify a pool of qualified candidates?

There is a tendency, especially among public employers, to use written tests to rank candidates and hire the candidate who scores highest.<sup>43</sup> The general experience is that minorities do less well on written tests than whites, due to inferior educational opportunities. If this is true in Canada, then employers who employ the highest scoring candidates will inevitably exclude minorities. To address this problem, the Uniform Guidelines on Employee Selection Procedures impose a heavier burden of "validation" on employers who use tests for ranking than on those who use tests only to identify a pool of qualified applicants.<sup>44</sup> This approach seems more realistic in light of the limited predictive power of most written tests.

Because of this experience, Canada may wish, in situations where the employer has "underutilized" minorities, to limit the use of written tests to the creation of a pool of qualified applicants. Selection from the pool would be based on factors other than the test score, and would include affirmative action considerations. The employer could set its "cut-off score" to provide an adequate pool of candidates, but could not exclude minorities whose scores were close to the scores of whites.<sup>45</sup> Written tests generally do not have the predictive power to distinguish between candidates whose scores are close to one another.

Under this approach, an employer who used tests for the creation of a pool of qualified candidates may include sufficient minorities to meet its AA obligations without taking any other steps. Thus the employer will obtain workers who meet its own qualifications without engaging in extensive and possibly futile efforts at validation.<sup>46</sup>

Some objective standards that have adverse effect on women could be declared illegal either by statute or regulation so as to avoid litigation, e.g., height and weight restrictions.<sup>47</sup> If employers succeed in justifying an objective standard, they may lawfully use it to exclude minorities or women.<sup>48</sup> Therefore, the emphasis should be on meeting the affirmative action goals rather than justifying the failure to do so.

2. The bottom line approach can be achieved by permitting employers to use any standard, so long as it avoids overall adverse impact. For example, an employer who sets a 5'9" height requirement will exclude most women from consideration. This result would normally require that the employer validate or abandon the standard.<sup>49</sup> If, from among those females who are 5'9", the employer hires the same number of women as would be hired without the requirement, it has avoided the anticipated "disparate impact" on women. Similarly, an employer who used a written test that excluded a higher proportion of native people than whites would be required to validate the test under the disparate impact theory. But if that employer hired as many native people as would be hired without the test, the employer should not have to justify its use. Under these circumstances, the employer should be free to use the test because the purpose of the law—to improve minority employment opportunity—has been satisfied.

Validation, if it succeeds, provides a justification to exclude those who fail the test. If it fails, it exposes employers to liability for actions taken in reliance upon it. It is an uncertain and expensive process. The purpose of EEO law is to

improve opportunities, not to generally rationalize or regulate industrial practices.

To make the point more concretely, consider an employer with 100 applicants, a written test that has not been validated, and a need for 20 employees. The employer who considered the "bottom line" might function like this:

|                    | Applicants | Pass Test | Hired |
|--------------------|------------|-----------|-------|
| Whites             | 50         | 40        | 10    |
| Native People      | 20         | 5         | 3     |
| Visible Minorities | 30         | 10        | 7     |

The test had an adverse impact on minorities and native people as compared to whites, because 80 per cent of the whites passed but only 25 per cent of the native people and 33 percent of the visible minorities. This would normally require the employer to validate the test, or be found in violation of EEO laws. However, the employer has hired the same proportion of minorities and native people as appeared in the applicant pool. Assuming the application pool itself was fairly arrived at, the employer has both met its AA obligations and obtained employees who meet its own qualification standards. This is the optimum result.<sup>50</sup>

The bottom line concept emphasizes that the purpose of EEO laws is to improve minority and female employment opportunity, not to choose among those minorities or women who should be hired or promoted. The law is for the benefit of tall women as well as short, and for minorities who can pass tests as well as those who have difficulty. This is the position of the administrative agencies.<sup>51</sup>

However, in 1982, in *Connecticut v. Teal*, the Supreme Court limited, and possibly rejected, the concept.<sup>52</sup> The case involved an employer who tried to meet the "bottom line" on the courthouse steps, not one who had a regularized affirmative action program, and it may be distinguishable on that ground.<sup>53</sup>

Canada may take advantage of the U.S. experience on this point by providing specifically that employers who do meet their "goals" or otherwise have an appropriate bottom line need not validate or otherwise justify their selection procedures.

The emphasis on validating objective standards developed in connection with jobs in heavy industry in the U.S. may be misplaced in the new technology. Increasingly, employers will rely on subjective, rather than objective, standards, particularly in higher level and technical jobs.<sup>54</sup>

To the extent that selection practices are "subjective" they, of course, make it possible to "bury" intentional discrimination under the guise of selecting the "best qualified" candidate.<sup>55</sup> At the same time, as we have seen, "objective" criteria can easily produce an adverse impact on minorities or women. "Subjective standards" can conceal discrimination while "objective standards" may prevent minorities or women from obtaining employment opportunities.<sup>56</sup> In addition, there will be increasing numbers of situations where the employer avowedly utilizes subjective decision-making. They will assert that it is impossible to "objectify" employment decisions, particularly with respect to "higher level jobs."<sup>57</sup>

My view is that decision-making for virtually all "higher level" jobs is necessarily in part subjective. That being the case,



virtually the only way EEO laws can be implemented with respect to such jobs is to compare statistics of those hired or promoted with the statistics of white males, and to assure that fair procedures are used. In this setting, the "bottom line" approach is particularly important.

3. There should be addressed one further theoretical problem with the affirmative action concept as applied in the U.S. Is the objective of affirmative action to make each employer a microcosm copy of the population or labor force? If a given labor force is 43 per cent female, 20 per cent black, and 15 per cent hispanic, is it to be expected that each employer of substantial numbers of workers will have a labor force that reflects those percentages? While this question has not been definitively answered, there are indications under the Executive Order concept of affirmative action that the answer is yes.<sup>58</sup> The quotation from the Hazelwood case, discussed above, may be interpreted in the same way.<sup>59</sup>

This approach is inconsistent with the way in which industrial relations systems work. It would require extensive governmental intrusion into employment practices. Some employers may employ large numbers of visible minorities but few disabled persons, or few visible minorities but many native people. This will happen because the most common technique of hiring is word-of-mouth recruiting by incumbent employees. Because social patterns tend to be segregated, the word will frequently be circulated among members of those groups already employed. Where employees are all white, such a practice would be illegal.<sup>60</sup> But where there are minority group members at work, the same practice will spread notice of opportunities within the group. This process can further affirmative action when minorities are included in the workforce.

It may lead to informal "specialization" by employers as to the minority groups whose members they employ. But as long as they do not intentionally reject a minority who is not a member of the "in" group, and so long as employment opportunities for members of other protected groups remain significant, it is not inconsistent with EEO laws. This approach could not be used by an employer who provided most of the employment opportunities in a given area. Where there are many employers, it is not useful to attempt to make each workforce a microcosm of the overall labor force. Because women constitute such a high proportion of the potential labor force, it would be inconsistent with EEO objectives to apply this concept to them. An employer should not be allowed to meet its affirmative action obligations by hiring white women instead of minorities or native people.

EEO law should continually focus on its major objective and seek the easiest method of accomplishing it. U.S. law has had its finest moments when this standard was applied, as in the *Griggs* case. When the law descends to regulation of complex details, its objectives are often forgotten and not readily achieved. The bottom line concept holds the promise of achieving EEO objectives, while leaving detailed matters of industrial relations practices to employers. So long as it is supplemented by a procedure to remedy individual instances of unfair treatment, the bottom line concept provides the best hope for achievement of a more equal but still free industrial relations system.

## VIII. PROCESSING INDIVIDUAL CASES

While the "adverse impact" standard has had a profound impact on employer practices, the vast bulk of complaints under EEO laws are individual claims that race or sex was a significant factor in an adverse personnel action.

These complainants do not allege that the employer has used an identifiable discriminatory practice. Rather, the claim is that the particular personnel action challenged was "tainted" by bias against the group to which claimant belongs. The relief sought is most often individual. The majority of these claims involve discharge, failure to hire, and failure to promote.<sup>61</sup> These "disparate treatment" claims are processed and litigated under different standards than the "impact" claims.<sup>62</sup>

### A. Administrative Processing

In 1965, individual claims were utilized by EEOC as the basis for an administrative investigation of all employment practices of the employer. These wide-ranging investigations were time consuming. They were processed in a formal manner, with written findings of "reasonable cause" to believe there was discrimination. This was important at the time because there was no case law concerning discrimination.<sup>63</sup> One result was the development of a backlog of cases. Years of delay harmed complainants who lost interest and faith, and respondents who were sometimes exposed to extensive liability.<sup>64</sup>

The delay fed upon itself, in the sense that the longer the time between the event complained of and the investigation, the more difficult the investigation. Conciliation of these "old" cases was very difficult because of the large amounts of money involved, based on the time from the discriminatory event. Employers were unwilling to pay such amounts, and complainants, if they had not lost interest, were unwilling to settle for small amounts.

In 1977, with the program in disarray because of delays and other factors, the EEOC introduced a "rapid charge processing system". The investigation was to be focused on the individual complaint, and the objective of the newly developed "fact finding conference" was to settle the case at an early stage, as well as facilitate the investigation.<sup>65</sup> This new system was a vast improvement over the old formal system because it secured much better results.<sup>66</sup> It too has its drawbacks. Some employers believe the current "rapid charge processing system" seeks to obtain settlement in non-meritorious cases. Some complainants and their counsel believe the EEOC creates pressure to take inadequate settlements.

### B. Judicial Processing

The litigation of these cases is no more satisfactory than the administrative processing. Recently, the Supreme Court has held that the time limits for filing complaints with the EEOC under Title VII are to be construed literally.<sup>67</sup> Earlier lower court decisions that applied equitable principles to avoid the impact of these limits were rejected.<sup>68</sup> The time limits began to run in individual cases when the complainant is "clearly advised" that the adverse action would be taken, even though grievance and arbitration procedures have not been exhausted.<sup>69</sup> The result has been a vast increase in litigation over the time limits issue.

When these cases are litigated on the merits, the courts apply the "McDonnell Douglas" approach, under which the plaintiff must establish a *prima facie* case; the defendant then has an opportunity to justify its action. The plaintiff may rebut the justification by demonstrating that it was a pretext for "intentional" discrimination.<sup>70</sup> Courts had great difficulty with this approach. The Supreme Court has taken several cases in the last decade in an effort to clarify the nature and order of proof in these individual cases.<sup>71</sup>

In addition to the recent administrative narrowing of the individual claims noted above, and the rigorous enforcement of time limits, the Supreme Court has recently narrowed the scope of private class actions. In the late 1960s, when conciliation of these cases failed, the courts permitted "across the board" class actions challenging a wide range of employment practices based on the presumption that any single minority or woman could represent all minorities or women.<sup>72</sup> The Supreme Court has rejected this presumption, and thereby limited the class to those whose situation was factually similar to that of the individual claimants.<sup>73</sup>

Thus the procedures for processing individual claims have changed over time, and are not viewed as satisfactory. The approach of the EEOC in the early years may have been necessary to provide maximum impact for the statute, but it developed such difficulties that it could no longer function. The narrowing of the individual case process in the 1970s may have reflected a dissatisfaction with the difficulties of the earlier approach. The narrowing of the court actions involving individual complainants may reflect the lessening of "systemic discrimination" and hence the reduction in the probability that any particular employment decision was tainted. The earlier case law virtually presumed that a complainant had been discriminated against, and left the employer the burden of justifying its actions.<sup>74</sup> A recent decision of the Supreme Court has rejected this approach altogether.<sup>75</sup>

There are many problems in constructing an effective and fair program for individual complaints. The fact that earlier efforts did not hold up over time may say more about changing circumstances than about the wisdom of the program at the time of adoption. Lessons from this checkerboard of experience should be cautiously drawn.

### C. Causes of the Difficulties in Individual Complaint Processing

These difficulties have resulted from the complexities of fact, law, and administration in what appears to be a simple matter.

First, there is the problem of legal analysis. These cases can be argued under three analytically distinct theories: (1) conduct animated by a desire to subordinate all members of a disfavoured group—a term for this is "evil motive" or "intentional" discrimination; (2) conduct that treats a member of a disfavoured group less favourably than a similarly situated or qualified member of a favoured group (denial of "equal treatment"); and (3) application of a practice that adversely affects members of the disfavoured group without business necessity.<sup>76</sup>

Each of these legal theories emphasizes a different type of proof. The first concept requires proof of circumstances which, taken together, give rise to the inference that the

adverse personnel action was taken "because" of a dislike of the group of which the complainant is a member.

The second concept requires proof that individuals were similarly situated but differently treated. Unfortunately, in the U.S., this concept has been treated as a method of proving "evil motive" rather than as a separate theory on which liability may be based. The trier of fact must go beyond a finding of "differential treatment" and infer that the reason for the difference was the desire to suppress the group of which the claimant is a member. This extra step has added unnecessary complexity to the trial process. It should be enough for plaintiff to show different treatment to establish a violation.<sup>77</sup>

The third concept, proof of application of a selection procedure with adverse impact, is usually raised in a class action. It permits statistical proof on the issue of the cause of the adverse impact.<sup>78</sup> This, in turn, has generated extensive case law and literature concerning appropriate statistical analysis. This development has raised the costs of litigation.<sup>79</sup>

### D. Analysis of the U.S. Experience

The design of a procedure for individual claims should recognize the following elements in the U.S. experience:

1. Prompt processing of cases is imperative. Delay means either justice denied to complainants who lose interest and faith or to respondents who are called upon to pay for the government's default. Furthermore, passage of time alters the outcome of these cases in significant ways. It reduces the chance of settlement and increases the likelihood of litigation.

2. A claim of discrimination is processed, with intensive examination of the complainant at least four times under current procedures: (1) in the initial complaint stage; (2) in the administrative investigation; (3) in the discovery phase of litigation; and (4) in the trial phase of litigation. This is a wasteful and burdensome procedure.

3. The present "rapid charge processing system" of EEOC, while an improvement over older practices, is essentially an occasion for negotiation. The conference is not on the record, and hence will bind neither of the parties. Therefore, if it does not produce a settlement, the parties must "start over".

The reason for this lies in the history and structure of the statute. Congress has consistently refused to give the Equal Employment Opportunity Commission the power to conduct administrative hearings and issue regulatory orders.<sup>80</sup> The EEOC may investigate, find reasonable cause to believe the statute has been violated, and seek to conciliate. If conciliation fails, the individual as well as the EEOC may institute a *de novo* federal court action against private employers.<sup>81</sup>

Against this statutory background, the "fact finding conference" was as close to a trial-type hearing as the agency could come. It could compel attendance and the production of information, but it had no power to hold an "on the record" proceeding and issue an order based on that record. Even if it had been given such powers, the tradition in administrative agencies is to conduct investigations and settlement efforts prior to institution of formal hearings. The state agencies, which do have powers to hold trial-type hearings, follow essentially the same procedure as the EEOC.

4. Most employers and employees are aware of the continuing option to negotiate. It is not necessary to create a

procedure to call their attention to this possibility. It may be useful to have some official function as a facilitator of negotiation between the parties.

5. The "order of proof" under the McDonnell Douglas formula resembles a ping pong game rather than a trial of a civil action. It has distracted judges and counsel. The Supreme Court remarked with surprise in 1982 that the question of whether the plaintiff had established a *prima facie* case was litigated long after the judge had admitted the evidence and was in a position to make a determination on the merits.<sup>82</sup>

6. The "nature" of the proof will vary with the facts and the theory used, but the U.S. law has not recognized what should be obvious: if a minority or woman is treated differently than a similarly situated white male, the employer cannot possibly make out a business justification. The dissimilar treatment of a similarly situated person demonstrates that the employer's actions are internally inconsistent.<sup>83</sup>

#### E. A More Effective Procedure for Individual Cases

The common thread that binds these matters together is the reason given by the employer for the adverse personnel action. The structure of legal theory, the "nature" of the proof required, and the "order" in which that proof must be presented are all technical matters designed to assist in determining the legitimacy of that decision. Therefore, the first step in the processing of any case should be a full statement of reasons, made by the employer in a form that is binding.

Based on this elementary consideration, a more effective procedure for case processing can be envisioned. First, the complaint, if not dismissed on its face, could be presented to the employer. The employer should be required to respond in writing and under oath, stating in full the reason or reasons for the challenged personnel action. Failure of the employer to respond in a timely manner would result in a presumption that the answer, if given, would be adverse to the employer.<sup>84</sup>

The case, now at issue, with respect to the legitimacy of the proffered reason, would be presented directly to a hearing officer for trial on the merits. The separate steps of informal investigation and conciliation would be omitted. The hearing officer could seek settlement with at least as much efficacy as the equal opportunity specialist. At the hearing, complainant's testimony would be directed to the reason given by the employer, and the employer's testimony would be directed to supporting that reason.<sup>85</sup> If complainant failed to establish a *prima facie* case by his or her testimony, viewed in light of the employer's statements, the case would be dismissed. If plaintiff did establish such a case, defendant would present its justification.

At that point, which would normally be reached in one day, each party could request specific discovery. This discovery would be under the control of the hearing officer who had just heard the evidence, and would be tailored to the facts of the case. Thereafter, if necessary, an additional hearing could be scheduled. The hearing officer would then render a decision on the merits of the controversy, not on formal questions relating to *prima facie* case or rebuttal. Because these decisions are highly fact sensitive, appellate review should be either avoided, or restricted to "questions of law".<sup>86</sup>

This relatively simple procedure is similar to that used by labour arbitrators in processing discharge cases under collective bargaining agreements. One reason it has not been adopted in the U.S. is the convention that the plaintiff must present evidence first.<sup>87</sup> But, where there is an administrative procedure, the employer's reason is already known. The various methods of proof and legal theories are much less difficult to apply when they centre on the reason for the challenged action.<sup>88</sup>

Such a procedure may have some "bugs", which would have to be worked out, but it would be an improvement over the process now used, because it would subject the parties to a single governmental effort to address the problem rather than four efforts. The hearing officer could, as can any judge, encourage settlement at any stage of the proceedings.

If Canada were to adopt the direct affirmative action requirement discussed above, a modification in one of the theories would be required. The application of a process that has adverse impact would not give rise to liability if the employer could show that its "bottom line" of employment was appropriate.<sup>89</sup>

Canada should certainly avoid the situation that exists in the U.S. of multiple proceedings under various federal and state laws based on the same facts.<sup>90</sup>

#### IX. SPECIFIC PROBLEMS UNDER U.S. LAW

Some special problems have arisen under U.S. law that are worth special attention here. The following discussion is based on existing U.S. law, not the proposal developed earlier in this paper for a direct affirmative action requirement.

##### A. Wage Discrimination

The Equal Pay Act of 1963 prohibited sex discrimination in the denial of "equal pay for equal work".<sup>91</sup> The statute was construed to require that the jobs done by men and women be substantially the same before a pay differential could be actionable. The prohibition on sex discrimination in Title VII of the 1964 Civil Rights Act is broader than the Equal Pay Act. It prohibits intentional discrimination in wages even where the jobs held by men and women are different.<sup>92</sup> Canada may wish to avoid the uncertainties on this subject that are currently troubling the U.S. This can be achieved by explicit administrative recognition that an equal pay act of Canada imposes a requirement broader than the comparable statute in the States.

The original version of the EPA prohibited sex discrimination on jobs with "equal skill". Employers were concerned that such a provision would invalidate wage structures based on job evaluations, because those evaluations typically considered not only skill, but also the factors of effort, responsibility, and working conditions. To satisfy this concern, the EPA as adopted in the U.S. prohibits sex discrimination on jobs with equal skill, effort, and responsibility and performed under the same working conditions.<sup>93</sup>

In usual job evaluation practice, the factors of skill, effort, responsibility, and working conditions are given numerical values. These values are then added together to compare jobs that have essentially different content.<sup>94</sup> In fact, the primary function of job evaluation systems is to determine an equitable method of compensation for jobs that are different in characteristics.



For example, compare a hypothetical loading dock worker (typically a male job) with a hypothetical light assembly worker (typically a female job). Assume each factor is weighted 1-10.

|                          | Male | Female |
|--------------------------|------|--------|
| Skill .....              | 2    | 7      |
| Effort .....             | 8    | 4      |
| Responsibility .....     | 3    | 6      |
| Working conditions ..... | 5    | 1      |
| Total .....              | 18   | 18     |

These jobs are different, but their point values are the same, and therefore, with respect to the "internal equity" aspect of job evaluation, they should be paid similarly. However, in the United States, the agencies and the courts have imposed the requirement that the jobs be similar in each of the four characteristics, considered separately, not considered cumulatively, and, therefore, in the above illustration there would be no violation of the EPA. Canada, on the contrary, has specific statutory language that requires a consideration of the "composite" of the four factors in determining whether there has been a denial of equal pay for equal work.

In short, the Canadian EPA is written to comport with standard job evaluation procedure, while the U.S. has imposed the limitation under its EPA that the jobs be the same. Canada may wish to issue regulations interpreting its present statute in order to solve concerns about wage discrimination currently under discussion in the U.S.

The issue in the States has been posed as a question of whether jobs of "comparable worth" should be paid the same. This argument presupposes the existence of a "touchstone" by which the value of dissimilar jobs can be compared. It is now clear that no such "touchstone" exists, and that the appropriate question is not whether jobs are of "comparable worth" in some abstract sense, but whether there has been discrimination in the setting of the rates of pay for various jobs.<sup>95</sup>

There is one additional concern that might be addressed legislatively in Canada. U.S. employers frequently argue that they rely on the "market rate" in setting wages. If this rate reflects the stereotype that female or minority work is "worth less" than male work, the rate itself may embody discrimination. Employers are concerned that a holding to this effect would be ruinously costly, although their representatives tend to agree that "women's job" wage rates may be infected with discrimination. Canada may wish to consider two steps to address this situation: (1) a legislative or administrative finding that the "market rate" for traditionally female or minority jobs has probably been depressed because of discrimination against the type of people who occupy the jobs; and (2) a timetable, perhaps five years, during which employers, with technical assistance from the government, can squeeze the discrimination out of the wage structure.

#### B. Bona Fide Occupational Qualification, Seniority, and Other Privileges

There are several exceptions to the broad adverse impact principle reflecting political judgments of the Congress. These exceptions are generally construed narrowly in accordance with basic principles of statutory interpretation.<sup>96</sup>

The exceptions are of two types. The first involves confession and avoidance. It seeks to justify overt discrimination. To invoke this exception, the employer must admit that it intended to act on the proscribed ground, and then argue that it was justified.

This is true, for example, of the *bona fide* occupational qualification (BFOQ), which is available in all situations except racial discrimination. Because of the risks to the employer of losing the case if the court denies the privilege, the "BFOQ" today is rarely asserted. It cannot be invoked on the basis of stereotypes, such as women are not as strong as men, and "consumer preference" is not usually considered a qualification because its recognition could subvert the purposes of the act.<sup>97</sup>

An employer may, within this framework, seek females to model women's clothes,<sup>98</sup> and exclude women from the position of unarmed prison guard in a jail where sex offenders are held in "dormitory" conditions, because of the risks involved.<sup>99</sup>

The second form of exception to the "adverse impact" principle reflects a Congressional desire to permit socially useful conduct, such as the operation of a seniority system under a collective bargaining agreement.<sup>100</sup> This exception requires a demonstration that the challenged conduct was carried out for a legitimate purpose. The complainant may show that the purpose of the employer was to discriminate.<sup>101</sup> This approach is akin to the "business necessity" defense allowed in *Griggs*.

The operation of seniority systems under collective bargaining agreements has been analyzed under this approach by the Supreme Court. Lower courts had applied the *Griggs* principle to seniority systems that "locked" minorities and women into lower paying, less desirable jobs. These systems were declared illegal and ordered revised. Much of industry reformed its seniority systems in favor of "large unit" or "plant wide" seniority. This, in turn, enabled those long-service minority and female employees to transfer to better jobs when vacancies arose. The seniority system in the steel industry was reformed in this direction through collective bargaining.<sup>102</sup>

Thereafter, in 1977, the Supreme Court ruled that the *Griggs* principle did not apply to seniority systems, which were to be considered lawful unless they had their "genesis" in discrimination or were operated for a discriminatory purpose. Thus the "intent" with which a seniority system was created in the distant past may determine its present legality.<sup>103</sup> It is not sound to base the legality of industrial relations practices of the 1980s on the establishment of 40-year-old facts about discriminatory intent, particularly when 40 years ago, race and sex discrimination were common.<sup>104</sup> A more responsible approach to the admittedly difficult problems involving equity and fairness should be developed.

The U.S. experience suggests that there are two distinct problems concerning seniority. The first, mentioned above, is whether or not the system restricts opportunities of long-term employees. If minorities and women were hired into a restricted group of jobs, and are still employed in those jobs because of the seniority system, this is unfair without regard to intention. If they are in those jobs as a result of individual

choice, independent of seniority considerations, that is a different matter. Promotion and transfer opportunities, without penalty, should be available to them if they qualify. They should have preference over more junior white male employees and strangers because of their past contribution. This protection should be written into law or regulation. It should not be necessary to litigate the motives of persons who have long since left the scene in order to establish these rights.<sup>105</sup>

The second problem is the opposite of the first; it involves employers who have not hired minorities or women until recently. In this situation, minorities and women are junior employees, not senior as in the preceding case. The claim of equity arising from long service with the employer works against them and in favor of incumbent whites/males. The whites/male equitable claim is, however, tarnished by the fact that their own employment opportunities were enhanced because of the exclusion of minorities and women.<sup>106</sup>

If the usual "last in-first out" rules of layoff are applied in this situation, the beneficiaries of affirmative action will be laid off and EEO policies will be frustrated. But if they are not applied, then policies favouring the collective bargaining process and worker equity are frustrated.

In addressing this situation, some courts have permitted a "last in-first out" layoff policy despite its "adverse impact."<sup>107</sup> Other courts, enforcing decrees, have required that, upon a layoff, the proportion of minorities and women may not be reduced.<sup>108</sup> This approach may require the employer to retain more junior persons, while laying off senior employees, a situation fraught with potential interpersonal tensions and operational problems.

An alternative is to require that the available work be shared among all the employees, rather than laying any of them off. There has been some experience with this approach in the States as well as in Canada. It is being encouraged by statutes in several states, and in a recent federal statute that permits employees in a work sharing program to collect unemployment compensation for the time they do not work. This makes the "work sharing approach" more palatable to senior employees, who would otherwise be kept on full time when their junior counterparts are laid off. The work sharing approach is, on the whole, a more equitable method of adjusting a complex set of interests. The Canadian experience with work sharing has been positive.<sup>109</sup> Employers and unions should be required to use it to the extent practical.

Finally, many employers who are not unionized have unilaterally adopted seniority systems that pose both of the problems described above. It is not yet clear whether the principles described above are applicable only where the seniority system is based on a collective bargaining agreement, although Supreme Court decisions have focused on the importance of the bargaining process.<sup>110</sup> If the principles described above are not applicable to unilaterally established seniority systems, then the *Griggs* principle is, and an employer may not utilize such a system if it has adverse impact on minorities or women. Such employers would have to adopt work sharing, or make individualized decisions with respect to layoffs. This issue should be consciously considered in developing a new program.

### C. "Business Necessity"

The "business necessity" justification recognized (if not invented) in *Griggs* is commonly invoked by employers seeking to uphold practices with adverse effect. There is considerable confusion among the courts in the manner in which this defense is to be recognized.<sup>111</sup> Canada may wish to avoid this confusion by adopting the following principles:

1. Business necessity is a defense either to a charge of adverse impact discrimination or a failure to adopt standardized goals and timetables. The employer bears the burden of persuasion on the issue because of specialized knowledge and concern.<sup>112</sup>

2. A business practice is not necessary if there is another reasonable method of accomplishing the business purpose with lesser adverse impact.

When the business necessity defense is offered, plaintiff may point out alternatives that the employer might have used to achieve its business purpose with lesser adverse impact.<sup>113</sup> Plaintiff has no "burden of proof" with respect to these alternative procedures, because the information concerning their practicality will normally lie within the control of the employer.<sup>114</sup> The employer's response to the plaintiff's assertion will be assessed under the basic principle that the employer has the burden of persuasion on the issue of business necessity.

### D. Pregnancy

The United States Supreme Court ruled, for reasons that elude me, that an employer who denied disability benefits for pregnancy was not doing so "because of sex". Congress promptly overruled the Supreme Court. Canadian legislation might resolve this issue so that there will be no need to repeat the experience.<sup>115</sup>

### E. Harassment

The practice of employer representatives seeking sexual favours as a part of employment relations of women has turned out to be far more common than most men suspected. It has also turned out to be illegal. The employer is responsible, on respondeat superior principles, for the acts of its supervisory personnel, and, upon notice, is required to take corrective action with respect to the conduct of other employees. The emerging principle is that a female employee is entitled to working conditions free of sexual demands or pressures.<sup>116</sup> A statute should specifically address this problem rather than leave it to the clumsy process of litigation or the uncertain process of administrative regulation.

### F. Age Discrimination and "Adverse Impact"

There have been efforts to expand the application of the "adverse impact" principle of *Griggs* to matters other than race, sex, or national origin. In *Geller v. Markham*<sup>117</sup>, the Court of Appeals applied the concept in an age discrimination case. This is an unfortunate development that ought not be followed elsewhere.<sup>118</sup> The purpose of the age discrimination acts is to break down stereotypes that assume that ability declines with age, regardless of individual ability. The adverse impact concept was designed to deal not with discriminatory stereotypes, but with industrial practices that reinforced the inferior position of the minority or female workers.

There is no social view that older persons are an inferior class. In fact, until recently, few survived to old age. Modern

science has now extended life, and created new problems. These problems cannot be addressed sensibly under the "adverse impact" concept. Industrial practices that adversely affect some older workers are of immense benefit to others. Seniority both protects older incumbent employees and excludes older job seekers. The "adverse impact" concept cuts both ways and is therefore not useful.

In *Geller*, the question was whether a school board, when deciding which teacher to hire, could take into account its policy of giving higher pay to new teachers who had prior experience. This policy favoured older teachers with such experience. If the board had hired older, more experienced teachers, paying them the same as inexperienced teachers, they might claim the failure to take account of experience had an "adverse impact" on older workers. This demonstrates that the adverse impact concept will not work in the area of age discrimination.

Furthermore, the primary beneficiaries of the age act are middle age white males (who may have been beneficiaries of prior discrimination against minorities and women). If the statute is construed broadly to protect them, it will reduce the available opportunities for minorities and women, thus conflicting with the policies of the laws relating to race and sex. To avoid this conflict, the age act should be confined to "intentional" discrimination, a concept fully adequate to break down the stereotypes concerning age.<sup>119</sup>

#### G. EEO Laws and Training Opportunities

One of the most serious flaws in the overall structure of U.S. manpower programs is the failure to effectively tie the employer into other institutions of society that provide manpower training. There is little formal liaison between high schools and employers, and little coordination between employers who are "deficient" or "underutilized" and various manpower training programs supported by the federal government.<sup>120</sup> Canada would do well to build in such links by virtue of requirements in affirmative action plans, under which employers would be expected to inform their sources of manpower: (a) that they were not receiving sufficient qualified minorities or women; and (b) the nature of the deficiencies in the applicants they did receive. This information would be useful to the sending institutions in improving their programs.

#### X. COST/BENEFIT ANALYSIS AND EEO PROGRAMS

Evaluation of government programs through an examination of their costs and benefits has become popular as a method of controlling government budgets. For several reasons, the cost/benefit approach has not lived up to the expectations of its supporters. Some of these reasons are applicable to the EEO program and explain why there is no overall cost/benefit analysis of the extensive EEO activities of the federal and state governments.

The first problem with the cost/benefit approach is the assumption that the "costs" will be borne by one set of persons or institutions and the "benefits" by others. This assumption is erroneous. Employers and majority group workers may benefit from the posting of notices of job vacancies and the elimination of irrational employment criteria. The benefits of social stability and a productive workforce flow not only to those who participate in programs of affirmative action but to the rest of society as well.

The second difficulty has to do with the measurement of costs. The cost to government can be identified by examining appropriations. But it is difficult, if not impossible, to quantify and measure the costs to the regulated community, or the costs to society. For employers, EEO program costs would include: (a) retention of personnel to engage in EEO and AA activities; (b) time of operating personnel spent on EEO matters; (c) attorney and litigation costs; (d) cost of revising industrial relations structures and procedures; (e) costs in lost productivity because of employee attention to EEO/AA matters. While items (a) and (c) may be isolated, the remaining items, while "real", are difficult if not impossible to quantify with reasonable certainty.

Similar difficulties exist with respect to measuring benefits. The measurement problem has two components. The first is the problem of quantification of qualitative benefits. How are the values of dignity, equality, liberty, and opportunity to be measured? These values, which benefit both those who seek improved conditions and those who are in the mainstream of modern life, are admittedly important, but to assign a dollar value to them exceeds the capacities of most analysts.

Therefore the cost/benefit analysis itself may express a value judgement on the "worth" of these intangibles. The analysis may assume matters which cannot be counted don't count.

Under a cost/benefit analysis, EEO programs can be reviewed in two ways. The dollar value of benefits received through enforcement actions can be identified and compared with enforcement costs. This requires an assumption as to the duration of the benefits. If a worker secures a \$10,000-a-year job through conciliation, is it to be assumed that the job will continue until she retires, or are benefits in future years to be disregarded? Either way, speculation bordering on the mystical is necessary to assign a value to this very real benefit.

But there are deeper problems of "causation" in this analysis. Our societies do not depend on the force of law to function. We assume that most persons and institutions will make good faith efforts to comply with most law most of the time. The emphasis on voluntariness in EEO statutes is evidence of this attitude. The "benefits" of the EEO laws cannot be viewed as limited to those concrete results in specific cases. Rather, those benefits should include all economic and social activity that can be fairly attributed to the existence or operation of the law.

The statistics in Table 1 demonstrate that minority occupational status began to improve only with the passage of the federal Civil Rights Act. Therefore, it is fair to attribute the improvement in minority occupational status to those laws.

While I am skeptical of the cost/benefit process, I have prepared the "benefit" side of the U.S. EEO program, assuming that the improvement in occupational status of minorities and women since 1965 is one of the "benefits" of the law. The Statistical Abstract of the United States, 1966, provided information as to the occupational distribution of minorities and women among the 10 standard job categories used for statistical purposes in 1965. This percentage distribution was applied to the number of minority employees and the number of female employees in 1980. This analysis shows how many minority and female employees would have been in each job category in 1980 if the 1965 occupational



distribution had continued. This figure was compared to the actual occupational distribution of minorities and women in 1980, excluding agricultural and household workers. This comparison showed that there were large numbers of minorities and women in the higher paying job categories in 1980, and gave a specific number for each category.

The Bureau of the Census Report on Money Income in the United States for 1979 and 1980 identified the mean income of those minorities and women in each job category. I multiplied this figure by the number of minorities and women who would not have been there under the distribution of 1965. I then subtracted the income "lost" because fewer minorities and women, proportionally, occupied lower paying jobs. This produced a figure showing the net increase of wages of minorities and women in 1980 attributable to the EEO laws.

For minorities, the figure was nearly \$9 billion. For women, the figure was more than \$21 billion. Since the two categories overlap, it is conservative to conclude that the EEO program enhanced minority and female earnings in 1980 by at least \$22 billion beyond that which would have been received under the 1965 distribution.<sup>121</sup> If this \$22 billion figure is projected back into earlier years on a conservative basis, the

benefits of increased wages to protected class members must reach more than \$100 billion. It is impossible for the costs of the EEO programs to make an impact on that figure.

There are many difficulties with this analysis, but even if the figure is cut in half, it is still very impressive. Those who challenge it may be challenging the cost/benefit methodology itself. If this analysis has done no more than display the difficulties in using the analysis, it has served a worthwhile purpose. In addition, it suggests the dimensions of the peaceful social revolution inaugurated by the Civil Rights act of 1964.

## XI. CONCLUSION

The EEO laws have enhanced opportunity, dignity, and income for minorities and women. This report has emphasized the difficulties that have been encountered, in the hopes that those who build upon experience can develop even more successful programs. Employment opportunities are an important component of individual freedom. I hope that those who seek the realization of that freedom may draw practical insight and inspiration from the United States experience.

## NOTES

1. Sovern, *Legal Restraints on Racial Discrimination in Employment* (1966), provides the best overview of the experience from the end of World War II until the passage of the Civil Rights Act of 1964. Title VII of that Act is the basic modern statute addressing equal employment opportunity, 42 U.S.C. 2000e. In addition, post-Civil War statutes, 42 U.S.C. 1981 et seq., are applicable to racial discrimination, and state civil rights laws may be applied concurrently with the federal laws. Age discrimination is prohibited by the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq. Certain forms of sex discrimination in wage rates are prohibited by the Equal Pay Act of 1963, 29 U.S.C. 206(d)(1). Discrimination by federal government contractors is prohibited and affirmative action is required by Executive Order 11246, reprinted, 42 U.S.C. 2000e, note. Discrimination in the collective bargaining context is also prohibited by the National Labor Relations Act. Leading texts on this complex body of law are Schler and Grossman, *Employment Discrimination Law*, 2d ed. (1983) (hereafter cited as Schler and Grossman); Larson, *Employment Discrimination* (1981); Sullivan, Zimmer, and Richards, *Federal Statutory Law of Employment Discrimination* (1980).
2. Blumrosen, *Six Conditions for Meaningful Self-Regulation*, 69 A.B.A. Jour. 1264, 1267 (1983).
3. See discussion of cost/benefit analysis, *infra*, part X.
4. Note 2, *supra*. For a more detailed account of the limited pre-1964 program in one state, see Blumrosen, *Anti-Discrimination Laws in Action in New Jersey: A Law-Sociology Study*, 19 Rutgers L. Rev. 189 (1965), which discusses the "voluntary" approach of that period.
5. 401 U.S. 424 (1971).
6. See Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 St. Louis U. L. Jour. 225 (1976); Jones, *The Development of the Law Under Title VII Since 1965: Implications of the New Law*, 30 Rutgers L. Rev. 1 (1976).
7. See, e.g., *U.S. v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971); *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972).
8. See, e.g., *United States v. Allegheny-Ludlum Steel, Inc.*, 517 F.2d 826 (5th Cir. 1975); U.S. Comm. on Civil Rights, *The Federal Civil Rights Enforcement Effort-1974*, Vol. 5, p. 556; *United Steelworkers v. Weber*, 443 U.S. 193 (1979).
9. See Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59 (1972); and articles cited in note 6, *supra*.
10. See 42 U.S.C. 2000e-5.
11. See *United Steelworkers v. Weber*, note 8, *supra*; EEOC, *Guidelines on Affirmative Action*, 29 C.F.R. 1608 (1979); *Pullman Standard Co. v. Swint*, 456 U.S. (1982) makes clear that the question of intentional discrimination is a factual matter in which the trial court has a large measure of discretion.
12. Executive Order 11246, as amended, 3 C.F.R. 169, reprinted 42 U.S.C. 2000e at 28 (1983). See Nash, *Affirmative Action Under Executive Order 11246*, 46 N.Y.U.L. Rev. 225 (1971).
13. See *Uniroyal, Inc. v. Marshall*, 579 F.2d 1060 (7th Cir. 1978).
14. See *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982).
15. Under U.S. law, a single factual episode may be litigated under the Title VII, state law, the older federal civil rights acts, the Executive Order, and possibly under Common Law. It can be processed before the Federal Equal Employment Opportunity Commission (EEOC), the federal Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), federal courts, state human rights agencies, state courts, and, in some circumstances, the National Labor Relations Board as well. This results in part from overlapping federal and state jurisdiction and in part from a history in which new programs were superimposed on older law.
16. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980).
17. *Ibid.*
18. Federal Court of Appeals, 1983.
19. Office of Federal Contract Compliance Programs, "Revised Order No. 4", 29 C.F.R. 60-2.
20. *Ibid.*
21. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. 1607.4(d) (1980).
22. *Ibid.* See Blumrosen, *The Bottom Line Concept in Equal Employment Guidelines: Administering a Polycentric Problem*, 33 Administrative Law Rev. 323 (1981).
23. The guidelines are noted but not applied in *Connecticut v. Teal*, 102 S.Ct. 2525 (1982).
24. See Blumrosen, *Affirmative Action in Employment After Weber*, 34 Rutgers L. Rev. 3 (1981).
25. Affirmative Action Guidelines, 29 CFR 1608.1(c) (1979).
26. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Bakke involved several opinions on a wide range of issues. Four justices believed the "set aside" of 16 of 100 seats for minorities in a medical school class was unlawful under Title VI of the Civil Rights Act because that act proscribed "color conscious" program. Five justices believed that "color conscious" affirmative action programs were lawful under Title VI and the Constitution so long as their necessity was demonstrated. Four of these justices voted to uphold the program at issue as justified to correct societal discrimination. One justice who believed that color conscious actions were proper, however, believed that the particular program had gone too far in excluding whites from any consideration for the spaces. Consequently, he joined the four who disapproved of color conscious remedies altogether, to strike down the reservation of 16 of 100 seats in the Davis Medical School for minorities.
27. *United Steelworkers v. Weber*, note 5, *supra*.
28. 29 C.F.R. 1608.4(c)(2)(i).
29. 29 C.F.R. 60-2-11.
30. The eight factors, summarized here, are: (i) minority population of labour area surrounding facility; (ii) size of minority unemployment force in said labour area; (iii) per cent of minority workforce compared with total workforce in immediate labour area; (iv) general availability of minorities having requisite skills in said labour area; (v) availability of minorities with requisite skills in area where contractor can reasonably recruit; (vi) availability of promotable minorities within contractor's organization; (vii) existence of training institutions with relevant training programs; and (viii) degree of training that contractor can undertake. Full text appears in 41 CFR 602(b)(1). Similar factors are applicable to female employment opportunity. Note that the last two factors are not commensurate with the others.
31. *Firestone Synthetic Rubber and Laytex Co. v. Marshall*, 507 F. Supp. 1330 (E.D. Tex. 1981).
32. *Hazelwood School District v. U.S.*, 433 U.S. 299 (1977).
33. *Steelworkers v. Weber*, note 8, *supra*.
34. *Steelworkers v. Weber*, note 8, *supra*.
35. This has proved to be the case with monetary penalties under the Occupational Safety and Health Act of 1970.
36. This approach is akin to the "duty of fair recruitment". See *Lea v. Cone Mills*, 301 F. Supp. 97, 102 (M.D. N.C., 1969); Blumrosen, *The Duty of Fair Recruitment under the Civil Rights Act of 1964*, 22 Rutgers L. Rev. 465 (1968); *Legal Aid Society v. Brennan*, 608 F.2d 1319 (9th Cir. 1979) involved a suit by minorities against the Labour Department to compel officials to enforce the requirements for affirmative action plans. The court concluded that the minorities had "standing" to maintain the action because there was a reasonable possibility that they might have found employment with some government contractor if the order had been enforced.
37. See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980). Payment of fees to the prevailing party is provided for in Title VII (Sec. 706(k)) and in the Civil Rights Attorney Fee Award Act of 1976 with respect to the post-civil war statutes, 42 USC 1988. In the absence of statute, the rule in the U.S. is that each party must bear the cost of its own attorney fees. See also, *Chrapliwy v. Uniroyal, Inc.*, note 14, *supra*.
38. See *Legal Aid Society v. Brennan*, note 36, *supra*.
39. See Blumrosen, *Quotas, Common Sense and Law in Labor Relations*, 27 Rutgers L. Rev. 675 (1974).
40. The U.S. Equal Employment Opportunity Commission periodically publishes summaries by area and by industry of the reports on race, ethnic, and sex composition of the workforce, broken down by standard job categories. These summaries are useful tools in evaluating the minority and female participation rates of employers. They could be used as the basis for evaluating compliance with affirmative action obligations. The Department of Labor's "target selection" program takes these considerations into account in deciding which employers to subject to compliance reviews.
41. See note 21, *supra*.
42. See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs*, note 5, *supra*.

43. *Guardians Association v. Civil Service Commission*, 630 F.2d 79 (2d Cir. 1980) cert. denied, 452 U.S. 940 (1981).
44. 29 C.F.R. 1607.4(e).
45. See *Guardians Association*, note 43, *supra*.
46. This is a consequence of the "bottom line" concept discussed *infra*.
47. See, e.g., 29 C.F.R. 1607.4(c)(2).
48. See Guidelines, note 21, *supra*.
49. See *Dothard v. Rawlinson*, 433 U.S. 321 (1977).
50. Blumrosen, The Bottom Line Concept in Equal Employment Opportunity Law, 12 N. Car. Cent. L. Jour. 1 (1981); Blumrosen, The Group Interest Concept, Employment Discrimination and Legislative Intent; the Fallacy of Connecticut v. Teal, 20 Harv. Jour. on Legislation, 99 (1983) and articles cited in note 22, *supra*.
51. Notes 21, 22, *supra*.
52. 102 S. Ct. 2525 (1982).
53. Blumrosen, The Bottom Line after Connecticut v. Teal, 8 Employee Rel. L. Jour. 572 (1983).
54. Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 945 (1982).
55. *Rowe v. General Motors*, 457 F. 2d 348 (5th Cir. 1972).
56. Blumrosen, Quotas, Common Sense and Law in Labor Relations, note 39, *supra*.
57. *Valentino v. U.S. Postal Service*, 674 F. 2d 56(D.C. Cir. 1982).
58. 41 CFR 60.211(a).
59. See text *supra* at note 32.
60. Corcoran, Datcher, and Duncan, Most Workers Find Jobs Through Word of Mouth, Monthly Labor Review, Aug., 1980, at 33; Blumrosen, The Duty of Fair Recruitment under the Civil Rights Act of 1964, 22 Rutgers L. Rev. 465 (1968).
61. Blumrosen, Strangers No More: All Workers Are Entitled to "Just Cause" Protection Under Title VII, 2 Indus. Rel. L. J. 519 (1978).
62. *Teamsters v. United States*, 431 U.S. 324, n. 15 (1977).
63. Blumrosen, Black Employment and the Law, Ch.2 (Rutgers, 1971).
64. Note 61, *supra*.
65. Schlei and Grossman, note 1, *supra*, p. 948 (1983).
66. Forty-three per cent of the complaints were settled in 1981, as compared to fewer than 10 per cent in the mid-1970s. Compare Schlei and Grossman, *op. cit. supra*, p. 938, note 1, with Blumrosen, *op. cit. supra* note 61.
67. *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980).
68. *United Airlines v. Evans*, 431 U.S. 553 (1977).
69. *Delaware State College v. Ricks*, 449 U.S. 250 (1980).
70. *McDonnell Douglas Corp. v. Green*, 411 U.S. 732 (1973).
71. *Furnco Constr. Co. v. Waters*, 438 U.S. 567 (1978); *Sweeney v. Board of Trustees of Keene State College*, 439 U.S. 24 (1978); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Aikens v. U.S. Postal Service*, U.S. (1982).
72. *Oatis v. Crown Zellerbach Corp.*, 398 F. 2d 496 (5th Cir. 1968); *Jenkins v. United Gas Corp.*, 400 F. 2d 28 (5th Cir. 1968); *Johnson v. Georgia Highway Express, Inc.*, 417 F. 2d 1122 (5th Cir. 1969).
73. *General Telephone Co. of the Southwest v. Falcon*, 102 S.Ct. 2364 (1982).
74. *East v. Romine, Inc.*, 518 F. 2d 332(5th Cir. 1975); *Turner v. Texas Instruments, Inc.*, 555 F. 2d 1251 (5th Cir. 1977).
75. *Texas Community Development Authority v. Burdine*, note 71, *supra*.
76. While the Griggs principle is often invoked in class actions, it can be litigated in an individual suit as well. See *Brito v. Zia Co.*, 476 F. 2d 1200 (10 Cir. 1973) (unvalidated written test with adverse impact); *Sprogs v. United Airlines* 444 F. 2d 1194 (7th Cir.) Cert. Denied, 404 U.S. 991 (1971) (prohibition on employment of married stewardesses).
77. Note 61, *supra*.
78. *Hazelwood School District v. U.S.*, note 32, *supra*.
79. See the 125-page opinion in *Vuyanich v. Republic Nat'l Bank of Dallas*, 505 F. Supp. 224 (N.D. Tex. 1980). See Schlei and Grossman, note 1, *supra*, 1331 to 1391.
80. Blumrosen, Black Employment and the Law, Ch. 1 (1971).
81. The EEOC may not sue state or local governments, which became subject to Title VII by the 1972 amendments to the statute. Those governments may be sued by the Justice Department, or by individuals.
82. *Aikens v. U.S. Postal Service*, note 71 *supra*.
83. Blumrosen, note 61, *supra*.
84. The New Jersey Division on Civil Rights has adopted a rule providing that failure to respond to interrogatories can result in default.
85. *Aikens v. U.S. Postal Service*, note 71 *supra*.
86. Appellate review of "fact issues" is more limited in federal court than is review of "issues of law". See *Pullman Standard v. Swint*, 456 U.S. 273 (1982).
87. See *Texas Department of Community Affairs v. Burdine*, note 71, *supra*, Blumrosen, note 61, *supra*.
88. *Aikens*, note 71, *supra*.
89. See discussion in part VII, point 2 *supra*.
90. See note 15, *supra*.
91. 29 USC 206(d)(1).
92. *County of Washington v. Gunther*, 452 U.S. 161 (1981). This is the narrowest reading of *Gunther*. It is not clear what kind of proof of "intent" will be required. See Blumrosen, Comparable Worth and Wage Discrimination Claims after County of Washington v. Gunther, in Current Trends and Developments in Labor and Employee Relations Law, J. Waks, Ed., Practising Law Institute, 1982, p. 245.
93. *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).
94. See R. Blumrosen, Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964, 12 Mich. Jour. L. Reform. 402 (1979).
95. *Ibid.*
96. *Corning Glass Works v. Brennan*, note 93, *supra*.
97. Schlei and Grossman, note 1, *supra*, 340-358.
98. See 29 CFR 1604.2(a)(2), EEOC Guidelines on Discrimination because of Sex ("genuineness").
99. *Dothard v. Rawlinson*, 433 U.S. 321 (1977).
100. Section 703 (h) of Title VII, 42 USC 2000e-2(h).
101. *Teamsters v. United States*, 431 U.S. 324 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).
102. Moore, Steel Industry Consent Decree—A Model for the Future, 3 Employee Relations L.J. 214 (1977).
103. Note 101, *supra*.
104. But 40 years later, before an unsympathetic trial judge, it may be difficult to prove in a particular case. See *Pullman Standard v. Swint*, note 86, *supra*.
105. All workers as well as the employer have vital interests in seniority systems under collective agreements. These interests should not be subjected to the uncertainties with respect to proof of an issue of fact that may be half a century old.
106. In *United Steelworkers v. Weber*, 443 U.S. 193 (1979), the case that upheld the reservation of 50 per cent of the places in a training program for minority employees against a claim of reverse discrimination, I have estimated that the white workers who were complaining had a 50 per cent better chance of being employed than they would have had if the employer had been hiring blacks at the proportion of their availability in the workforce. See Blumrosen, Affirmative Action in Employment After Weber, 34 Rutgers L. Rev. 1, 5, note, (1981).
107. *Watkins v. Steelworkers, Local 2369*, 516 F. 2d 41 (5th Cir. 1975).
108. 6th Cir.
109. Reid and Meltz, Short Time Compensation in Canada: A symposium on the California Program, Centre for Industrial Relations, University of Toronto, (May, 1983); Blumrosen and Blumrosen, The Duty to Plan for Fair Employment: Work Sharing in Hard Times, Rutgers L. Rev. (1975).
110. See, e.g., *Teamsters v. United States*, note 62, *supra*.
111. See Schlei and Grossman, note 1, *supra*, p. 1329-30.



112. *Griggs*, *supra*, note 5. But see *Albemarle*, note 42, *supra*, and *Burdine*, note 71, *supra*.
113. *Albemarle*, note 42, *supra*.
114. The Uniform Guidelines on Employee Selection Procedures, 29 CFR 1607.3 (b) require the employer consider alternatives when developing a selection procedure.
115. *General Electric v. Gilbert*, 429 U.S. 125 (1976); result changed by the Pregnancy Discrimination Act, 42 USC 2000e-(k).
116. The sex harassment claim can come in two forms: conditioning employment opportunities on granting of sexual favours and creation of an atmosphere of intimidation and hostility. The second form of sex discrimination has its analogue in race discrimination case. See EEOC Guidelines on Discrimination because of Sex, 29 CFR 1604.11 a-g.
117. 635 F. 2d 1027 (2d cir. 1980) cert. denied, 101 S. Ct. 2028 (1981).
118. Blumrosen, Affirmative Action in Employment After Weber, 34 Rutgers L. Rev. 1, 16 (1981).
119. See *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979) for a discussion of jury instructions in age cases.
120. This defect has been apparent for many years. See Nathan, Jobs and Civil Rights (1969).
121. Blumrosen, The Law Transmission System and the Southern Jurisprudence of Employment Discrimination, 6 Industrial Relations Law Journal 313, 333-341 (1984).

## EMPLOYMENT DISCRIMINATION LAWS IN THE UNITED STATES: AN OVERVIEW

Lynn Bevan

### Sommaire

La présente étude est un survol du dossier de l'égalité en matière d'emploi et de l'action positive aux États-Unis. Elle décrit les lois et règlements qui y ont été adoptés pour mettre en œuvre les mesures d'égalité en matière d'emploi et d'action positive, soit: le Title VII du *Civil Rights Acts of 1964*, l'*Equal Pay Act of 1963*, l'*Age Discrimination in Employment Act of 1967*, les *Civil Rights Acts de 1866 et de 1871*, le *National Labor Relations Act* ainsi que les programmes d'action positive rendus impérieux de par la loi et les décrets du pouvoir exécutif.

La formulation des diverses théories sur ce qui constitue la discrimination, à savoir un traitement préférentiel ou, notion plus générale, des conséquences démesurément préjudiciables à certains groupes, est analysée à partir des débats qui ont eu lieu au Congrès avant l'adoption du Title VII et des cas américains importants. Les éléments de preuves, les mesures de protection possible et les solutions proposées en vertu des quatre théories actuelles reconnues de la discrimination, ainsi que la pertinence de chaque théorie, eu égard aux pratiques d'emploi, notamment l'embauchage, les promotions, les départs, les licenciements, l'évaluation des candidats au moyen d'épreuves et les programmes d'avantages sont examinés. Le sont aussi le traitement de faveur accordé aux régimes d'ancienneté, le rôle des syndicats et les solutions possibles en vertu des lois sur les relations de travail.

Le document examine d'une façon plus détaillée les obligations précises en vertu de la loi et les exemptions aux termes du Title VII ainsi que les mesures de protection judiciaires, notamment les exigences professionnelles réelles, les nécessités du service, le devoir de se montrer souple et la protection accordée aux femmes, aux groupes raciaux désignés et aux autochtones américains.

Il étudie les règlements en matière d'action positive applicables aux entrepreneurs fédéraux et administrés par l'Office of Federal Contract Compliance Programs en vertu du décret-loi 11,246 modifié, de l'article 503 du *Rehabilitation Act*, et de l'article 402 du *Vietnam Era Veterans' Readjustment Assistance Act*. La méthode utilisée pour déterminer si des mesures d'action positive sont nécessaires, les données à recueillir ainsi que les méthodes d'application de la loi et de suivi sont expliquées. Le sont également les antécédents de la discrimination à rebours.

L'auteur décrit les attributions parfois contradictoires de l'Office of Federal Contract Compliance Programs et de l'Equal Employment Opportunity Commission et examine les récentes études sur l'efficacité des programmes d'action positive.

Un document intitulé "A History of Executive Orders Requiring Contract Compliance" se trouve en annexe.

### Summary

This paper provides an overview of the American experience with equal opportunity and affirmative action measures. It also describes the legislative and regulatory mechanisms that were designed to implement these measures: Title VII of the *Civil Rights Act of 1964*, the *Equal Pay Act of 1963*, the *Age Discrimination in Employment Act of 1967*, the *Civil Rights Acts of 1866 and 1871*, the *National Labor Relations Act*, and affirmative action required by executive order and by statute.

The development of the various theories of what constitutes discrimination, from a belief that it arises from "disparate treatment" to the broader concept of "disparate impact", is discussed with reference to the Congressional debates preceding passage of Title VII and to key American cases. The elements of proof, available defences, and remedies under each of four currently accepted theories of discrimination, and the applicability of each theory to employment practices such as hiring, promotion, termination, lay-off, testing procedures and benefits programs, are reviewed. The specific position accorded seniority systems, the role of unions, and remedies available under labour relations law are also analyzed.

The paper includes a more detailed examination of the specific statutory duties and exemptions under the Title VII and the judicially developed defences, including bona fide occupational requirement, business necessity, the duty to accommodate, and the particular protection provided to women, to designated racial groups, and to Native Americans.

The paper explores the affirmative action regulations applicable to federal contractors administered by the Office of Federal Contract Compliance Programs under Executive Order 11,246, as amended, section 503 of the *Rehabilitation Act*, and section 402 of the *Vietnam Era Veterans' Readjustment Assistance Act*. The methodology required to determine when affirmative action is required, the data collection requirements, and monitoring and enforcement mechanisms are outlined. An historical perspective on reverse discrimination is provided.

The paper describes the sometimes conflicting roles of the Office of Federal Contract Compliance Programs and the Equal Employment Opportunity Commission and reviews recent studies evaluating the efficacy of affirmative action programs.

"A History of Executive Orders Requiring Contract Compliance" is included in an appendix.

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# EMPLOYMENT DISCRIMINATION LAWS IN THE UNITED STATES: AN OVERVIEW

Lynn Bevan\*

## I. HISTORICAL FRAMEWORK

Somehow, Birmingham (May, 1963) made clear to the American people that there was something radically wrong in their country; that an intolerable injustice existed....<sup>1</sup>

President John Kennedy was opposed to his administration sponsoring major civil rights legislation in 1963. His slim margin in the House of Representatives made him sure that this legislation would be defeated.

The May, 1963, riots in Birmingham, Alabama, changed his view and the first draft of the bill that eventually became the *Civil Rights Act of 1964*<sup>2</sup> was presented by him to Congress within three weeks of those riots.

The original draft of Title VII, forming part of the *Civil Rights Act of 1964*, was limited to providing statutory authority for the existing contract compliance program established under the President's Executive Order to eliminate discrimination in employment in companies working under government contracts. Kennedy was concerned that the entire Civil Rights Bill might be defeated if it contained more ambitious provisions directed at discrimination in employment. He cited as precedent the defeat of Truman's proposal to establish a Fair Employment Practices Commission which had, in Kennedy's view, set back the cause of civil rights by introducing legislation before the country was ready for it. Even though Kennedy considered minimum-wage and collective-bargaining laws to be more invasive of business freedom than laws requiring hiring on merit without regard for race or religion, he also believed that, for historical reasons, the employment issue was sufficiently contentious to jeopardize the entire bill.

In hearings before the House Judiciary Committee, however, both liberals and conservatives (the former because they supported, and the latter because they opposed and thereby hoped to ensure defeat) voted to replace the administration's Title VII proposal with much more ambitious provisions based on an existing bill which would have created an administrative agency like the National Labor Relations Board with power to issue cease-and-desist orders where discrimination was found. Title VII as passed, however, left enforcement to the courts through individual suit. The new Equal Employment Opportunity Commission's (EEOC) role was confined, by Senate amendments, to confidential conciliation efforts.<sup>3</sup> The conservatives hoped to ensure defeat of the bill by proposing payment of attorney's fees, an unusual provision in the U.S., and the Southern representatives' efforts to defeat the bill by making it more "extreme" included further amending Title VII on the House floor to add sex as a prohibited basis of discrimination.<sup>4</sup> Their strategy proved to be ill-conceived since this amendment has had the greatest impact of all Title VII provisions.<sup>5</sup>

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The case law arising from the period immediately following the passage of the *Civil Rights Act of 1964* illustrates that what the courts were first attempting to rectify, and what Congress viewed as being prohibited, was deliberate, long-standing discrimination against blacks, described as "disparate treatment". In the almost 20 years since the passage of the Act, the courts have had to develop additional theories or categories of discrimination, which will be discussed in Section II, without the benefit of the usual legislative history on which U.S. courts are accustomed to rely, and sometimes in a manner that, it seems probable, Congress did not intend.

## II. THEORIES OF DISCRIMINATION

Four theories or categories of discrimination have been developed by the U.S. courts. They are listed in historical order:<sup>1</sup>

- A. Disparate treatment;
- B. Policies or practices that perpetuate the effects of past discrimination;
- C. Policies or practices having an adverse impact not justified by business necessity; and
- D. Failure to make reasonable accommodation for an employee's religious practices or physical or mental handicaps.

All cases of employment discrimination may be analyzed under one or more of these categories. The elements of proof differ for each category.

### A. Disparate Treatment

For the first seven years after passage of the *Civil Rights Act of 1964*, the courts applied Title VII only to intentional acts of discrimination, requiring proof of the employer's intention to discriminate as evidenced by disparate treatment.<sup>2</sup>

Disparate treatment or different treatment is what Congress had in mind when it enacted Title VII.<sup>3</sup> It is irrelevant whether the treatment is better or worse or whether the plaintiff is a good or bad employee, merely that different treatment was based on a factor that may not be taken into account in making an employment decision, e.g., sex, race.

The Supreme Court has established the following order in the allocation of proof which must be followed if an allegation of disparate treatment is to be proved:<sup>4</sup>

1. The plaintiff in a refusal-to-hire case must establish a *prima facie* case of discrimination, involving evidence of membership in the protected group, application and qualification for the job for which the employer

was seeking applicants, rejection despite qualification, and continued search by the employer for applicants with the plaintiff's qualifications after rejection.<sup>5</sup> In a discharge case, the plaintiff must establish membership in the class, discharge, and evidence to show a connection between membership in the class and the discharge.

2. The burden remains at all times with the plaintiff. The employer/defendant must offer a legitimate non-discriminatory reason for its actions only after a *prima facie* case has been established by the plaintiff. (The Supreme Court has made it clear that the employer is not required to prove, on a preponderance of evidence, that the reason offered was the real motivation or that the selected candidate had superior qualifications.<sup>6</sup>)
3. If some reason is advanced, the plaintiff must establish that the employer's reason was in fact a pretext.<sup>7</sup> To do so, the plaintiff may offer direct evidence of motive (very difficult to do, as a rule); statistical evidence (of relatively low importance in individual disparate treatment cases, since it is probative rather than determinative);<sup>8</sup> and comparative evidence.

In seeking to establish that the employer's reason was a pretext, comparative evidence is most commonly used by the plaintiff. The key consideration is whether the persons being compared (by either the plaintiff or the defendant attempting to rebut the plaintiff's evidence) are in fact in comparable factual settings.

The most common disparate treatment cases pertain to discharge and discipline. Most age discrimination cases, retaliation cases, reverse discrimination cases, and sex discrimination cases have been litigated on the basis that they involve disparate treatment.

#### **B. Perpetuation of the Effects of Past Discrimination: Seniority and the Bona Fide Seniority System Defence/Exception**

Section 703(a) of Title VII provides that it shall be an unlawful employment practice to discriminate against an employee in terms of compensation or the terms, conditions, or privileges of employment or to limit, segregate, or classify employees in a way that deprives them of opportunities or adversely affects their status, because of race, colour, religion, sex, or national origin. Different standards pursuant to a "bona fide seniority or merit system", if not the result of an intention to discriminate, are not considered unlawful because of the exemption provided in section 703(h).

#### **Judicial Development of this Category of Discrimination**

Prior to the passage of Title VII, some employers discriminated against certain employees because of their race or sex by assigning them to relatively inferior employment or by maintaining apparently neutral seniority systems such as departmental seniority systems, which restricted transfer or, where transfers were permitted, resulted in a loss of seniority by those being transferred.

Beginning in 1968 with *Quarles v. Philip Morris, Inc.*,<sup>9</sup> a case that held that a seniority and transfer system constituted present discrimination if it locked protected groups into

jobs in which they had been placed as the result of past discrimination, the courts soon rejected the contention that systems that gave the appearance of neutrality without the substance were bona fide seniority systems entitled to protection under section 703(h).

The judgement rendered in *Quarles* was followed for almost 10 years in every circuit where the issue was considered. However, in 1977, the Supreme Court rejected the reasoning in the *Quarles* line of cases that a seniority system constituted present discrimination and violated Title VII if it perpetuated the effects of discrimination that had occurred prior to the enactment of the *Civil Rights Act of 1964*. In *Teamsters v. United States*,<sup>10</sup> the Court found that a discriminatory effect in itself was not sufficient to preclude continued application of a seniority system to members of a protected group who had not personally suffered post-Title VII discrimination.

In *Teamsters*, the Court acknowledged that section 703(h) does not immunize all seniority systems and, in particular, does not immunize actions made as a "result of an intention to discriminate". Lacking this intention, however, any bona fide collectively bargained seniority system is exempted even if it confirms past discrimination.

The result of this judgement has been that plaintiffs must meet the standard of proof required for a disparate treatment case, a much higher onus than that required in a disparate impact case, as an illegal motive or intention must be established.

*Teamsters* was the first of a line of cases that indicated a shift in the interpretation of the requirements under Title VII towards an accommodation of national labour interests (desire for job security and promotion opportunities through collectively bargained seniority rights) and away from the overall purpose of Title VII: the eradication of employment discrimination (desire of employees locked into discriminatory systems to achieve equal employment opportunity).

The courts' reluctance to interfere with existing labour practices is illustrated by the Supreme Court's statement in *Furnco Constr. Co. v. Waters* that "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress, they should not attempt it".<sup>11</sup>

The uncertainty that has surrounded section 703(h) resulted from Congress' failure to indicate definitely which systems are excluded from protection under this section. There was no reference to seniority in the original bill passed by the House of Representatives.<sup>12</sup> In the Senate, a memorandum was finally added which stated that Title VII would have no effect on existing seniority rights. This memorandum was added to mollify opponents whose objections were based on fear that existing systems would be disturbed.

There has been considerable academic debate as to whether Congress intended to exempt bona fide seniority systems forever or whether it simply intended to protect rights existing at the time Title VII was passed, i.e., to "grandfather" existing systems while permitting systems to survive or fall thereafter like any other employment practice. The lack of legislative guidance permitted the 180-degree shift in judicial reasoning that occurred between *Quarles* and *Teamsters*.

Since *Teamsters*, most litigation has focused on whether or not seniority systems were designed, maintained, or manipulated so as to discriminate. The Supreme Court continued its lenient interpretation of section 703(h) in *American Tobacco v. Patterson*,<sup>13</sup> which exempted a discriminatory system adopted after the effective date of Title VII. The Court held (5-4) that unless an actual intent to discriminate is proved, section 703(h) protects the bona fide system from invalidation.<sup>14</sup> Another court has held that the *Teamsters* rationale applies to company-adopted seniority systems as well as to seniority systems established by collective bargaining agreements.<sup>15</sup> This latter holding is somewhat surprising because the system was imposed by management and not collectively bargained — the underlying rationale for exempting bona fide systems.

In 1984, in the Missouri *Firefighters*<sup>16</sup> case, the U.S. Supreme Court affirmed its ruling in *Teamsters* that a seniority system is not discriminatory unless it can be shown to have been adopted with intent to discriminate and to have had a discriminatory effect on existing employees who are members of a protected group. In the *Firefighters* case, seniority-based layoffs that had the result of effectively reversing employment gains made by blacks were approved.

Although the post-*Teamsters* decisions have been based on cases brought under section 703(h) of Title VII, courts have applied the *Teamsters* rationale to claims under the *Civil Rights Act of 1866 and 1871* and to claims under Executive Order 11,246 administered by the Office of Federal Contract Compliance Programs (OFCCP). Even after *Teamsters*, the OFCCP continued to resist the rejection of the disparate impact approach to evaluating the bona fides of seniority systems since it considered any seniority system that perpetuated past discrimination open to attack. Four appellate courts had questioned whether section 703(h), being an expression of congressional intent, made the OFCCP's position unconstitutional under the U.S. Constitution's separation of powers principle.<sup>17</sup> Before the Supreme Court could decide this point, however, the OFCCP conceded in January, 1984, that it is bound by the Court's interpretation of the scope of the exception provided by section 703(h).

According to some analysts, "the protection granted to seniority interests acquired by employees who were able to obtain jobs when others were denied positions has been a major obstacle to the achievement of equal employment structure".<sup>18</sup> It is suggested that the Supreme Court's decision to focus on maintenance of existing labour relations practices, and not the elimination of employment discrimination even where the Court has acknowledged that "This was the acknowledged overall purpose of Title VII",<sup>19</sup> calls for explicit statutory language intended to achieve the desired result rather than leaving the question open to judicial interpretation. It is difficult to see what incentive, sanction, or reward there is for unions or employers to attempt to eradicate discrimination by renegotiating contracts to achieve positive results if there is no penalty for continuing the existing system unless intentional discrimination can be proved.

#### Seniority and Lay-Off Remedies

Prior to *Teamsters*, *Franks v. Bowman Transp. Co.*<sup>20</sup> held that plaintiffs (members of a protected group) who had been laid off and who could establish that, without past discrimination, they would have been hired at an earlier date and thus

would have had sufficient seniority to escape layoff, are entitled to relief in the form of constructive seniority. This theory was undercut by *Teamsters* and another case decided the same day, *United Air Lines v. Evans, Inc.*<sup>21</sup> *Evans* held that acts of discrimination that are not the subject of a timely charge are the legal equivalent of discrimination that occurred before Title VII and not actionable even if perpetuated by a seniority system.

Employees laid off in reverse order of seniority would now appear to have no Title VII claims unless they file a timely charge protesting the original discrimination in hiring, transfer, or promotion.<sup>22</sup>

#### C. Adverse Impact or Systemic Discrimination

Any action that has an adverse impact or effect upon the employment opportunities provided to any of the protected groups is unlawful discrimination unless the discrimination can be justified as being necessary to the safe and efficient operation of the business, irrespective of good faith or lack of discriminatory intent.

The plaintiff must establish a *prima facie* case of discrimination by showing that the employment practice in question "operate[s] to disqualify Negroes [or other protected groups] at a substantially higher rate" than their counterparts. If the plaintiff does not meet this burden, the validity of the employment practice is irrelevant. If the plaintiff establishes a *prima facie* case, the burden of proof then shifts to the employer who must show that the test "bear[s] a demonstrable relationship to successful performance of the jobs for which it is used".<sup>23</sup> If the employer/defendant is able to prove such a relationship then the plaintiff may attempt to rebut the defendant's evidence by showing that, although the practice is job-related, it does not constitute a business necessity because an alternative practice exists which would have comparable business utility but which would be less discriminatory.

#### Categories of Adverse Impact Actions

Actions that often result in discriminatory hiring practices, i.e., have an "adverse impact", may be grouped into three categories: scored tests, non-scored objective criteria, and subjective criteria.

Scored tests are "paper-and-pencil" tests that purport to measure, absolutely or relatively, knowledge, skills, or abilities, e.g., typing ability or reading comprehension. Non-scored objective criteria include years of experience or level of education. Subjective criteria include subjective assessments of candidates' qualities such as "leadership" or "initiative". All are within the definition of "test" in the EEOC's *Uniform Guidelines on Employee Selection Procedures*.

##### 1. Scored Tests

These tests are designed to reduce subjectivity in employee selection. Educational and industrial psychologists have played a major role in their development and application.

Title VII has required the courts to consider the possibility of improper bias in the use of such tests for employee selection. The law has looked to industrial psychology to assess whether or not a test is a colour- or sex-neutral predictor of successful job performance. (This is known as "validation".) While the courts consider the experts' findings, they must



review these findings with regard to legal principles and Congressional intent.<sup>24</sup>

Section 703(h) of Title VII expressly authorizes the use of "professionally developed" scored tests.

This section was not included in the original bill but was added after debate that arose largely because of a 1964 decision of a hearing examiner for the Illinois Employment Practices Commission<sup>25</sup> which implied that tests on which whites performed better than blacks could never be used, irrespective of business necessity. Some senators feared Title VII "would prohibit all testing and force employers to hire unqualified persons simply because they were part of a group formerly subject to job discrimination".<sup>26</sup>

Despite the wording of section 703(h), in *Griggs* the Supreme Court did not accept claims that ability tests do not violate Title VII if they are "professionally developed", but, having regard to legislative history, construed the section to "require that the tests be job-related":

*Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant. What Congress has commanded is that any test used must measure the person for the job and not the person in the abstract.*<sup>27</sup>

Neither *Griggs* nor *Albemarle* (in which the Court refined the analysis of section 703(h) and the allocation of proof) gave any specific guidance as to the degree of adverse impact tests would have to have before defendants' would have to prove they were job-related; what difference, if any, there is between "business necessity" and "job relatedness"; or the standard that must be met for a test to be judged as being "job-related". As a result, since *Griggs* the lower courts have reached varying opinions on these questions and have taken a stricter view of the requirements needed to validate tests than has the Supreme Court. In their consideration of cases involving the validity of tests, lower courts have deferred, in varying degrees, to the *Uniform Guidelines on Employee Selection Procedures*, as approved in *Griggs* and reiterated in *Albemarle*.<sup>28</sup>

**a. The Uniform Guidelines on Employee Selection Procedures**—It took six years for the EEOC, the Civil Service Commission, the Department of Labor, and the Department of Justice to adopt *The Uniform Guidelines on Employee Selection Procedures*,<sup>29</sup> which replaced the different, often conflicting, selection guidelines of the EEOC and the other agencies and which were published after public hearings. Despite the largely critical oral and written comments made at the hearings, the *Guidelines* were promulgated in substantially the same form as proposed. They purport to provide the current "framework for determining the proper use of tests and other selection procedures" to assist employers, labour organizations, and employment agencies to comply with federal law.

The *Guidelines* apply to any selection procedure used as a basis for making employment decisions. No guidance is provided for judging the legality of seniority systems or recruitment practices. They are applicable to any "employment decision" subject to Title VII and Executive Order 11,246 but do not include the employer's responsibilities under the *Age Discrimination in Employment Act* and the *Rehabilitation Act of 1973*.<sup>30</sup>

The *Guidelines* endorse "best-qualified" for the job as the approved standard for hiring practices. (In the EEOC and OFCCP compliance manuals, this means that the candidate pool must consist of not only those who are at present qualified but also those who with some usually unspecified training could learn to do the job.)

To determine adverse impact, the *Guidelines* set 80 per cent (the "4/5ths" rule) as a "rule of thumb". That is, where protected groups are selected at a rate that is less than 4/5 of the rate for the group with the highest rate, the selection procedure will normally be found to have had an adverse impact. The standard is applied to selection, rather than rejection, rates. This selection rate approach may be misleading where there are many applicants for few positions. For example, adverse impact would be found if one per cent of the most successful group is hired as compared to .79 per cent of the protected groups. The 80-per-cent rule has been severely criticized.<sup>31</sup> One study in which the inherent limitations of the rule are considered notes that, "because it is a ratio of ratios, it is unaffected by sample size and there is no way to determine the degree to which the observed differences could have occurred by chance alone".<sup>32</sup>

Where adverse impact is shown, the *Guidelines* provide standards for validity studies. The standards were drawn from the American Psychology Association's (APA) 1974 *Standards for Educational and Psychological Tests* and have been criticized by the APA itself as being inappropriate for use in litigation because they attempt to prescribe standards that were put forward as ideals, "putting a weight on the standards they cannot sustain", and that are out of date. In 1978, the Supreme Court affirmed without opinion a district court ruling that held "to the extent that the EEOC *Guidelines* conflict with well-grounded expert opinion and accepted professional standards, they need not be controlling".<sup>33</sup>

The *Guidelines* provide that if the total employment selection process does not have an adverse impact, individual components having such an impact need not "in usual circumstances" be validated. This is sometimes referred to as the "bottom line" approach. However, in *Connecticut v. Teal*,<sup>34</sup> the Supreme Court rejected the bottom-line approach for a multi-component selection process for promotion that had as its first component a pass/fail barrier to further consideration. Although the first component had an adverse impact on blacks, at the bottom line blacks did better than whites. The Court held that a test that included a pass/fail barrier and that is not job-related would result, unlawfully, in two categories of employees — those eligible for promotion and those not.

The majority of the Supreme Court also held that focussing exclusively on the bottom line ignores the *Griggs* decision that section 703(h) prohibits proceedings or testing mechanisms that operate as "built-in headwinds" for minority groups. The *Teal* rejection of the bottom line approach would probably be confined to a multi-components test that had as a component a pass/fail barrier, but it is not known what position the EEOC will now take.

One writer, Alfred Blumrosen, has asserted that the "theory of the 'bottom line' approach is to provide employers with a most important incentive. That incentive is the freedom from detailed government regulations...."<sup>35</sup> In a recent publication, Blumrosen argues that *Teal* is inconsistent with the

legislative history and the disparate impact theory.<sup>36</sup> He defends the bottom line theory and regards *Teal* as putting an impossible burden on employers who are attempting to produce tests that are job-related.

**b. Test Validation**—The standard of proof of job-relatedness and the choice of validation strategy have been considered by numerous lower courts with often conflicting results, due to the lack of guidance and grounds for confusion found in Supreme Court decisions on disparate impact in and after *Griggs*. This question of test validation has resulted in many cases that illustrate the important role of the expert.

The General Accounting Office released a report in 1982 in which it concluded that it is difficult for employers to validate tests since the *Guidelines* are difficult and expensive to follow and inconsistent with professional methods of determining job-relatedness.<sup>37</sup> If this is the case, employers are virtually forced to set quotas to meet the 80 per cent rule. Yet this step would be contrary to the intent of Title VII because, when quotas are established, minority group members do not compete equally with others but rather with one another for a predetermined number of positions.<sup>38</sup>

**c. Remedies**—The courts have provided diverse remedies in disparate impact cases involving scored tests. One court of appeals affirmed a trial court's addition of 250 points to the raw score of the minority group found to have suffered adverse impact. Another lowered the cut-off score so as to include larger numbers of minorities. Another required previously excluded minorities to be hired before anyone else.<sup>39</sup>

## 2. Non-Scored Objective Criteria (NSOC)

The *Griggs* mode of analysis is certainly applicable in determining the legality of NSOC — educational, experience, performance, or licensing requirements, arrests, convictions, garnishments, and other financial criteria, given that in *Griggs* the Supreme Court rejected the employer's requirement of a high school diploma for those seeking certain jobs and promotions.

Although the *Guidelines* do apply to all standards used to determine employee qualifications, most courts have not required that education, height, and similar NSOC be empirically validated and have allowed job-relatedness to be established by other evidence. The *Guidelines* place on the employer the burden of demonstrating that no suitable alternative with a lesser adverse impact is available, a position accepted by several courts despite the Supreme Court's holding in *Albemarle* that the burden is with the plaintiff.<sup>40</sup>

Educational and experience requirements have often been invalidated by courts, although courts have begun to approve educational requirements for highly skilled and professional jobs, despite a finding of adverse impact.<sup>41</sup> Case law arising from practices pertaining to discrimination in hiring for blue-collar jobs is often unsatisfactory when professional jobs are under consideration.

Where job requirements themselves are at issue, plaintiffs need not adopt the position that, say, substantially fewer blacks meet the requirements than do whites. Rather, plaintiffs can meet their first burden of proof by showing that the number of, say, blacks employed is very small. When the job requirements themselves are at issue, defendant employers

cannot rely on a defence that black applicants did not meet them.<sup>42</sup>

Courts have closely scrutinized other NSOC, such as arrest records. The EEOC has taken the position that the employer may not ask questions about arrest records because the "mere request tends to discourage application by those with arrest records and tends to induce false or incomplete answers for which the applicant may be penalized".<sup>43</sup>

The EEOC has gone further to hold that an employer may not discharge or refuse to hire an employee who answers an arrest record inquiry falsely because the inquiry itself was improper (the "fruit of the poisoned tree" ratio).<sup>44</sup> Another court has held that the plaintiff did not make out a *prima facie* case of discrimination because he did not tender evidence to show that blacks falsify their arrest records at a higher rate than whites or that black applicants were excluded at a higher rate than white applicants for that reason.<sup>45</sup>

Convictions, on the other hand, are viewed differently. Courts have found unlawful a total ban on hiring persons with prior criminal convictions but have permitted the use of criminal records in making hiring decisions as long as the employer takes into account "the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence and the nature of the job for which the applicant has applied."<sup>46</sup>

A dishonourable discharge from the armed forces is more analogous to a conviction (an adjudication is required) than to an arrest. However, the EEOC found that the use of an honourable discharge as a purportedly objective criterion violated Title VII since the requirement had a demonstrably adverse impact on blacks and could not be justified by business necessity.<sup>47</sup>

The EEOC also takes the position that employers cannot make an adverse employment decision against minorities on the basis of financial or similar information.<sup>48</sup>

## 3. Subjective Criteria

The use of subjective criteria may violate Title VII either under the disparate treatment or adverse impact theories. Discrimination can be shown without statistical evidence<sup>49</sup> but ordinarily statistics are used to show the effect of the subjective criteria that are under scrutiny.

Generally, courts have not looked favourably on employment practices that rely on subjective determinations (while recognizing the role of subjectivity in employment decisions) because they leave ample room for bias.<sup>50</sup>

Plaintiffs charging adverse discrimination in employment have been most successful in blue-collar cases where the courts have required employers to rely on objective criteria. The courts more readily accept reliance on subjective criteria in white-collar jobs, especially where the productivity cannot be easily allocated to any one individual. At this level, the courts require that the evaluation procedure be fair and safeguarded, i.e., applied fairly and uniformly. Where plaintiffs prevail, it is usually because the court finds disparate treatment. In general, however, the court decisions have not provided much guidance to employers seeking to find out what constitutes acceptable use of subjective criteria.<sup>51</sup>

## D. Reasonable Accommodation: Religion

The very broad protection given to religion as defined in section 701(j) of Title VII (observance, practice, or belief) has

provided little guidance for the courts or employers who are bound by this section to accommodate reasonably "an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business". This section establishes a special category of discrimination — failure to reasonably accommodate — not applicable to any other basis of discrimination in Title VII.

The Supreme Court<sup>52</sup> has set out a test in non-Title VII cases involving conscientious objectors that stresses that beliefs which are sincerely and strongly held by the objectors, or which are held by them as religious beliefs, qualify as valid conscientious objections to military service. The EEOC has expanded the *Welsh-Seeger* rule in its *Guidelines on Discrimination Because of Religion* to include recognition of a belief outside a standard religion or creed. Neither this broad approach nor the applicability of conscientious-objector cases to Title VII cases have been accepted by all courts. For the few courts that have ruled on the issue, the test seems to be that the individual treats a church or personally believed doctrine as mandatory.

#### Employer's Duty to Accommodate

This provision was included in the 1966 EEOC *Guidelines* to prevent adverse impact on religious employees because of an employer's apparently neutral practices. It set an affirmative requirement "to accommodate to the reasonable religious needs of employees..." that is consistent with the *Griggs* approach. Although few cases involving religious discrimination have been decided under the disparate treatment theory, it would be applicable to these cases.

After the EEOC's authority to impose a duty to accommodate religious beliefs, and after the burden of proving "no undue hardship" was challenged and determined to be without statutory basis and possibly unconstitutional,<sup>53</sup> Congress amended section 701(j) of Title VII to its present form imposing a statutory duty to reasonably accommodate. Since this amendment, the provision has been challenged under the First Amendment, which prohibits any law respecting the establishment of religion. The Supreme Court has not ruled on the constitutionality of the reasonable accommodation or non-discrimination provisions or on the constitutionality of applying Title VII to religious employers.

The courts have held that the duty to accommodate applies to unions as well as to employers. In *Trans World Airlines, Inc. v. Hardison*,<sup>54</sup> the Supreme Court narrowed the scope of the duty to accommodate by holding that neither an employer nor a union is obliged to take steps inconsistent with a valid collective bargaining agreement,<sup>55</sup> that an employer has no obligation to impose an undesirable shift on non-religious employees and no obligation to agree to substitute or replace workers if such accommodation would require "more than *de minimis* cost".

The EEOC issued the revised *Guidelines* in response to *Hardison*, but has, despite *Hardison*, continued to interpret broadly the duty to accommodate as being a duty to explore "each available method of accommodation". Although the courts have not accepted, post-*Hardison*, all of the EEOC's interpretation of the duty, they have agreed that the employer must at least consider exploring possibilities of accommodation. Pre-employment inquiries about religion are con-

sidered by the EEOC to violate Title VII unless they are justified by "business necessity".

Although the *National Labor Relations Act* permits compulsory union membership, the courts and EEOC have both held that unions should accommodate the employee who has religious objection to union membership by not requiring membership and by permitting payment of the equivalent of the union dues to a charity.

As will be discussed, grooming requirements, e.g., a requirement for untrimmed beards, associated with religious beliefs may be protected under the reasonable accommodation issue.

#### Permissible Religious Discrimination

Section 702 exempts religious organizations from the prohibition against religious discrimination, permitting them to restrict hiring to individuals who are of the same belief. Section 703(e)(2) provides a similar exception for religious educational institutions. The exemptions are expected to be challenged as being unconstitutional.

The specific bona fide occupational qualification (BFOQ) religious exemption available in section 703(e)(1) is not usually used, probably because of the broader exemptions provided in sections 702 and 703(e)(2).

### III. NON-DISCRIMINATION LAWS ADMINISTERED BY THE EEOC

#### A. Title VII of the Civil Rights Act of 1964

Title VII is the broadest federal anti-employment discrimination statute, but even Title VII holds only certain actions taken against specific groups to be unlawful employment practices. However, unlike other laws that merely prohibit discrimination, Title VII does impose a positive obligation to act in a non-discriminatory way. Under Title VII, it is an unlawful employment practice to discriminate against a person:

1. who is employed by a respondent-employer (including federal, state and local governments but excluding Indian tribes and private membership clubs) (s.701(b)), by an employment agency (s.701(c)), and by a labour organization, including unions and apprenticeship committees (s.701(d));
2. on a basis listed in Title VII — hiring, discharge, compensation, terms, conditions or privileges of employment, (s.703(a)(1)); limitation, segregation or classification of employees or applicants for employment (s.703(a)(2)); failure to refer (s.703(b)); exclusion or expulsion from membership (s.703(c)(1)); limitation, segregation or classification of membership or applicants for membership (s.703(c)(2)); or cause an employer to discriminate (s.703(c)(3)); or printing or publishing a discriminatory employment notice or advertisement (s.704(b));
3. on the basis of race, colour, religion, sex, (including pregnancy, childbirth and abortion) national origin or reprisal (ss.703 and 704(a)).

Before a business is subject to Title VII, it must be involved in interstate commerce and must have employed 15 or more individuals for at least 20 weeks during the current or preceding calendar year (s.701(b)).



Title VII permits a limited use of criteria related to sex, religion, or natural origin by validating them as job-related ("bona fide occupational requirement") factors, if they are "reasonably necessary to the normal operation of that particular business or educational institution" (s. 703(e)(1)).

#### **A Charge of Discrimination under Title VII**

It is the Equal Employment Opportunity Commission (EEOC) that administers Title VII and that attempts through conciliation to ensure that employers comply with the law. Where there is no conciliation, Title VII cases may be brought in the federal courts by individuals or by the EEOC.

To be valid, a charge under Title VII must be timely and filed by the aggrieved person, someone on behalf of the aggrieved person, or the EEOC against a respondent covered by the Act, and it must allege discrimination and an unlawful employment practice.

The term "aggrieved" is not defined in Title VII and the courts have generally relied on the traditional concept of "standing" to determine if an individual is aggrieved. The "standing" issue is resolved by finding a person who is a member of the protected group who is potentially subject to the discriminatory policy or suffers indirect injury or is stigmatized by the practice. Courts have generally denied standing to anyone who is not a member of the protected group. On the other hand, the EEOC has taken an expansive view of "standing" and seems to give standing to anyone who files a charge on the theory that all employees have the right to work in an atmosphere free from unlawful practices.<sup>1</sup>

The courts have generally held that a representative suit by a union or civil rights group may result in only injunctive or declaratory relief unless there is an assignment of damages awarded.<sup>2</sup>

The EEOC may also file charges. This procedure is adopted to ensure anonymity and thereby prevent retaliation and to investigate "pattern-and-practice" cases or systemic discrimination. Where an EEOC charge is dismissed, right-to-sue letters are issued to identified persons and members of class actions, who may then bring individual suits.

Although Title VII applies to state and local governments and private employers, most state and local governments have fair employment practices legislation as well. The EEOC therefore usually refers charges to local authorities first. If no solution is reached within a reasonable time (established as 60 days), then the EEOC assumes jurisdiction.

Section 706(e) requires a charge to be filed within 180 days after the unlawful practice has occurred or, if there is state or local jurisdiction, within 300 days or 30 days of termination of the state action, whichever comes first. Unless a continuing violation can be established, the Supreme Court by its decision in *United Air Lines v. Evans*<sup>3</sup> has foreclosed claims based solely on the residual effects of discrimination not made the subject of a timely charge.

Title VII provides the person claiming to be aggrieved with a 90-day period within which to file a civil action after receipt of a notification of the right to sue from the EEOC (s. 706(f)(1)).

#### **Statutory Relief — Non-Monetary**

##### **1. Injunctions**

The language of section 706(g) of Title VII appears to require a specific finding that discrimination was intentional

before the courts can have the authority to enjoin a respondent employer from engaging in an unlawful employment practice ("If the court finds that the respondent has intentionally engaged in..."). However, the courts have relied on *Griggs* to hold that it is the consequence of the action and not the intention behind it that matters and that "intentionally" means "not accidental".<sup>4</sup>

Injunctions have frequently been used to prohibit, for example, height and weight requirements or educational requirements, unless the court is satisfied that the injunction would unnecessarily interfere with the defendant's business or that the defendant is unlikely to discriminate in the future.

##### **2. Relief for Identifiable Victims of Unlawful Employment Practices**

The Supreme Court has confirmed judicial authority to order reinstatement of an employee who has been proven to be the victim of unlawful employment practices with constructive or full seniority.<sup>5</sup> Other courts have granted tenure, ordered or stopped promotions, ordered material removed from personnel files, ordered sensitizing training sessions and alteration of test scores. "Front pay" may be awarded where future cooperation is held to be impossible between the employer and the employee.<sup>6</sup>

##### **3. Quota Hiring and Promotion Orders Benefitting Persons Other than Identifiable Victims**

Lower courts have frequently required hiring, and admission to unions, to occur on a preferential basis following set numerical ratios intended to integrate work forces. The persons benefitting are not usually victims themselves and therefore such requirements are controversial because they are open to claims of reverse discrimination. In light of *Bakke* and *Weber*, discussed in Section VI, the courts' authority to issue a hiring order based on quotas is established. The questions still at issue are the standards to be used in setting the quotas and the occasions on which the court's discretion to establish quotas should be exercised. The justification given for quotas is that they are effective even in cases involving the most blatant discrimination.<sup>7</sup>

Quota orders have usually been made for public employers undoubtedly because public policy considerations affect public employers more than private ones. Generally, courts have imposed quotas in race cases. Few sex discrimination cases have resulted in quota orders.

Courts are reluctant to grant preferences in promotion, despite the approval expressed by the Supreme Court in *Weber*, because of the consequences to incumbent employees and the availability of other relief in the form of damages.

#### **Statutory Relief — Monetary**

Section 706(g) establishes employer liability for back pay for up to two years prior to the filing of a charge with the EEOC. Back pay is also available in suits brought by the EEOC under section 707. Despite the absence of enabling language, *Albemarle*<sup>8</sup> has established that back pay is the rule, not the exception.

##### **1. Front Pay**

The courts have adopted a "rightful place" theory for cases involving denial of promotion, meaning plaintiffs will

not attain the position they would have had but for discrimination until vacancies occur. This is an attempt to balance the interests of incumbent employees with those of the victims of discrimination. Plaintiffs argue that "front pay" should be awarded since there may be few vacancies and it may take years for the plaintiffs to achieve their rightful place.

## 2. Compensatory and Punitive Damages

Neither of these types of damages is available under Title VII. The remedial provisions of Title VII were patterned after the *National Labor Relations Act*<sup>9</sup> under which compensatory and punitive damages are not available.

## 3. Class Action Procedures for Back Pay

Title VII cases comprise the largest number of class actions in the U.S. federal courts. By their nature, they are particularly suited to class actions because discrimination is a public wrong even if it is privately litigated.<sup>10</sup> (In this respect, Canadian human rights legislation differs from Title VII in that, in the U.S., the courts, rather than human rights commissions, are the major means of enforcing rights.)

In most cases, all members of a protected class are automatically covered by a class action suit unless they choose to opt out. Lack of notice to class members is not a concern where the remedy provided is injunctive or declaratory relief, but is a concern where the remedy is back pay.

In most employment discrimination class actions the courts have divided the liability to the class from the determination of entitlement to damages in order to avoid expensive, lengthy, and complex problems of discovery and evidence. Failure to establish liability terminates the case.

Section 706(k) stipulates specifically that attorneys' fees shall be awarded as costs to the prevailing party even though in the United States costs are not always available to the successful litigant.

## B. Equal Pay and the Comparable Worth Issue

Sex-based discrimination in rates of pay paid to employees, whether male or female, is prohibited by the *Equal Pay Act of 1963*, part of the *Fair Labor Standards Act of 1938* (FLSA),<sup>11</sup> by Title VII, and, for government contractors, by Executive Order 11,246. Many states also have equal pay legislation that is applicable to private employers.

### Equal Pay Act of 1963, as amended (EPA)

The EPA prohibits, in section 206(d)(1), pay differences between male and female workers who are performing equal work within the same establishment of an employer. "Equal work" has been held to mean jobs that are "substantially equal", even if the nature of the jobs makes it impractical for the sexes to work interchangeably.<sup>12</sup> An evaluation must be made to ensure that performance of the jobs calls for equal skill, effort, responsibility, and working conditions. Wage differences are permitted if paid pursuant to (i) a seniority system; (ii) a merit system; (iii) a system measuring earnings by quantity and quality of production; or (iv) a differential based on any factor other than sex.<sup>13</sup> The employer may not gain compliance by reducing the wage rate of any employee.

The EPA covers employees of private employers including higher level employees who are exempt from overtime pay requirements and federal, state, and local government employees. The FLSA does not excuse non-compliance with federal or state laws establishing higher minimum wages.

Originally, the Secretary of Labor enforced the EPA, but responsibility was transferred to the EEOC in 1979, except for federal government employees, who are governed by the Civil Service Commission.

An individual claiming an EPA violation may either bring a civil action in a state or federal court or may file a complaint with the EEOC. Any private right to sue terminates if the EEOC files an action seeking back pay. Criminal penalties are available but rarely imposed. Class actions conducted under the EPA are subject to rules different from those applicable to Title VII cases. They require "opting in" by members of a class as opposed to "opting-out" under Title VII class actions. As under Title VII, attorneys' fees may be awarded. Contrary to the provisions of Title VII, but like those of the *Age Discrimination in Employment Act of 1967*,<sup>14</sup> (ADEA), employees who sue successfully under EPA can recover both back wages and an equal amount as liquidated damages. The EEOC may sue for wages, injunctive relief, and liquidated damages. Unions are not liable for damages under EPA.

In an EPA suit, the government or individual bears the initial burden of proving that the employer pays employees of one sex more than employees of the other sex for performing equal work. Once this is established, an employer must show that the differential is justified by one of four statutory defences: (i) a seniority system; (ii) a merit system (The regulations require merit systems to be applied "systematically and objectively"). Merit systems that rely on subjective criteria are more difficult to defend; (iii) incentive systems; and (iv) differences based on factors other than sex.

The important case of *Corning Glass Works v. Brennan*<sup>15</sup> considered the issue of whether work was performed under similar working conditions. The defence advanced — the fact that females can be hired for lower wages than men or alternatively that "men would not work at the low rates paid women inspectors" — was not held to be valid. The Supreme Court, while finding it understandable that the company would take advantage of the situation as a matter of economics, held that the practice had become illegal with the enactment of the EPA, since the discrimination in wages was based on sex.

A ruling with considerable economic impact is the Supreme Court's decision in *Manhart*<sup>16</sup> that a pension plan requiring female employees to pay more than males on the grounds that females as a class live longer than males (resulting in lower compensation to females) was unlawful under Title VII, as the difference was based entirely on sex.

In the United States, as in Canada, equal pay legislation has done little to narrow the earnings gap between men and women.<sup>17</sup> In the United States, women earn, on average, 61 per cent of what men earn.<sup>18</sup>

The economic analysis of this differential centres on the failure of women workers to achieve significant wage gains relative to men and to move out of traditional occupational ghettos, despite society's political and legal commitments to equality and an economic theory that delineates remedies for inequality.<sup>19</sup>

One economist's<sup>20</sup> discouraging view is as follows:

*The legal remedy has been to pass laws mandating equality and proposing administrative reforms (like affirmative action) that provoke animosity toward the*

fundamental objective — without undermining legal support for the traditional family and its gender-based expectations. These laws are relatively costless to pass, but the costs are mainly borne in resentment and conservative backlash. They are politically acceptable as long as they do not threaten the family which is the fundamental mainstay of distinct gender roles and barriers to economic parity. It was interesting to note that the passage of a tax reduction for the earnings of a "second worker" was acceptable politically as a way to reduce the "marriage penalty", but resisted when presented as a way to encourage wives' labor force participation.

Many popular remedies to improve women's economic status paradoxically reinforce gender-based economic roles: the welfare system reinforces the expectation of female dependency; comparable worth pay admits gender distinctions; equal pay keeps women out of high-status jobs; wages for housework, part-time, flexitime, all reinforce traditional stereotypes while facilitating flexibility for women as homemakers, thereby reducing stress in traditional families and accommodating gender-role distinctions.

Ignoring the household economy, which absorbs far more of the economic activity of women relative to men, has biased our evaluation of the economic activity of women relative to men. As economic status is determined solely by resources allocated to paid employment, the family system, in which women are primarily responsible for housework and child care and men for financial support, makes the goal of economic parity for women unachievable.

### Comparable Worth

Plaintiffs unable to meet EPA's requirement of "substantially equal" work have argued successfully that Title VII allows suits on the grounds of wage discrimination when employees are performing dissimilar jobs of comparable worth or value.

#### 1. Relationship between EPA and Title VII

Both the EPA and Title VII prohibit discrimination on the basis of sex and other grounds in "compensation, terms, conditions or privileges" in employment. To rationalize interpretations of the two laws concerning compensation, the Bennett Amendment was included in Title VII as section 703(h).

Originally, this amendment was considered to limit federal law respecting sex discrimination in pay to the provisions of the EPA. The U.S. Supreme Court in *Gunther* has held (5-4), however, that the Bennett Amendment does nothing more than incorporate into Title VII the four defenses contained in the EPA, and that the "substantial equality" of jobs required in an EPA suit is not an element of a *prima facie* Title VII case for sex-based wage discrimination.<sup>21</sup> On the other hand, a claim for equal pay for equal work is governed by EPA standards, whether it is brought under the EPA or Title VII.<sup>22</sup>

The Supreme Court stressed in the *Gunther* case that the respondent's claim was not based on the "comparable worth" concept; rather, that the wages were depressed because of intentional sex discrimination. This case illustrates the extent to which a court, in interpreting the scope of anti-

discrimination laws, will seek assistance from the legislative history. The Court, in finding that the Bennett Amendment did not nullify non-equal work cases under Title VII, reviewed the legislative history at length and stated:

*As Congress itself has indicated, a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination. S. Rep. No.86 F, 88th Cong., 2d Sess., 12(1964). We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate.*

Relying strictly on "traditional canons of statutory construction and relevant legislative history", the dissenter rejected the majority's finding that "any other conclusion would be unsound public policy", and concluded that "Congress in 1963 explicitly chose not to provide a remedy in such cases [comparable worth cases]. And contrary to the suggestion of the Court, it is by no means clear that Title VII was enacted to remedy all forms of alleged discrimination" [emphasis in original].

#### 2. Comparable Worth Suits

Without legislative direction, plaintiffs will be hard-pressed to prove that dissimilar jobs are of comparable worth because of the significant degree of subjective judgement required to evaluate many jobs and the lack of knowledge of the components of various jobs. Until clarification, the cases most likely to succeed are *Gunther*-like disparate treatment cases involving intentional discrimination in the setting of wage rates.

The comparable worth issue was specifically addressed in December, 1983, in *AFSCME v. State of Washington*,<sup>23</sup> in which the district court used comparable worth as the basis for a \$1 billion award of damages in a sex discrimination case. Because the lower courts have been divided on the issue of what defenses are available, or what proof is required in a comparable worth case, and because *Gunther* merely allowed plaintiffs to proceed under Title VII on the grounds of non-equal pay claims without authorizing a true comparable worth claim, a Supreme Court decision is anticipated.

The key element of proof in the *Washington* case was a study commissioned by the governor, which showed that workers holding predominantly female jobs earned substantially less than those in mostly male job categories requiring similar amounts of stamina, responsibility, and skill. When the state legislature refused the governor's request for funds to redress the imbalance, the union filed suit.

It is expected that the *Washington* case will prompt other states to make voluntary payments to rectify inequalities in pay. The greatest portion of the liability arising from claims of unequal pay comes from back pay and resulting pensions payments. This case will be reviewed by the 9th Circuit Court in the near future.

Neither the *Gunther* decision nor the *Washington* case addressed the question of whether or not proof of disparate impact or disparate treatment would be required to establish a Title VII pay-discrimination violation. A recent decision of the 9th Circuit Court, *Spaulding v. University of Washington*, has held that plaintiffs in Title VII pay-discrimination cases



must prove disparate treatment.<sup>24</sup> The U.S. Supreme Court has refused to review this decision. In the earlier *Washington*<sup>25</sup> case, the judge accepted evidence that supported a finding of both disparate treatment and disparate impact. As the *Washington* case will be reviewed soon by the same circuit court that decided *Spaulding*, it is expected that the standard of proof required to establish pay-discrimination violations will then be settled.

The standards of *McDonnell Douglas Corp. v. Green* discussed in Section II would be applicable to comparable worth cases brought under the disparate treatment theory. If, ultimately, the Supreme Court determines that comparable worth cases may be brought on the basis of adverse impact, the applicable standards will differ from those set out in *Griggs*. The "any other factor other than sex" defence contained in the EPA is different from, and broader than, the "business necessity" defence of *Griggs*. *Gunther* suggests that a valid defence is available to an employer who conducts a wage survey and adheres to the results. Since the results will often show that female classifications will have lower rates than male classifications, employers may pay less to women than men because the "market rate" is lower.

### 3. Comparable Worth Hearings

The role of the EEOC in the comparable worth issue is not clear, although the EEOC has accepted comparable worth cases. As part of a three-pronged effort that included the study of job evaluation systems by the National Academy of Science and intervention in carefully selected court cases, the EEOC held hearings in Washington in 1980 prior to its issuing guidelines respecting discrimination in compensation under Title VII and the EPA. Eleanor Holmes Norton, then chairing the EEOC, stated at these hearings that the widening of the wage gap between men and women that has occurred since Title VII and the EPA have been in effect "creates some urgency in looking beyond the traditional causes". She stated further:

*The issue needs to be faced squarely and objectively: whether wages for historically segregated jobs have been discriminatorily depressed because those jobs were held by minorities and women. This is surely the largest and most difficult issue left unresolved under Title VII today.*<sup>26</sup>

Submissions of union and business representatives, a psychologist, an anthropologist, and an historian were received, indicating again the role non-legal experts can have when the law pertaining to employment discrimination and the proper limits of such law are under consideration. Business representatives speculated that equality of compensation for jobs of comparable worth would set back affirmative action efforts by removing the incentive for women to enter non-traditional jobs. The EEOC's authority to take action where job evaluation systems incorporate race or sex bias was acknowledged, but business submitted that lack of comparability in itself, without evidence of this bias, should be insufficient evidence to establish bias and that government intervention in market place judgements on this basis would be disastrous. The legal position expressed on behalf of business was that Title VII was not intended to examine wage rates of unequal jobs, but to prohibit the discrimination that prevented protected groups from having access to higher-paying jobs.

The unions asserted that, except in trades where there is a hiring hall, management has control over hiring and initial placement — decisions which, together with wage discrimination and denial of promotional opportunities, determine the wage gap. The union position has been, therefore, that the responsibility for eliminating unequal compensation lies with the employer. Several unions have pursued the issue through collective bargaining, but concerns have been expressed by women's groups about the sincerity and aggressiveness of the pursuit when women are a minority in a union.

The OFCCP's original thrust in this area included revisions to its *Sex Discrimination Guidelines* dealing with comparable worth that were to have become effective in January, 1981. However, the affirmative action rules finally issued did not include the comparable worth section.

In addition to these federal laws, there are 15 states that have laws prohibiting sex-based discrimination in wages for work of comparable character. Most have been enacted as amendments to equal pay acts and coverage varies from state to state. None of the state statutes defines any method for ascertaining the comparable worth of dissimilar jobs so as to determine whether or not different pay rates for sex-segregated jobs can be attributed to sexual discrimination.<sup>27</sup> Again, a company operating in several states or nationally must conduct a "cross-country checkup" to determine its various employment responsibilities under myriad federal and state laws.<sup>28</sup>

The controversy that has developed on the issue is expected to continue. According to Naresh C. Agarwal, a Canadian professor of business, the controversy has centred on the "discriminatory nature of the observed earnings differentials between men and women" and the "type of public policy needed to deal with it".<sup>29</sup> Agarwal argues that the adjustments made for male-female differences are incomplete and that the adjustment approach implicitly assumes equal access by men and women to education and training, which is not the case. Agarwal's review of the literature indicates the difficulties that business academics have found in determining the current methods by which to identify the causes of the wage gap. Whatever those causes may be, it can be stated that equal pay legislation has had a very limited impact.

### C. Age Discrimination in Employment Act of 1967, as amended (ADEA)<sup>30</sup>

The stated purpose of the ADEA is "to promote employment of older persons based on their ability rather than age". ADEA was amended in 1978 to make it unlawful for employers to discriminate in hiring against those between 40 and 70 years of age on the basis of age. There is now no upper age limit for federal employees.

ADEA applies to employers, labour organizations, and to employment agencies; to states and, with certain differences, to the federal government. An employer is defined in virtually the same terms in this Act as under Title VII except that the number of employees required for ADEA to have jurisdiction is 20<sup>31</sup> rather than 15.<sup>32</sup>

The prohibitions in the ADEA are generally the same as those in Title VII,<sup>33</sup> but the remedies are more like those applicable under the *Fair Labor Standards Act*.<sup>34</sup> In addition, it is

unlawful to discriminate on the basis of age within the protected age group. The prohibition against discriminatory advertisements or notice means that requests for "retired persons" or "recent college graduates" are prohibited whereas specifying an age limit, e.g., "not under 18", or less than 40, is not.

Claims against public employers are also subject to challenge under the equal protection clauses of the Constitution, although the Supreme Court has ruled that there is no violation of the equal protection clauses if the procedure complained of is "rationally related to permissible state interests". Examples of state interest include the retiring of police officers at 50 to ensure physical fitness in the force and judges retiring at 70 to "improve and increase judicial manpower".<sup>35</sup>

Like the *Equal Pay Act*, ADEA makes it unlawful for an employer to reduce the wage of any employee to comply with the Act.

Almost all cases arising under ADEA are brought under the theory of disparate treatment. Generally the order, allocation, and standards of proof set forth in *McDonnell Douglas Corp.* are applicable.

There have been few age cases argued under the theory of adverse impact. This may reflect a time lag (development of case law under ADEA is now at a stage that case law under Title VII reached several years ago) or that there are fewer systems that discriminate against older workers. In addition, lower courts have held that the adverse impact theory is not easily applied to age cases because age, unlike race and gender, is a progressive condition.<sup>36</sup> In the case of *Geller v. Markham*,<sup>37</sup> however, the court held that this theory of discrimination is applicable to age discrimination cases involving non-scored objective criteria. For example, a cost-cutting policy that led to a prohibition against the hiring of experienced teachers (who were, of course, generally older) was found not to be defensible as a "business necessity".

### Statutory Provisions

Section 4(f) sets forth five permissible defences:

1. age as a bona fide occupational qualification reasonably necessary to the normal operation of the particular business (BFOQ);
2. where action is based on reasonable factors other than age (RFOA);
3. to observe the terms of a bona fide seniority system;
4. to observe the terms of a bona fide employee benefits plan; and
5. to discharge or otherwise discipline an individual for good cause.

Defences 1, 3, and 4 are affirmative defences, in that the employer acknowledges that age was the basis for the decision but maintains that the action was nonetheless justified.

RFOA as a defence is comparable to the business necessity defence of Title VII where an employment practice has an adverse impact on employees on the basis of their age. The majority of BFOQ cases concern jobs involving public safety. Generally, a defending employer must prove it is impossible to deal with the excluded person on an individual basis or that there is a factual basis for believing that most of the affected class would be unqualified.<sup>38</sup>

Because seniority systems tend to favour older workers, there have been few cases challenging age discrimination on the basis of a seniority system.

### Suits

It is estimated that one-half of all private age bias suits filed up to the end of 1975 were dismissed on procedural grounds.<sup>39</sup> Until 1978, notice of intention to file suit was required. Since the amendments passed in 1978, a "timely-filed" charge is a condition precedent to suit, as it is under Title VII.

#### 1. Private Suits — Deferral to Government Proceedings

A provision in ADEA concerning the jurisdiction of state agencies empowered to remedy age discrimination has resulted in a Supreme Court compromise<sup>40</sup> providing that if the alleged discriminatory act occurs in a state with an agency empowered to remedy age discrimination, section 14(b) of ADEA requires the grievant to pursue state proceedings before filing an ADEA suit. Once an ADEA suit is commenced, section 14(a) provides that it supersedes state proceedings.

#### 2. Public Suits

The EEOC assumed responsibility for enforcing compliance with ADEA in 1979 under the Carter Reorganization. Because the EEOC administers both ADEA and Title VII, there are few procedural differences in the handling of complaints under the two Acts.

The 60-day waiting period imposed on the charging party is intended to provide the EEOC with an opportunity to conciliate, a requirement of ADEA. Where a court finds that the EEOC has not discharged this statutory duty, any action commenced by EEOC will be stayed.<sup>41</sup>

Because ADEA is governed by the *Fair Labor Standards Act*, there are certain significant differences from the Title VII procedure. Class actions under ADEA are limited to those who opt in; those under Title VII cover all similarly situated individuals except those who opt out. Under Title VII, plaintiffs are entitled to equitable relief "to make them whole". ADEA court proceedings provide for jury trials confined to facts concerning economic loss and damages, including back pay (which is not available to federal employees), equitable relief (injunctions, reinstatement), and liquidated damages (equal to the economic loss). Because of the procedural differences and possibility of larger awards under the ADEA, an increase in ADEA cases is expected, especially in those cases dealing with unlawful terminations of employment for older employees during recessionary periods.

### IV. DISCRIMINATION ON THE BASIS OF SPECIFIC PROTECTED CLASSIFICATIONS

#### A. Discrimination on the Basis of Sex

##### Bona Fide Occupational Qualification (BFOQ)

Section 703(e) of Title VII permits employment discrimination on the basis of sex, religion, or national origin if it is a bona fide occupational qualification reasonably necessary to the normal operation of a business. A BFOQ is therefore an "affirmative" defence.

The EEOC *Guidelines* are entitled to great deference by, but are not binding on, the courts.<sup>1</sup> The *Guidelines* state the BFOQ should be interpreted narrowly and that some specific situations do not warrant applications of the BFOQ, e.g., a

refusal to hire based on a belief in stereotypes because of customer, employer, or co-worker preference, but will be permitted where required to maintain the integrity of an artistic production. Generally, both the EEOC and the courts have rejected BFOQ as a defence in sex discrimination cases.

There are three theories of BFOQ:

1. ability to perform (e.g., manual labour or intricate work);
2. same sex BFOQ; accommodating privacy of others (e.g., skin searches); and
3. customer preference.

### 1. Ability to Perform

A BFOQ is permitted where "all or substantially all women would be unable to perform safely and efficiently the duties of the job involved",<sup>2</sup> except that where it is possible to evaluate individual capabilities to perform the job, the employer must do so.<sup>3</sup> To meet the necessary burden of proof, the employer would have to introduce evidence about, for example, the limited lifting abilities of women. In the *Weeks* case the Court held that Title VII rejects

*...romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle.*<sup>4</sup>

BFOQ has been held to include pregnancy in specific situations, usually employment in aircraft, despite section 701(k) defining sex discrimination as including pregnancy discrimination. The courts have had varying views as to when incapacity related to pregnancy arises but all have agreed that at some point the risk is high and have found BFOQ a defence for employment discrimination in jobs involving public safety.

### 2. Same Sex

The Supreme Court approved the *Weeks* test of what is required to establish a BFOQ in *Dothard v. Rawlinson*,<sup>5</sup> a case involving a female would-be correctional officer. However, in cases involving privacy issues such as body searches and shower supervision as in group homes, the courts have been more willing to find a BFOQ. Of relevance is whether or not the person is in the institution voluntarily. In the case involving children, the need for male and female role models has also been advanced as a BFOQ.

### 3. Customer Preference

The courts have not been receptive to claims of customer preference as a basis for BFOQ. The best known case of this type involved Pan American Airways' refusal to hire men as flight attendants.<sup>6</sup> Pan Am had advanced evidence that passengers preferred female attendants and female attendants could better attend to the psychological needs of the passengers. In rejecting this evidence, the court found the primary function of the job was assuring passenger safety.

There is a difference between BFOQ and business necessity. BFOQ, a statutory defence, is applicable to intentional

sex discrimination. Business necessity is an apparently neutral practice that has an adverse impact on the hiring of protected groups but is justified by the need for safe and efficient performance of the job.

### State Protective Laws

Most states had enacted protective laws as a result of the exploitation of female and child labour in the nineteenth century. Title VII has superseded restrictive state laws (e.g., prohibiting employment of women under 18 years of age as street vendors, setting maximum hours, etc.). The EEOC in its *Guidelines* requires that beneficial laws, e.g., rest periods that may discourage employers from hiring women because of added costs, must be extended to men. Title VII establishes as the standard for all employees the highest standard applicable to any one group. The courts have not yet finally determined whether beneficial state laws will be extended to males or invalidated, but are tending towards invalidation.

### Separate Lines of Progression and Seniority Systems

The *Teamsters'* decision has been held to be applicable<sup>7</sup> to comparable sex discrimination cases, i.e., a continuance of a pre-Title VII seniority system that was intentionally sex-based and that perpetuated the effects of prior discrimination is illegal.

### Fringe Benefits

Operating on the premise that women lived longer than men, women covered by benefits plans were often charged more than men for the same benefits or received reduced benefits for the same contributions. The Supreme Court has held that requiring females to make larger contributions than males to a defined benefit pension plan violated section 703(a)(1) of Title VII<sup>8</sup> because its discrimination was based solely on an individual's membership in a protected class, i.e., sex.

Retirement plans that permit earlier retirement for the same years of service for one sex and not the other or that have a differing compulsory or optional retirement age are violations of section 703(a)(1). Survivor benefits must be the same for employees of both sexes. Insurance, medical, and disability plans that treat male and female employees differently have been determined to be an "outright violation"<sup>9</sup> of Title VII. The fact that benefits for women cost more than those for men has been rejected as a defence by the EEOC and under Title VII.

### Pregnancy, Childbirth, and Parenting

EEOC's position is that employment policies or practices that have a negative effect on female employees because of pregnancy, childbirth, and related medical conditions constitute disparate treatment based on sex. After many lower court decisions to the contrary, the Supreme Court held in *General Electric Co. v. Gilbert*<sup>10</sup> that excluding periods of disability arising from, or related to, pregnancy or any unrelated disability occurring while on a pregnancy/childbirth leave from coverage under a disability plan did not constitute gender-based discrimination<sup>11</sup> and therefore was not a disparate-treatment violation of Title VII in the absence of evidence that the exclusion was a pretext for gender-based discrimination. (No court has found pregnancy classification to be a pretext.) The court in effect developed a new gender: the pregnant woman. In *Gilbert*, the Supreme Court did not consider the disparate impact of these policies on women.



The following year (1977), however, the Supreme Court in *Satty v. Nashville Gas Co.* found an employer's requirement that women forfeit their seniority for competitive bidding purposes on return from a leave occasioned by childbirth to be a violation of Title VII. The exclusion of pregnancy from disability plans was distinguished from forfeiture of seniority because women were not simply denied a benefit (as in *Gilbert*) but burdened in a manner "that men need not suffer".<sup>12</sup> The court held that in *Gilbert* there was an additional cost to the employer, whereas in *Satty* there was a burden on females that resulted in a loss of employment opportunities as opposed to a loss of benefits.

Congressional dissatisfaction with the Court's decisions resulted in the enactment of the *Pregnancy Discrimination Act* as section 701(k) of Title VII. The Congressional Record is of interest: "The Supreme Court's narrow interpretations of Title VII tend to erode our national policy of non-discrimination in employment".<sup>13</sup>

Under this Act, disparate treatment or impact is a violation unless a BFOQ defence or business necessity is established.

The EEOC's position is that an employer must extend pregnancy benefits to unmarried employees and to spouses of male employees. The courts have split on this latter issue.

The Supreme Court held in *Cleveland Board of Education v. La Fleur*<sup>14</sup> that mandatory leave at a predetermined date prior to a woman's giving birth is a violation of the Due Process clause of the Constitution's Fourteenth Amendment, and has no rational relationship to any state interest advanced. The *La Fleur* rationale has been utilized to declare unconstitutional the policy of terminating the employment of an employee who becomes pregnant.<sup>15</sup>

#### Right to Voluntary Leave

Since pregnancy is not synonymous with disability, an employer is under no obligation to allow an employee to take leave until she is disabled by her pregnancy by complications, or by the childbirth itself. Under the EEOC *Guidelines*, pregnancy is not a temporary disability. To avoid a finding of adverse treatment, however, employers must grant leaves uniformly, i.e., if leave is ordinarily granted for personal, or disability-related reasons, then employers must grant leave to pregnant employees.

Parenting leave to nurture the child is not analogous to disability, so again the employer's obligation is to be consistent. If an employer allows maternity leave, it may also have to provide paternity leave.<sup>16</sup>

Failure to hire a woman who wishes to return to work after a pregnancy must be based on a business necessity.<sup>17</sup>

The *Pregnancy Discrimination Act* was necessitated by erratic court decisions and now requires in section 701(k) that pregnancy and childbirth be treated the same as any other medically based inability to work. The problem employers now face involves the exposure of fertile or pregnant employees to hazardous work areas. The Hobson's choice facing employers is that, on the one hand, excluding these women may be a violation of Title VII, while on the other hand, failure to do so may result in tort liability. Exclusion of women only, where there was evidence that the hazard affected the reproductive capacities of both men and women, would constitute disparate treatment. The

employer's only defence would be BFOQ that require evidence that all, or substantially all, women are unable to perform the work safely and effectively.

The narrowness of the *Pregnancy Discrimination Act* might permit exclusion on the basis of ability to conceive, since the Act is confined to pregnancy, childbirth, or related medical conditions. This discrimination would require a defence of business necessity, such as the cost of eliminating the hazards or liability for damage to unborn children.

#### "Sex Plus"

The theory of this type of discrimination is that an employer classifies employees on the basis of sex plus another characteristic and then treats this group disparately from others. In *Phillips v. Martin Marietta Corp.*,<sup>18</sup> the employer mainly hired women, but refused to hire women with pre-school-age children. Men were hired regardless of their parental status. The Supreme Court held that the refusal to hire, which was based on the applicants being female and having young children, was as unlawful as a refusal to hire on the basis of sex alone.

Generally, discriminatory hiring practices based on sex plus, e.g., sex plus female applicant being an unmarried parent, or sex plus female applicant being an unmarried female, have been found to violate Title VII. (Where the no-marriage rule was found not to be a violation was in cases where airlines discriminated against males completely, so it was held that there could be, on that suspect reasoning, no discrimination against married women.)

Most cases in the "sex plus" area involved grooming and personal appearance. Courts have consistently upheld an employer's requirement that men have short hair, wear ties, and not grow beards or that women not wear trousers in executive offices. These cases have been distinguished on the basis that the discrimination is based on a neutral requirement for grooming to be in accordance with community standards and that, although specifics differ for males and females, the standards apply to both.

On the other hand, where sex plus grooming is based on offensive sex stereotypes, e.g., requiring women but not men to wear a uniform or where the required uniform for women was sexually provocative, these requirements have been found to be an invasion of privacy.

A distinction is often made between mutable (readily changed) characteristics, such as appearance, and immutable ones, such as having children, wearing corrective lenses, etc. Evidently the legal and social consequences of grooming issues are not very significant, nevertheless they have occupied a lot of court time.

#### Height, Weight, and Physical Agility Requirements

Use of these requirements as employment criteria has been found to have an adverse impact on women that requires an employer to demonstrate business necessity or job-relatedness. Because stature, like sex and race, is an immutable characteristic, the courts have reviewed these standards stringently. Weight is regarded as being more subject to individual control and is treated more like grooming.

#### Sexual Harassment

Adverse employment decisions resulting from an employee's refusal to accept a supervisor's demands for sexual favours is sex discrimination within the meaning of Title

VII. A sexually harassing or intimidating work environment is also considered discriminatory if management is aware of the situation and does nothing to remedy it, even if there is no adverse impact on the employee. An employer's actual or constructive knowledge of sexual harassment by a supervisor renders the employer liable. The employer is also liable for sexual harassment by a co-employee where the employer knows or should have known of the conduct unless it can be shown that the employer took immediate and corrective action.

Publicity has been considered a major factor in eliminating sexual harassment. Included under this heading are court decisions, EEOC interpretations, and anti-harassment employee policies.

#### **Sexual Orientation**

The EEOC and the courts have uniformly held that Title VII does not prohibit employment discrimination against "effeminate" males or against homosexuals on the basis that "sex" means gender, an immutable characteristic, and that sexual orientation discrimination is thus more analogous to grooming cases.

The situation is different where adverse action is taken by public employers who must be able to show that the employee's homosexuality affects ability to perform the job, e.g., leads to "notorious" conduct or provides the potential for blackmail. Failure to show a connection between the homosexuality and the inability to perform the job may be attacked on constitutional grounds (the rights to free expression and due process and the right to equal protection under the First, Fifth, and Fourteenth Amendments).

#### **Preference for Veterans**

Section 712 permits employment preference for veterans if required by law. Courts have invalidated employers' voluntary preference for veterans because of the adverse impact on women. As with other exceptions to Title VII, the preference may not be applied sporadically as a pretext to exclude women.<sup>19</sup>

### **B. Race and Colour**

The EEOC Annual Report 1980 shows that 80 per cent of the charges of employment discrimination allege discrimination on the basis of race and colour.

#### **Race- and Colour-Linked Characteristics**

Under disparate treatment theory, discrimination on the basis of an immutable characteristic associated with race, such as skin colour or facial features, violates Title VII, even though not all members of the race possess the characteristic.<sup>20</sup> Under the adverse impact theory, discrimination on the basis of a condition that is predominantly associated with an immutable characteristic of one race (e.g., sickle cell anemia) may not be a violation of Title VII if it does not produce an adverse impact (the bottom line approach) or is justified by business necessity.

Employment decisions based on stereotyped assumptions about the abilities, traits, or performance of various racial groups are also unlawful.

#### **Cultural Identification and Grooming**

Courts have followed the precedents developed in sex discrimination grooming cases with respect to mutable characteristics to uphold an even-handed grooming policy, even

where it was asserted that the policy infringed on black employees' expression of black pride or cultural identification (e.g., blacks have no right under Title VII to wear their hair in an Afro style).

#### **Racially Intimidating Environment**

The employer is responsible for maintaining a working environment free of racial intimidation. This requirement forbids an employer's toleration of racial or ethnic jokes by employees. Racial harassment constitutes a violation where there is a concerted pattern of harassment, not merely isolated or incidental usages of racial epithets in casual conversation. The burden is on the plaintiff to show that the employer failed to take reasonable steps to prevent the harassment.

Segregated facilities played a major role in the history of racial discrimination in the U.S. All segregation on the basis of race is a violation of Title VII.

Although the BFOQ defence is specifically not available in charges of race or colour discrimination, the court has found isolated cases where the "business necessity" defence might be available, e.g., where an undercover agent is required to work in a black neighbourhood.

### **C. Native Americans**

#### **Anti-Discrimination Provisions**

Courts have found native Americans protected by Title VII on the basis of national origin, race, and both race and national origin. Colour as a prohibited ground for employment discrimination might also be available. Protection from racial discrimination is available under the *Civil Rights Acts of 1866 and 1871*, which may also be invoked against discrimination in respect of national origin. Claims based on disparate treatment and disparate impact have been considered.

#### **Section 701(b) Exemption for Native Indians**

Employers entitled to this exemption include "the United States, a corporation wholly owned by the Government of the United States, an Indian Tribe", and others. Based on legislative history that recognized Indian tribes as "virtually political subdivisions of the Government",<sup>21</sup> the exemption is interpreted as applying only to those Indian employers that are tribes functioning as political entities.

The exemptions in sections 701(b) and 703(i) were included to allow Indians to benefit from then existing, or future preference, programs. In order to gain the benefit of section 703(i), a preferential employment practice must be publicly announced and the employment offered must be on, or near, an Indian reserve. There is some question whether the preference applies to layoffs. The exemptions in Title VII do not contravene or otherwise limit other federal statutes that give preference to native Americans, nor do they constitute invidious racial discrimination in violation of the Due Process clause of the Fifth Amendment.

### **V. AFFIRMATIVE ACTION REGULATIONS ADMINISTERED BY THE OFCCP**

#### **A. Executive Order 11,246, as amended Overview**

In addition to the federal non-discrimination laws that apply to corporations because they are employers,<sup>1</sup> Executive Order 11,246<sup>2</sup> (E.O. 11,246) applies to many of these same corporations because they are government contractors. A form of contract compliance program has been in

place for more than 40 years.<sup>3</sup> E.O. 11,246 "preempts" state or local laws where there is conflict<sup>4</sup> and, in general, applies to all government contracts or sub-contracts of more than \$10,000 and to construction projects financed in whole, or in part, by federal funds.

E.O. 11,246 requires that every contract contain a seven-point clause in which the contractor pledges not to discriminate because of race, colour, religion, sex, or national origin, and further, to take affirmative action wherever a protected group is underutilized in comparison to its availability for employment to ensure that applicants are employed without regard to these factors. There are additional requirements for all contractors and sub-contractors with 50 or more employees and a contract worth \$50,000 or more. These employers<sup>5</sup> must develop and implement a written affirmative action program for minorities and women who are underutilized, regardless of whether the employer has been found to have discriminated. The threshold applies on an establishment-wide, rather than contractor-wide, basis to avoid exempting entire industries such as banks.

There is some degree of overlap with resulting conflict between E.O. 11,246 and Title VII since acts that constitute illegal discrimination under Title VII are also prohibited under the Executive Order. What distinguishes the two is the additional onus under E.O. 11,246 on larger contractors to implement for each establishment an affirmative action program which is intended to increase the participation of women and minorities who are shown to be underutilized compared to their availability for employment. Both the EEOC and OFCCP require employers to file an annual data report, Standard Form 100 - Employer Information Report EEO-1. This form requires an employer to show the representation of female and minority employees in its workforce in nine major job categories ranging from service workers to officials and managers. Federal contractors are also required to indicate their status as contractors on this form.

#### Non-Construction Contractors

The regulations set out what steps a "non-construction" (i.e., supply) contractor must take to produce an affirmative action plan. After conducting a work force audit by job group, the contractor must determine "availability" — the number of women and minorities theoretically available and qualified for employment — for each job group, by considering eight factors listed in the regulations. These factors are set out in Section 60-2.11(b)(1), which provides:

*In determining whether minorities are being underutilized in any job group, the contractor will consider at least all of the following factors:*

- i) *The minority population of the labor area surrounding the facility;*
- ii) *The size of the minority unemployment force in the labor area surrounding the facility;*
- iii) *The percentage of the minority work force as compared with the total work force in the immediate labor area;*
- iv) *The general availability of minorities having requisite skills in the immediate labor area;*
- v) *The availability of minorities having requisite skills in the immediate labor area;*

- vi) *The availability of promotable and transferable minorities within the contractor's organization;*
- vii) *The existence of training institutions capable of training persons in the requisite skills; and*
- viii) *The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities."*

Factors ii) and viii) are substantially the same with respect to women. The availability of females seeking employment in the immediate labour area is considered in lieu of the entire female population. (Section 60-2.11(b)(2).)

The analysis requires statistics for each minority group exceeding two per cent of the population in the relevant labour market. In practice, the OFCCP no longer requires weight to be given to each factor, and in its proposed revised regulations the availability analysis will be reduced to four factors:

- i) *Percentage of minorities and women in the civilian labor force in the immediate labor area;*
- ii) *Percentage of minorities and women with requisite skills in the immediate labor area;*
- iii) *The percentage of minorities and women with requisite skills in the relevant recruitment area; and*
- iv) *The percentage of minorities and women among those promotable and preferable within the contractor's establishment.<sup>6</sup>*

The availability figures are compared to the contractor's "utilization" or employment of women and minorities in each job group. If the figures differ, the contractor must declare that underutilization exists for that group and set goals and timetables designed to "achieve prompt and full utilization of minorities and women at all levels".<sup>7</sup> Both annual and "ultimate" goals, which are "significant, measurable, and attainable", are required. The regulations also provide that a contractor's compliance status will be determined on two bases: whether the set goals and timetables have been met, and an evaluation of the efforts the employer has expended to make the program work.

In practice, the availability figures are difficult to compute because of the subjectivity required to give weight to each of the factors that permit an OFCCP compliance officer to question the availability figures determined by the contractor. The process is in no sense mechanical. It requires judgement calls regarding the weight to be given to each factor. This absence of precise standards leads to considerable controversy. The courts have confirmed this subjectivity by designating "underutilization" as "less women or minorities than would reasonably be expected by their availability".<sup>8</sup>

The result is that most compliance reviews end up as determination, not so much of whether the goals were attained, which they seldom are, but of whether the contractor has used its best efforts to attain them. In practice, this means that a one-on-one negotiation is almost always required.

#### Construction Contractors

The primary difference between the affirmative action requirements for construction and non-construction contractors is that goals and timetables for the former are set periodically on an area-wide basis by the OFCCP rather than



being determined by the contractor through its workforce analysis. For example, a single national goal of 6.9 per cent for the utilization rate of women has been set for construction contractors.

As a condition of bidding, the contractor must agree to attempt to meet the established goals. The contractor must subscribe to an equal opportunity clause that applies to each contractor or sub-contractor holding any federal or federally assisted construction contract in excess of \$10,000 and that applies to all of the contractor's employees engaged in an on-site construction whether on a federal project or not.

### Compliance Reviews

The OFCCP was established within the Department of Labor to administer E.O. 11,246. For purposes of OFCCP compliance, the country is divided into 10 regions. Prior to the Carter Reorganization, E.O. 11,246 was enforced by each government agency that contracted for goods or services. This decentralization resulted in a severe lack of standardization, unequal resource commitment, wide variation in effort, and genuine confusion.<sup>9</sup> The OFCCP had its staff halved under President Reagan's administration so that the combined staffs of the 10 regions amount to only 979 employees divided into administration, compliance officers, and support staff. Approximately 5,000 compliance reviews and 3,000 complaint investigations are completed each year. The director has instructed OFCCP officers to limit reviews to 150 hours, on average, so as to handle the workload. By the end of 1984, reviews were taking, on average, 125 hours each.

The OFCCP determines where enforcement is required, primarily through compliance reviews. The OFCCP has followed a policy of targeting for review those industries with high growth and those with traditional concentrations of women and minorities in low-paying jobs.

Compliance reviews, by regulation, involve an analysis and evaluation of a contractor's hiring and employment practices, an assessment of the adequacy of the company's affirmative action plan and of its efforts to implement the plan.<sup>10</sup> In practice, a compliance review consists of a desk audit and an on-site review if the results of the audit reveal deficiencies, which is usually the case.

Unlike the EEOC, which has no control over its workload, the OFCCP is able to schedule its compliance reviews systematically. In the normal course of events, a contractor would be reviewed about once in four years. However, contractors may be subject to much more frequent reviews if they are part of an industry under scrutiny, if they have many establishments, or if individual complaints on which the OFCCP is prepared to act have been received. The OFCCP seldom initiates investigations except in cases involving handicapped individuals and veterans. Whether it should handle individual complaints if it wishes to maintain its credibility with contractors is a source of debate within the OFCCP.

Conciliation is used if deficiencies are found. If conciliation fails, enforcement proceedings may be brought. (The OFCCP, unlike the EEOC, has adjudicative powers.)

The OFCCP also reviews a contractor's employment practices to determine if they have resulted in systemic discrimination against an "affected class".<sup>11</sup> If such discrimination is

found, the contractor is required to take remedial action. This includes providing back pay and retroactive seniority and is achieved through a conciliation agreement or enforcement proceedings. As will be discussed, the potential duplication of Title VII functions is controversial.

Although complaints by individuals may be investigated by the OFCCP, most are referred to the EEOC.<sup>12</sup>

The sanctions that can be applied for non-compliance are specified in E.O. 11,246 and include administrative determinations to cancel, terminate, or suspend a contract or, after a hearing, to prevent contractors from entering into further contracts with government agencies, a step known as "debarment".

The Department of Justice may bring court proceedings to enforce E.O. 11,246 and, on the OFCCP's recommendations, to obtain injunctive relief against persons who prevent compliance. Judicial proceedings are considered where debarment would be an impracticable or ineffective sanction, e.g., in the cases of banks, public utilities, or very small contractors.

The validity of the Executive Order has been defended by supporters who assert that the failure of government to prohibit employment discrimination by government contractors would amount to government's aiding and funding discriminatory activities in violation of the equal protection clause of the Fifth Amendment. However, the validity of the affirmative action requirement is less clear, since it is an administrative, rather than legislated, requirement under a program that may not be regarded as voluntary in certain markets. In fact, the OFCCP even asserts jurisdiction over contractors who have not assented to the affirmative action clause.<sup>13</sup> Further, the Executive Order is based on the premise that affirmative action may be required whether or not there has been past discrimination. In *Fullilove v. Klutznick*,<sup>14</sup> one Supreme Court judge held that race-conscious remedies could be imposed by government only after a finding of illegal discrimination. The effect, if any, on the Executive Order is yet to be determined.

A contractor may obtain judicial review of an adverse decision at the conclusion of the enforcement proceedings.

Protected individuals have no direct action against contractors, but suits against federal officials to compel performance of their duties under contract compliance have been upheld.

Unions are not subject to suit except where they interfere with compliance.

The reluctance of contractors to provide information stems in large part from concern that the information will be made available to competitors and others under the *Freedom of Information Act* (FOIA). The Supreme Court in *Chrysler Corp. v. Brown*<sup>15</sup> established that the FOIA does not limit an agency's discretion to disclose privately submitted information otherwise falling within any of the Act's exemptions from mandatory disclosure. The exemptions do not obligate OFCCP to refrain from releasing information.<sup>16</sup>

Contractors generally want to prevent disclosure of information that could result in competitive injury because it did not fall within the FOIA exemption or the *Trade Secret Acts* test (confidential commercial information).

The lack of confidentiality obviously becomes a problem in the pretrial discovery in Title VII cases. The courts have reached conflicting opinions. Contractors respond by being less open and more careful in their affirmative action plans, by using disclaimers, and by subscribing to self-generated definitions, etc. They find they must include a confidentiality clause to obtain whatever confidentiality benefits are available to them under *Chrysler*.

#### **The OFCCP Proposed Final Revisions to Contract Compliance Rules and Regulations**

Proposed revisions to the OFCCP's contract compliance rules and regulations were subjected to "two years of analysis, extensive public comments, inter-agency review and debate".<sup>17</sup> These rules were to go into effect after required coordination with the EEOC and approval by the White House. The intent of the proposals is to reduce the scope of the regulations and the overall onus on business, particularly small businesses. The amount of paperwork would be significantly reduced for all contractors and enforcement and compliance requirements would be eased. These are the significant changes:

##### **1. Change in Threshold for Written AAPs**

The original proposal to raise the threshold above which written affirmative action plans (AAPs) are required from companies with 50 employees and \$50,000 in federal contracts to 250 employees and \$1 million in contracts met resistance from special interest groups, such as those representing minorities. The final proposal is 100 employees and \$100,000 in contracts.

##### **2. AAP Format Options**

In an effort to reduce the paperwork burden for small contractors and to provide flexibility to different types of contractors, there will be several new AAP formats, including a short form for contractors with 100-250 employees and contracts of \$100,000-\$500,000. There will also be a new five-year AAP format requiring a commitment to training for disadvantaged groups, as well as the previous requirement that employment goals be set. Contractors who opt for this type of AAP must have it approved but are then exempted from routine compliance reviews for five years.

##### **3. Sex Discrimination Guidelines**

The OFCCP had originally proposed that similarly situated men and women be provided with equal fringe benefits in order to reflect the Supreme Court's decision in *City of Los Angeles, Dep't of Water & Power v. Manhart*.<sup>18</sup> However, in response to submissions, the OFCCP has deleted this provision pending further clarification in the courts.

The OFCCP has now adopted most of the EEOC's guidelines interpreting the *Pregnancy Discrimination Act* and sexual harassment.

##### **4. Deletion of Certification**

To reduce paperwork, sub-contractors no longer need to be certified nor is there a need to certify that facilities are not segregated.

##### **5. Confidentiality of Salary Information**

The OFCCP may examine all relevant salary information at a contractor's establishment but may not remove the information from the contractor's site except where violations are alleged.

#### **6. Availability Analysis**

Perhaps the most significant change is the simplification of the regulations governing measurement of the availability of minorities and women for employment. The factors that must be considered have been reduced from eight to four:

- a) Percentage of minorities and women in the civilian labour force in the immediate labour area.
- b) Percentage of minorities and women with requisite skills in the immediate labour area.
- c) Percentage of minorities and women with requisite skills in the relevant recruitment area.
- d) Percentage of minorities and women among those promotable and transferable within the contractor's establishment.

To fully understand how OFCCP may apply these factors, it is necessary to review certain key terms in these factors that are now defined in section 60-1.3:

**Availability:** "the percentage of minorities and women among those persons who are eligible currently or will be eligible during the term of the affirmative action program as determined in accordance with s.60-2.11(c)".

**Immediate labour area:** "that geographic area from which employees and applicants commute to the contractor's establishment".

**Minorities and women with requisite skills:** those "who have demonstrated they possess the skills for the job in question (e.g., through performance on another job), those who have completed training or educational programs designed to provide skills for the job in question, and those who could reasonably be expected to acquire those skills within a relatively short time after placement".

**Promotable or transferable:** "those employees who are currently employed in a job group or groups which serve or could serve as a source from which selections are or could be made for another job group." While the new factor four stipulates this promotion/transfer should occur within the establishment, the definition itself contains no parallel stipulation.

Supplementing the adoption of the four-factor approach is the incorporation of a specific provision on weighting that permits zero weighting of any of the four factors deemed not to apply to a given availability analysis. Also, the proposed final rules specifically provide that compliance officers are to defer to the contractor's determination of availability unless it is structured so as to mask the representation of minorities and/or women.

#### **7. Underutilization**

Included in this final rules package is a new provision in section 60-1.3 defining the term "underutilization" for the purpose of contract compliance—having fewer minorities or women in a particular job group than would be reasonably expected by their availability. This definition also specifically states that "underutilization is neither a finding nor an admission of discrimination"—a question that had previously caused concern among some contractors and their legal advisors.

The proposed final rule also abandons the past practice of having contractors declare underutilization whenever there is

any difference, no matter how small, between the composition of the contractor's workforce in any job group and the availability of minorities and women. In its place, OFCCP has substituted an 80 per cent standard. Under this new standard, a contractor would not have to declare "underutilization" if its current utilization was at least 80 per cent of availability. The adoption of this 80 per cent standard has been generally opposed by affected groups who feel that the 80 per cent standard will mask discriminatory patterns. The proposal has also received mixed reactions from contractor groups who feel that the 80 per cent standard is statistically unsound. Despite these reservations, OFCCP has elected to stay with the proposed 80-per-cent standard. Lastly, the proposed final rules require that a utilization analysis be prepared for all job groups rather than just for "major" job groups, as is specified in the current rules.

### 8. The "Two Per Cent" Rule

In its original set of proposed changes to the procedures required for a utilization analysis, OFCCP intended to incorporate the so-called "two per cent" rule from Technical Guidance Memorandum No. 1. This rule required contractors to conduct a separate availability analysis for each minority group that exceeded two per cent or more of the population in the immediate labour area. The proposed addition has not been incorporated into the proposed final rules package, as OFCCP now believes that the additional paperwork burden it imposes on contractors cannot be justified.

### 9. AAPs for Vietnam Era Veterans, Disabled Veterans, and Handicapped Workers

The new regulations do not require contractors to develop affirmative action plans for veterans and handicapped persons according to Executive Order procedures, i.e., no goals and timetables are required.

The definition of "qualified handicapped individual" (that an individual is capable of safely and adequately performing the job) applies to all handicapped employees, including alcoholics and drug abusers.

### 10. Data Base

The U.S. Bureau of the Census definition of "civilian labor force" is adopted by the OFCCP because most contractors who develop availability analyses use census publications. The contractor satisfies its obligations by using the most recent census data.

### 11. The Concepts of "Qualified", "Promotable", and "Transferable"

Minorities and women with "requisite skills" are defined to mean those who have demonstrated that they possess the skills for the job in question by, for example, performance on another job; those who have completed training or educational programs designed to provide skills for the job in question; and those who could reasonably be expected to acquire those skills within a "relatively short time" (90 days or a probationary period) after placement.

The entire workforce in the "feeder jobs" is to be included in the calculation of availability. The number of vacancies, comparative qualifications, and individual interest will continue to be taken into account where a contractor has failed to achieve its goals. These defences will be considered in light

of the contractor's affirmative obligation to identify, encourage, train, and promote minorities and women within its own workforce.

### EEOC Response to OFCCP Proposals

In accordance with the Carter Reorganization on EEO responsibility, the EEOC as the "lead" agency must approve the OFCCP proposals. The EEOC's objections to certain OFCCP proposals were based on its belief that the OFCCP proposals should be consistent with Title VII standards and that complainants and contractors are entitled to have one standard by which to evaluate the government's actions, and that critical matters such as proof, limitation periods, and statistical standards should be consistent. To achieve this consistency, the EEOC wanted adoption of quota relief, back pay for a period of more than two years, and wholesale adoption of EEOC guidelines.

The EEOC objected to the OFCCP's 80 per cent rule, on the grounds that a contractor who complied with the OFCCP requirement might well be acting in violation of Title VII. The EEOC opposed proposed aggregation of goals for all minority groups because it believed this would allow contractors to mask discrimination against a particular minority group. The EEOC also wanted the OFCCP's definition of availability to include those whom the contractor could reasonably train and has objected to OFCCP's use of directives to implement policy changes, a procedure that bypasses the required consultation and rule-making process.

Where the OFCCP findings are at variance with EEOC's, the White House must approve the final form of the proposals to ensure rational standards.

### The Cost and Effectiveness of Executive Order 11,246

Several recent government-sponsored reports have analyzed the impact of the federal contract compliance programs. There have also been various non-governmental evaluations of the affirmative action requirements.

A 1982 Senate Committee analysis, the Hatch Report,<sup>19</sup> concluded that there was wide support among employers, minorities, and women for affirmative action programs designed to implement non-discriminatory employment practices but that there was a serious need for administrative reform to reduce unreasonable costs, paperwork, and complex procedures.<sup>20</sup> Hatch concluded that there is unnecessary and unreasonable duplication of function with the EEOC, caused by the OFCCP's decision to focus:

*...primarily on relief for victims rather than on affirmative action, and by regulating the employment practices of facilities and subcontractors having little if any direct relationship with federal procurement, OFCCP has expanded its jurisdiction far beyond anything reasonably contemplated or legally required by E.O. 11246. With available resources already heavily taxed and with budget cuts necessitating even further economies in the future, it is appropriate to evaluate whether the American people currently are realizing the greatest return on their civil rights investment. Clearly the answer is that they are not.<sup>21</sup>*

Despite these criticisms and despite Senator Hatch's reputation as an opponent of affirmative action, the Hatch Report recommended that any federal contract compliance program



be statutorily based to ensure that it would be outside presidential influence.<sup>22</sup>

Two studies commissioned by the Department of Labor concluded that affirmative action enhances the employment opportunities of minorities and women. The first, the Crump study,<sup>23</sup> compared the employment practices of federal contractors with those of companies that held no federal contracts in the period 1974-1980. It found that the employment participation of minorities and women in firms with federal contracts was greater in all job categories than in non-contractor firms. The study was designed to "discount Title VII influence" and concluded:

*In sum, the data indicate that greater changes in participation rates were made by minorities and women in employer establishments which have operated under the Executive Order's affirmative action requirements than were made in employer establishments that only operated under the employment discrimination prohibitions of Title VII of the Civil Rights Act. Additionally, the greater changes in the participation rates of minorities and women in those employer establishments undergoing Executive Order compliance reviews suggests that this activity may also have had a positive impact on the employment opportunities of protected groups. Additional study would be necessary to establish the scope and extent of such changes that may be attributed directly to the compliance program.<sup>24</sup>*

The Leonard study<sup>25</sup> analyzed the same data as the Crump study and concluded that federal contractors have provided greater employment opportunities for black males than have non-contractors. Leonard also concluded that Title VII litigation has been helpful in increasing black employment.

The cost of OFCCP's compliance activities and its impact on 21 companies "selected on a representative basis from The Fortune 500" was analyzed by the Equal Employment Advisory Council in a study released May, 1981.<sup>26</sup> It showed the average cost of a compliance review to a Fortune 500 federal contractor to be just over \$20,000. The average cost of a compliance review to the OFCCP was \$15,500. Another assessment of the cost effectiveness of equal employment opportunity by the Director of Review and Appeals for the EEOC concluded that equal employment opportunity regulation is "growth-inducing". He estimated annual enforcement costs to be \$10 billion: \$1 billion representing government enforcement expenses; \$6 billion representing employer compliance expense; and \$3 billion for executive opportunity cost.<sup>27</sup>

The U.S. Conference Board, in its 1980 Report *Nondiscrimination in Employment — And Beyond*,<sup>28</sup> on the implications of federal equal employment opportunity laws and regulations for major corporations, addressed the question "Too Much Paper Work?" and noted that the initial corporate answer was "yes". However, with time, that answer has changed:

*But, increasingly, senior personnel executives are coming to view these paperwork requirements from a different perspective. Many admit that — for the first time — they have detailed information about the numbers of people in meaningful job groupings and*

*about the movement or flow of members of various protected groups into, between and out of those meaningful job groupings during specified time periods. Furthermore, because of line management participation in the establishment of realistic, interrelated goals and timetables, again for the first time they have solid information regarding the company's probable future human resource needs. They also have developed a much clearer picture of external labor market sources and availabilities, once again by meaningful job categories. Put all this information together and they find that — for the first time — they know enough to begin to monitor and to help the company to manage its overall human resource utilization as a flow system.*

## B. Handicap

### Section 503 of the Rehabilitation Act of 1973<sup>29</sup>

Section 503 of the Rehabilitation Act of 1973 requires affirmative action in the employment and advancement of qualified handicapped individuals by federal contractors.

All federal contracts and subcontracts in excess of \$2,500 must include clauses with similar requirements to those of Executive Order 11,246: a requirement that the contractor follow employment practices that will not discriminate against protected groups as well as a requirement to undertake affirmative action for the employment of qualified handicapped workers in all of the contractor's establishments.<sup>30</sup>

Employers who are obliged to prepare a written affirmative action plan under Executive Order 11,246 are also obliged to prepare a written affirmative action plan for the employment of qualified handicapped workers.<sup>31</sup>

The definition of a handicapped individual is broad and includes:

*...any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of Section 503... such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to the property or the safety of others.<sup>32</sup>*

A qualified handicapped individual is one who is capable of performing a particular job, with reasonable accommodation for his or her handicap.<sup>33</sup>

When a mental or physical job qualification requirement exists that screens out otherwise qualified handicapped employees or applicants, the onus is on the contractor to show that the requirements are job-related and are consistent with business necessity and the safe performance of the job.<sup>34</sup> It is permissible for an employer to inquire into an applicant's or employee's mental or physical condition or to conduct a medical examination prior to hiring or to a change in employment status.<sup>35</sup>

Contrary to its usual practice of referring individual complaints to the EEOC, the OFCCP receives individual complaints about employment discrimination from handicapped

persons. The complaint must be filed within 180 days of the alleged discriminatory action, although the time for filing may be extended for good cause.<sup>36</sup> Contractors with internal review procedures are given 60 days to resolve the complaint. If the internal process is unsuccessful, the OFCCP will proceed with investigation.<sup>37</sup> If no discrimination is found, or if found but no proceedings are undertaken, the complainant may request a review.<sup>38</sup> There is no private right of action under section 503.<sup>39</sup>

The OFCCP also conducts compliance reviews of the employment of handicapped persons, sometimes as part of reviews under Executive Order 11,246. The penalties for non-compliance are the same as those available under the Executive Order.<sup>40</sup>

#### **Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974<sup>41</sup>**

Section 402 of this Act requires affirmative action for the employment of disabled and Vietnam era veterans by any federal contractor with contracts of \$10,000 or more at each of the contractor's establishments. The contractor must also list all job openings with government employment services.<sup>42</sup> These employment services are then required to give veterans priority in referrals for these job openings.

As is the case under section 503 of the *Rehabilitation Act* of 1973 and Executive Order 11,246, contractors with a contract for \$50,000 or more who have 50 or more employees are required to produce written affirmative action plans for the employment of Vietnam era veterans but, as is the case for handicapped employees, in practice, these plans do not have to include goals and timetables.

Business necessity and job-relatedness are valid defences in suits alleging discrimination in employment adversely affecting the handicapped. However, employers may not categorically exclude persons with a particular handicap unless there is a high degree of human or economic risk in their employment and individual assessment cannot readily be made.<sup>43</sup> A high degree of probable future injury or aggravation of an existing injury is a defence.<sup>44</sup>

The provision of fringe benefits raises the question of whether an employer must provide equal benefits to a handicapped employee, even if the cost is greater.

The section 503 regulations require reasonable accommodation of the limitations of a handicapped applicant or employee.<sup>45</sup>

The concept of "reasonable accommodation" with respect to a handicap developed from the similar concept of reasonable accommodation with respect to religious beliefs and practices. In *Trans World Airlines, Inc. v. Hardison*,<sup>46</sup> the Supreme Court held that an accommodation that imposed upon the employer more than a *de minimis* cost, or that interfered with co-workers' competitive seniority rights, or that imposed on co-workers a burden tantamount to discrimination, constituted an undue hardship. However, under section 503, the problem of reverse discrimination does not arise because the status of not being handicapped, unlike the status of not adhering to a particular religion, is not protected. Also, possession of a handicap is involuntary, while adherence to a particular religion or belief is not.<sup>47</sup>

## **VI. AFFIRMATIVE ACTION AND REVERSE DISCRIMINATION**

### **Historical Overview**

As far back as the 1930s U.S. labour lawmakers recognized that merely forcing employers to "cease and desist" was insufficient remedy for discriminatory actions. Thus, the *Wagner Act* used the term "affirmative action" to describe the efforts that an employer must make to "end the future detrimental effects of his past conduct".<sup>1</sup>

The term "affirmative action" is used to refer generally to specific policies and practices intended to improve the employment status of designated groups. When, however, "affirmative action" carries an additional requirement that members of designated groups be chosen, it becomes contentious.

The debate centres on the purpose of Title VII: should it ensure "equal treatment" or "equal achievement"? "Equal treatment" seeks a "colour blind universe where all persons are treated without regard to their race or gender". "Equal achievement", on the other hand, looks "to the results of the contest, not to whether the rules are the same for everyone",<sup>2</sup> on the basis that "equal treatment" is often another way of perpetuating past wrongs.

A review of the legislative history of Title VII supports the view that any attempt to make each workforce a microcosm of the externally available workforce was not intended. Senator Hubert Humphrey stated that the legislation that became known as Title VII "does not require an employer to achieve any kind of racial balance in his work force by giving preferential treatment to any individual or groups", and that section 703(j) of Title VII had been "added to state this point expressly". Section 703(j) states that nothing in Title VII requires an employer to grant preferential treatment to anyone because of an imbalance that might exist in his workforce "in comparison with the total number or percentage of persons of such race, color, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area".

It was not Title VII but the Office of Federal Contract Compliance Programs that initiated the shift from "equal opportunity" to "equal results" by its introduction of guidelines for federal contractors in 1968 referring to "goals and timetables" and "representation". By 1970, these guidelines referred to "results-oriented procedures". By 1971, "underutilization of minorities and women" was tied to "availability" in the relevant job market.<sup>4</sup>

### **Affirmative Action under Title VII**

Despite the existence of section 703(j), the Supreme Court has approved preferential treatment, sometimes involving the use of quotas, for minorities in cases where it considered they were appropriate.

The first case to reach the Supreme Court, *DeFunis v. Odegaard*,<sup>5</sup> was not determinative. The Court held it was moot because by the time the case reached the Supreme Court, DeFunis, whose admission to law school had been ordered by a lower court, was about to graduate.

Between 1978 and 1980, the Supreme Court did, however, decide a now famous trilogy of cases that alleged reverse discrimination arising from affirmative action plans: *Bakke*,<sup>6</sup> *Weber*,<sup>7</sup> and *Fullilove*.<sup>8</sup> In *Bakke*, the Court considered the

legality, under Title VI and the Equal Protection Clause of the Fourteenth Amendment, of setting aside a fixed number of places in a medical school admission program. *Weber* addressed the question of whether a voluntary, collectively-bargained selection ratio for craft trainees, based on race, was permissible under Title VII. *Fullilove* was a direct constitutional challenge to a Congressional enactment that required that minority business enterprises be awarded at least 10 per cent of certain construction funds.

The court had had previous experience with "affirmative action" when it ordered desegregation of the public schools, but the highly publicized *Bakke* case first brought the issue of "reverse discrimination" to public attention.

*Bakke* is not about employment discrimination but about public funding of educational institutions and was decided, therefore, under Title VI. In brief, Allan Bakke, a white applicant for medical school, was refused admission despite his having had better qualifications than members of minority groups who were accepted. The U.S. Supreme Court affirmed the California Supreme Court's decision ordering his admission.

*Bakke* produced six separate opinions. The lack of a formal plan and the lack of a finding of past discrimination concerned five of the justices. However, another four justices, plus one from the first group, held that race-conscious programs could be appropriate even if there had been no finding of deliberate discrimination.

Brian Weber, a white male, challenged a voluntary, collectively bargained training program whose admission procedures provided that equal numbers of blacks and whites be enrolled when he was passed over for a less senior black employee. Weber's suit was successful at both the trial and appellate levels, but the U.S. Supreme Court reversed the appellate decision with the majority declaring that the background and purpose of Title VII could not be construed to bar "all private, voluntary and race-conscious" efforts to abolish "traditional patterns of racial segregation". A "literal construction" of sections 703(a) and (d), which prohibit discrimination on racial grounds, was "misplaced" in light of the context in which the Title VII was enacted. Further, the Court found section 703(j) was designed to prevent the federal government from requiring preferential treatment, but not to prohibit voluntary affirmative action.

Without specifying what is permissible and what is not in voluntary plans, the majority emphasized the temporary duration of the plan, its remedial purpose of breaking down traditional racial segregation in job classifications, the "voluntary" (even though taken under government pressure) nature of the plan, and the fact that this new program did not limit the existing rights of whites, nor was it an absolute bar to the advancement of whites. In addition, since in *Teamsters*<sup>9</sup> and *Hazelwood School District v. United States*<sup>10</sup> the Court had endorsed the concept that a gross statistical disparity could be a basis for a finding of discrimination, the Court was not troubled that the minority selection rate in *Weber* was greater than the minority's representation in the workforce: blacks constituted 39 per cent of the surrounding labour market but held only 1.83 per cent of the craft positions.

Although *Weber* involved blacks and a private employer, the standard set for judging voluntary affirmative action under Title VII would appear to be applicable to other minori-

ty groups and public employers, especially in light of the 1972 Congressional debates on amendments to Title VII, which emphasized the economic plight of women and Hispanics, as had the 1964 debate respecting blacks.

In *Fullilove*, the U.S. Supreme Court reviewed a program approved by Congress under the *Public Works Employment Act* which required, unless there was a specific waiver, that at least 10 per cent of federal funds for local public works must be used to procure supplies or services from minority business enterprises (MBE). Several contractors alleged the MBE preference was unconstitutional. In *Fullilove*, approving the use of race as a criterion, the Supreme Court produced five separate opinions, none of which commanded the support of more than three Justices.

Court decisions following *Weber* have upheld voluntary preferential programs that "mirror(s) the purpose of the statute" as required by *Weber*.<sup>11</sup> The courts have not, however, clarified the amount of racial imbalance that is required to justify preferential treatment of a particular group nor have they indicated the appropriate statistical basis for, or offered guidance regarding, the type of affirmative action provisions deemed to be reasonably related to the purposes of Title VII.

#### EEOC Affirmative Action Guidelines

In 1979, the EEOC issued *Affirmative Action Guidelines* designed to provide a defence for employers who might engage in affirmative action and then find themselves charged with reverse discrimination. Section 713(b)(1) provides that no person shall be subject to a liability or punishment if an act or omission was made in good faith and with reliance on any written interpretation or opinion of the EEOC. The employer, to avail itself of this defence, must conduct a self-analysis, have a reasonable basis for concluding that affirmative action is required, and take reasonable action to resolve the problem revealed by the self-analysis.

The validity of these *Guidelines* or their availability and efficiency as a defence against charges of reverse discrimination have not yet been established.

#### Majority Group Members and Affirmative Action

These cases involve disparate treatment of "majority" group members that has not arisen from employer efforts to engage in affirmative action.

The Supreme Court first made it clear in *Griggs*<sup>12</sup> that Title VII applies to all people, not just to members of protected groups. In that case, decided in 1976, the Court specifically held that discrimination against whites was prohibited by both Title VII and section 1981 or the *Civil Rights Act of 1866*. This decision reflected statements reported in the Congressional Record that asserted that Title VII was intended to cover "all white men and white women and all Americans" and that it creates an "obligation not to discriminate against whites".<sup>13</sup>

This protection does have its limits. Affirmative action on behalf of handicapped persons or persons between the ages of 40 and 70 is not illegal, because those who are able-bodied or under 40 are not subject to protection.

#### VII. OTHER LAWS AND REMEDIES

##### A. Civil Rights Acts of 1866 and 1871

Following the Civil War and nearly a century before the passage of Title VII, the U.S. Congress enacted a series of



civil rights statutes that were designed to give effect to the newly ratified Thirteenth (eradication of slavery), Fourteenth (equal protection, due process), and Fifteenth (voting rights) amendments to the Constitution. Three of these statutes that were codified (now usually referred to as sections 1981, 1983, and 1985) are frequently cited in cases involving charges of racial discrimination.

The Supreme Court decided in 1975 that these statutes provide an independent right of action that may be exercised by filing suit in the federal courts simultaneously with the filing of a Title VII charge with the EEOC.<sup>1</sup> Originally each was construed not to be applicable to private actions.

Most discriminatory situations covered by these statutes are also covered by Title VII,<sup>2</sup> but these statutes are attractive to plaintiffs because they provide a safeguard against the slow, cumbersome, and often ineffective<sup>3</sup> EEOC procedure and because they provide additional remedies, including compensatory and punitive damages. The right to trial by jury is also available in certain circumstances.

#### **Applicability of Section 1981, The Civil Rights Act of 1866**

Section 1981 of the Act gives to "all persons the same right to make contracts and have the full and equal benefit of all laws and proceedings... as is enjoyed by white persons".

Although it is clear that section 1981 is applicable to racial discrimination, what was not always clear and therefore generated numerous conflicting decisions was whether the protection against racial discrimination was available to whites. The Supreme Court resolved the issue in an important case, *McDonald v. Santa Fe Transp. Co.*, involving reverse discrimination in which it held that the section was "applicable to racial discrimination in private employment against white persons".<sup>4</sup>

After extensive litigation, it is now generally accepted that section 1981 does not apply to discrimination based on sex.<sup>5</sup>

Section 1981 prohibits discrimination based on alien status.<sup>6</sup> A majority of courts have held that section 1981 does not cover ethnicity and national origin, per se, unless individuals are non-white, i.e., who have physical characteristics (especially colour) that distinguish them from "whites" even though, technically, they are the same race in an anthropological or sociological sense.<sup>7</sup> By the same analysis, a white would be able to advance a claim based on colour or race but not on national origin or ethnicity.<sup>8</sup>

Religion is not covered by section 1981 since it is not a form of discrimination based on race or colour.

#### **Applicability of Section 1983, The Civil Rights Act of 1871**

By its terms, section 1983 affects only persons claiming colour of state law, or, as it is otherwise known, the "state-action requirement". It has been used to deal with employment discrimination involving police and fire departments, public schools, colleges and universities, public or semi-private hospitals, state agencies, and similar institutions.<sup>9</sup>

The more difficult cases occur when it can be argued that a private institution is so involved with the state through licensing, receipt of public funds, location in state-owned facilities, carrying out of functions normally exercised by the

state, etc., that state action will be found proper. The Supreme Court's finding under Chief Justice Warren that state action was required in *Burton v. Wilmington Parking Authority*,<sup>10</sup> which involved a restaurant leased by a public authority, is regarded as one of that Court's most liberal interpretations of the state-action requirement. Under Chief Justice Burger the Court has since interpreted the requirement more strictly. It viewed, for example, a privately owned utility operating as a monopoly under extensive state regulations and providing an essential public service as not being sufficiently state-connected to meet the requirement for state action.<sup>11</sup>

Section 1983 does not apply to federal officials unless they are acting in conjunction with state officials or pursuant to local custom, law, or regulation. It does apply to local, but not to state, governments. Suits may still be brought against state officials in their official and individual capacities, but only limited relief is available because of the immunity provided to states under the Eleventh Amendment, which establishes states as sovereign entities.

Section 1983 applies to discrimination covering any of the five bases of Title VII — race, colour, sex, religion, or national origin — as well as on other grounds — non-citizenship, age, possession of a handicap, physical attributes, or sexual preference — if the discriminatory behaviour is not related to some legitimate state interest.<sup>12</sup>

#### **Applicability of Sections 1985 and 1986, The Civil Rights Act of 1871**

Private conspiracies involving racial discrimination (unlawful under the Thirteenth Amendment) may be covered by section 1985. Conspiracies involving discrimination based on sex, religion, age, and (probably) national origin (unlawful under the Fourteenth Amendment) would be covered only if officials of the state government or some form of state action were involved.

This statute provides a remedy in cases where distinct entities, e.g., union and employer, participate in the same discriminatory practice as well as against representatives of a single entity acting both within and without their official capacities.

Section 1986 provides companion protection to that provided by section 1985 since it is directed at those who, having knowledge of a conspiracy to discriminate and having the ability to prevent it, neglect or refuse to do so. Liability must first be established under section 1985(3). The plaintiff bears a heavy burden of proof since it is necessary to prove that the defendants had actual knowledge of, and were in a position to prevent, the conspiracy.

The coverage of sections 1985 and 1986 is broader than that in either section 1981 or section 1983 alone. However the Supreme Court has determined that the sections cannot be used to enforce rights created solely by Title VII.

If there is no state action, sections 1985 and 1986 may only apply to discrimination based on race and (arguably) religion. When state action exists, sections 1985 and 1986 would probably cover discrimination based on any unjustifiable classification.

## Remedies

The independent nature of the remedy available under section 1981 has been held to mean that there are no prerequisite "timely filing requirements" that must be met prior to the bringing of action under these *Civil Rights Acts*. Nor is there a requirement that state administrative remedies be exhausted before an action can be brought. Actions arising under sections 1981, 1983, 1985, and 1986 may be brought either in federal district court or the appropriate state court.

Prior to the Supreme Court's decision in *Washington v. Davis*,<sup>13</sup> courts regarded these statutes and Title VII as involving analogous theories of discrimination. In *Washington*, the Court stated that cases based on the constitutional doctrine of equal protection (as opposed to the statutory basis of Title VII) would require proof of discriminatory purpose or intent. This holding applies to sections 1981 and 1983. Under section 1985, conspiratorial intent must be shown. This requires proof of a purpose to discriminate based on some invidious, class-based ill-will.

Declaratory and injunctive relief and compensatory and punitive damages (not against state entities) are available. Back pay is not restricted to the two years specified in Title VII. Assistance in investigation, conciliation, counsel, waivers of court costs, and compensation for attorney's fees are not available in actions taken under the *Civil Rights Acts*, but generally the remedies available are similar to Title VII remedies — reinstatement, promotion, and the setting of goals, timetables, and quotas for the class.

## B. National Labor Relations Act (NLRA)<sup>14</sup>

### Remedies Against Discriminatory Unions

The NLRA does not expressly prohibit race or sex discrimination.

In practice, the National Labor Relations Board has relied on the doctrine of exclusivity<sup>15</sup> (of representation) and the duty of fair representation (DFR) that flows from it. The case law arising from this doctrine has resulted in the following remedies:

1. denial of access to Board processes, particularly to bargaining remedies;
2. denial or rescission of certification;
3. a judicial finding of "unfair labor practice" with attendant remedy provided for a breach of the DFR; and
4. a judicial finding of "unfair labor practice" with attendant remedy when a union refuses an employer's offer to remedy discrimination.

An employer's refusal to bargain because of alleged racial discrimination by its union resulted in the union's being precluded from any remedies otherwise available to it from the Board. The court approved of this denial, holding that if access had been permitted the Board would have been guilty of unconstitutional federal complicity in invidious discrimination.<sup>16</sup> This case has had limited approval. It has been rejected by one Circuit Court of Appeals and is no longer followed even by the Board; however, its potential for speedy remedy is significant if it were to be statutorily based.

The Board's present practice is not to deny certification because of a union's pre-certification discrimination and,

although it has stated its willingness to do so, the Board has rarely rescinded the certification of a union that discriminates. In fact, it overruled its own decision in *Bekins Moving & Storage Co.*,<sup>17</sup> i.e., not to certify where discrimination has been found, in *Handy Andy, Inc.*<sup>18</sup> where it stated:

*We now conclude that the policies of the Act are better effectuated by considering allegations that a labor organization practices invidious discrimination in appropriate unfair labor practice rather than representation proceedings. Accordingly, ... the Bekins decision is overruled.*

The courts have held that discrimination based on sex, age, alien status, or religion violates the duty of fair representation, as, for example, where separate male and female union locals are maintained even when they represent the same bargaining unit.

### Employer Discrimination

In *Jubilee Manufacturing Co.*,<sup>19</sup> the Board rejected the District of Columbia Circuit Court's<sup>20</sup> 1969 finding that the Board has the authority to remedy employer discrimination based on race, colour, religion, sex, or national origin, as being outside the purview of the NLRA on the grounds that employer discrimination did not necessarily infringe the collective bargaining process and that the NLRA protected employee's rights to act in a concerted manner. The District of Columbia Circuit Court accepted this repudiation of its earlier decision without opinion.

The Board and the Supreme Court<sup>21</sup> have held that employees who strike in violation of a valid no-strike agreement lose the NLRA protection regarding concerted activity, even where the activity was to protest an employer's racial policies. Where a valid no-strike agreement is not in force, the Board and courts have found complaints of race and sex discrimination and sexual harassment to be protected concerted activity.

### Duty to Provide Data to the Union on the Composition of the Workforce

The NLRA makes it an unfair labour practice for an employer to refuse to bargain with a union of its employees. A component of that duty is the employer's obligation to provide the union, on request, with information relevant to the union's functions of bargaining and implementing any agreement.

The right of a union to obtain data on the composition of the employer's workforce, affirmative action efforts, and discrimination complaints, on the basis that they were relevant to these union functions, was considered in *Electrical Workers, IUE v. NLRB*.<sup>22</sup> The Circuit Court of the District of Columbia ordered the employer to provide the number, types, dates, and alleged bases of complaints filed but, to maintain confidentiality, did not require that actual copies of the complaints should be made available.

The Court also found the workforce analysis portion of the employer's Affirmative Action Plan (AAP) to be relevant in order to permit the union to enforce the collective bargaining agreement provisions aimed at the elimination of discrimination against women and minorities. However, the Court refused to order production of the employer's AAP on the grounds it was not the union's duty to challenge the employer's future plans, goals, or commitments, since there were

other remedies available should violations occur. The Court held that:

*An employer's self-analysis, often including admissions and desirably candid self-criticism, is necessarily chilled by a foreknowledge that the results of that analysis must be disclosed to the union representing its employees and might then be disclosed to its competitors and others if the union sues the employer or otherwise elects to publicize the analysis.*

### C. Related Causes of Action

#### Co-existence of Remedies and Choice of Forum

Title VII supplements, but does not supplant, existing federal laws.<sup>23</sup> The doctrine of "election of remedies does not apply"<sup>24</sup> and Title VII does not supplant state remedies. In fact, section 708 expressly states that state remedies are unaffected.

State causes of action may be important where there are jurisdictional problems under Title VII, ADEA, or the *Rehabilitation Act*.

Monetary damages under Title VII are limited to back pay, but under state action the plaintiff may receive punitive damages or damages for mental distress. Back pay is taxable; damages for distress are not.

#### Private Causes of Action

In the United States, unlike Canada, employees without express contract or statutory protection have traditionally been subject to a U.S. interpretation of the common law that their employment was terminable "at will": Under this doctrine even long-term employees could have their employment terminated "at the will" of their employers, although federal (including Title VII) and state restrictions were terminations of employment based on prohibited grounds such as race, sex, and age. Now, as is the practice in Canada, some U.S. courts are allowing claims based on a finding of implied contract and, in tort, for violation of a public policy. These actions may be joined with actions for discrimination.

A claim for defamation may arise if an employer makes false statements to its own employees or to a former employee's prospective employer. Defamation suits are often linked to claims for tortious interference with contractual relations.

#### Withholding of Federal Funds and Regulatory Agency Remedies

The Supreme Court has held that because of its discriminatory practices, various federal funding agencies and regulatory bodies should withhold monies expended by a utility.<sup>25</sup> The District Court of the District of Columbia has also held that the Federal Communications Commission should consider applicants' employment discrimination practices in licence renewal proceedings.

### VIII. UNIONS

The role of the union in the protection of its minorities has become increasingly important since the Supreme Court's liberal construction of the seniority system exemption in *Teamsters*.<sup>1</sup>

When it is acting as an employer, a union with few exceptions, is in the same position as any other employer. When it is acting as a union, it is liable for its own discrimination

against its members and applicants for membership under sections 703(c) and (d) of Title VII.

#### Referrals

Where unions control who is referred for a job (the hiring hall) or who may become a member, they may be liable for any discrimination practices.<sup>2</sup> Even before *Teamsters* and *Evans*,<sup>3</sup> some courts had outlawed unions' requirements that those referred for employment should have trade experience on the ground that, because of a discriminatory environment, minorities had been prevented from obtaining the necessary experience. Since 1977, the first question to be decided in a case alleging discrimination in job referrals is whether the referral system is a bona fide seniority system.<sup>4</sup> If it is, then the issue is whether it was implemented for legitimate reasons, even if it is discriminatory. Segregated unions are, per se, discriminatory, even if the discrimination is voluntary or desired by all members or where integration of local unions would be to the economic detriment of minority group members.<sup>5</sup>

#### Duty of Fair Representation (DFR)

DFR is a judicially created doctrine grounded in the *National Labor Relations Act* (NLRA) and imposes a greater duty than the duty imposed by Title VII since it requires the union to serve the interests of all members of the unit "without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid all arbitrary conduct". When a breach of DFR is alleged, an individual may proceed under the NLRA, and/or Title VII, and the *Civil Rights Acts of 1866 and 1871*. The choice of forum and statute may have serious procedural and tactical implications.<sup>6</sup>

The effect of the theory that Title VII imposes on a union an affirmative duty to ensure that employers comply with equal employment opportunity statutes with respect to employees that the union represents must also be considered.<sup>7</sup> In the leading case, *Macklin v. Spector*,<sup>8</sup> the Court held that, where there is "solid evidence" of employer discrimination, "it would undermine Title VII's attempt to impose responsibility on both employers and unions to hold that union passivity at the negotiating table in such circumstances cannot constitute a violation of the Act." The union's liability appears to be confined to areas within the scope of the collective bargaining agreement, and there are divergent findings as to whether a union has a duty to challenge practices that have not been made the subject of a complaint.<sup>9</sup> The union is not required by DFR or Title VII to be an enforcer of the law.

A union is normally jointly liable with an employer under both Title VII and the *Civil Rights Acts of 1866 and 1871* for discrimination under the provisions of a collective bargaining agreement.<sup>10</sup> Defences of good faith, lack of intent, or reliance on judicial authority have been rejected.

Unions are also jointly liable with employers under the *Age Discrimination in Employment Act*. Since *Teamsters*, the defence that the seniority system is bona fide is available to unions named as defendants.

When a union induces an employer to discriminate, it may be forced to pay all of any back pay awards, but an employer cannot justify a discriminatory employment practice or decision on the grounds of a desire to "keep the peace" with the union.<sup>11</sup>



An employer has been found to be jointly liable with a union for the union's discrimination against non-members in employment referrals but is not held to be liable for discrimination in the hiring hall.

Regional and international unions may be found liable if they are proven to be involved in the discriminatory practices of locals on the basis of a "failure to police" theory.

#### **Handling of Grievances**

The typical complaint alleges that the union discriminated when it decided not to file or process a grievance. The complaint is made under the theory of disparate treatment<sup>12</sup> so the plaintiff must show intentional discrimination, dissimilar treatment based on comparative evidence, or statistical proof.

#### **Procedural Matters**

Until 1976, the courts were reluctant to allow unions to be certified as class representatives. This reluctance was founded on the potential for conflict of interest with their duty to

represent all employees, and because of the fact that all class members are bound by a decision in a class action. More recently, the courts have been more willing to allow unions to be certified as class representatives because of the legal and financial resources unions can bring to a class action.<sup>13</sup> Generally, courts refuse to certify unions as class representatives in actions involving back pay claims or individualized relief.

The *Equal Pay Act* imposes a duty only on employers.<sup>14</sup> Executive Order 11,246 imposes no direct duty on unions<sup>15</sup> if they are not government contractors. A union may be subject to injunctive relief if it attempts to interfere with an employer's compliance with non-discriminatory employment requirements by, for example, failing to refer sufficient numbers of minorities for employment.<sup>16</sup> Employer actions taken pursuant to an OFCCP directive, EEOC conciliation agreement, or court decree, even where the employer has unilaterally changed procedures in collective bargaining agreements, have been generally sustained.

## NOTES

## SECTION I

1. Norbert A. Schlei (former Assistant Attorney-General in the Kennedy Administration), in *Employment Discrimination Law*, Second Edition, Schlei, Barbara, and Grossman, Paul, American Bar Association Section of Labor and Employment Law, The Bureau of National Affairs, Washington, D.C., 1983, p.viii (hereinafter Schlei and Grossman). The author has relied extensively on the information contained in this text.
2. Pub.L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. para 2000e (1976)).
3. In fact, in February, 1963, Kennedy's first special message to the 88th Congress on Civil Rights referred to the steps taken to eliminate racial discrimination in the federal government's own employment practices, by federal contractors, and through litigation against discriminatory unions. He stated that he hoped these actions would make the enactment of legislation unnecessary. (Vaas, Francis J., "Title VII: Legislative History," 7 B.C. Ind. and Comm. Law Review, 1965-66, 431-458, 432.)
4. Blumrosen, Alfred W. "Six Conditions for Meaningful Self-Regulation," 69 American Bar Association Journal (September 1983) 1264-1269.
5. Schlei and Grossman, *supra*, note 1, pp. xii, 441-442. The debate surrounding the sex amendment referred to discrimination against women who "could not find a husband".

## SECTION II

1. Blumrosen, Alfred W. "Six Conditions for Meaningful Self-Regulation," 69 American Bar Association Journal, (September 1983) 1264-1269. See also Schlei and Grossman, *supra*, note 1, Section 1, Chapter 2.
2. "Bottom Line Defense in Title VII Actions: Supreme Court's rejection in *Connecticut v. Teal* and a Modified Approach," *Cornell Law Review*, Vol. 68, No. 5, June 1983, 735.
3. *Teamsters v. United States*, 431 U.S. 324, 335-36 n.15, 14 FEP 1514 (1977).
4. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP 965 (1973).
5. *Ibid.*, p.802.
6. *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP 113 (1981).
7. *Davis v. Weidner*, 596 F.2d 726, 19 FEP 668 (7th Cir. 1979).
8. For example, *Smith v. Union Oil Co. of Cal.*, 17 FEP 960 (N.D. Cal. 1977).
9. 279 F. Supp. 505, 1 FEP 260d (E.D. Va. 1968).
10. *Supra*, note 3.
11. 438 U.S. 567, 17 FEP 1062 (1978) at 578.
12. *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). (Franks was the first case dealing directly with seniority considered by the Supreme Court in which the majority ordered as remedy the awarding of retroactive seniority. The dissent considered this remedy to be injurious to innocent employees without having negative consequences to the employer.)
13. 456 U.S. 63, 28 FEP 713 (1982).
14. Zehner, Judith Walker, "American Tobacco v. Patterson: The Supreme Court Clarifies the Scope of Title VII's Section 703(h) Seniority System Exception," 14 U. Tol. L. Rev. 433-68, Wint. '83.
15. *EEOC v. E.I. du Pont de Nemours & Co.*, 445 F.Supp. 223,249, (D.Del. 1978).
16. *Firefighters Local Union No. 1784 v. Stotts et al.* (No. 82-206) 1984.
17. "Remedying Discrimination in Seniority Systems: The Conflict between Title VII and Executive Order No. 11,246," *Tex. L.R.* 59, 1077-1106, '81.
18. Cooper and Sobol, "Seniority Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion", 82 Harv. L. Rev. 1598 (1969).
19. *Supra*, note 13.
20. *Supra*, note 12.
21. 431 U.S. 553, 14 FEP 1510 (1977).
22. *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 21 FEP 833 (5th Cir. 1979).
23. *Griggs v. Duke Power Co.*, 401 U.S. 424, 3 FEP 175 (1971) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 10 FEP 1181 (1975).
24. *Guardians Ass'n. of the New York City Police Dep't. v. Civil Serv. Comm'n.*, 630 F. 2d 79, 89, 23 FEP 909, 918 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981).
25. *Myart v. Motorola Corp.*, Charge No. 63C-127 (February 26, 1964) reprinted in the Congressional Record. The decision was reversed in 1966.
26. *Griggs v. Duke Power Co.*, *supra*, note 23. The legislative history of s.703(h) is reviewed in Griggs.
27. *Ibid.*, p. 180.
28. The Court in Griggs found the EEOC Guidelines to constitute "the administrative interpretation of the Act by the enforcing agency" and therefore "entitled to great deference".
29. Schlei and Grossman, *supra*, note 1, Section 1, pp. 92-97.
30. However, if a case based on discriminatory impact alleging discrimination because of age should arise from a scored test, the EEOC Age Guidelines indicate tests having an adverse impact on age "will be scrutinized in accordance with" the Guidelines.
31. See Schlei and Grossman, *supra*, note 1, Section 1, p. 94, footnote 42 for citations of studies.
32. *Ibid.*, p. 99, footnote 77.
33. *National Educ. Ass'n. v. South Carolina*, 434 U.S. 1026, 16 FEP 501 (1978).
34. 457 U.S. 440, 29 FEP 1 (1982).
35. "The Group Interest Concept, Employment Discrimination and Legislative Intent: The Fallacy of *Connecticut v. Teal*", 20(1) *Harvard Journal on Legislation*, Wint. '83, 9, 13. See also note 2, *supra*.
36. *Ibid.*
37. Report of General Accounting Office (EEOC Compliance Manual, Report Letter No 45 (Sept. 31, 1982)), referred to in "Bottom Line Defense in Title VII Actions: Supreme Court's rejection in *Connecticut v. Teal* and a Modified Approach", *supra*, note 2.
38. *Ibid.*
39. Schlei and Grossman, *supra*, note 1, Section 1, p. 157.
40. *Albemarle*, *supra*, note 23.
41. *Vuyanich v. Republic Nat'l Bank*, 505 F.Supp. 224, 24 FEP 128 (N.D. Tex. 1980).
42. *Spurlock v. United Air Lines Inc.*, 475 F.2d 216, 5 FEP 17 (10th Cir. 1972).
43. EEOC Dec. 74-02, 6 FEP 8 (1973).
44. For example, EEOC Dec. 74-08, 6 FEP 467 (1973).
45. *Jimerson v. Kisco Co.*, 404 F. Supp. 338, 11 FEP 1420 (E.D. Mo. 1975), aff'd 542 F.2d 1006, 13 FEP 977 (8th Cir. 1976).
46. *Green v. Missouri Pac. R.R.*, 549 F.2d 1158, 14 FEP 878 (8th Cir. 1977).
47. EEOC Dec. 74-25, 10 FEP 260 (1973).
48. For example, *United States v. City of Chicago*, 385 F. Supp. 543, 16 FEP 1262 (N.D. Ill. 1974), aff'd in part, rev'd and remanded in part, 549 F.2d 415, 14 FEP 462 (7th Cir.), cert. denied, 434 U.S. 875 (1977).
49. Where, for example, no objective criteria are utilized, or where there is no prior history of applications by minorities.
50. *Stallings v. Container Corp. of Am.*, 75 F.R.D. 511, 17 FEP 321 (D. Del. 1977).
51. Schlei and Grossman, *supra*, note 1, Section 1, pp. 201-205.
52. *Welsh v. United States*, 396 U.S. 333 (1970). *United States v. Seeger*, 380 U.S. 163 (1965).
53. *Dewey v. Reynolds Metals Co.*, 300 F.Supp. 709, 1 FEP 759 (W.D.Mich. 1969), rev'd and remanded, 429 F.2d 324, 2 FEP 687 (6th Cir. 1970), aff'd mem. by an equally divided court, 402 U.S. 689, 3 FEP 508 (1971).
54. 432 U.S. 63, 14 FEP 1697 (1977).
55. The Court thereby distinguished prohibition against use of a collectively bargained agreement or seniority system that violates Title VII from duty to accommodate in a manner inconsistent with the agreement.

## SECTION III

1. EEOC Dec. 7-1969, EEOC Dec. 6-1973.
2. *Warth v. Seldin*, 422 U.S. 490 (1976).

3. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 14 FEP 1510 (1977).
4. *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1976).
5. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 12 FEP 549 (1976).
6. *Schlei and Grossman*, *supra*, note 1, Section 1, p. 1397.
7. *Ibid.*, pp. 1398-1400.
8. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 10 FEP 1181 (1975).
9. *Ibid.*
10. *East Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 14 FEP 1505 (1977).
11. 29 U.S.C. para. 206(d)(1) (1976). See also, *Equal Pay Act* regulations issued by the EEOC, 29 CFR Part 1620.
12. *Brennan v. City Stores, Inc.*, 479 F.2d 235 (5th Cir. 1973).
13. *Supra*, note 11.
14. 29 U.S.C. para. 621-634 (1976 & Supp. III 1979), Exec. Order 11,141, 3 CRF 179 (Feb. 12, 1964).
15. 417 U.S. 188 at 205, 9 FEP 919 (1974).
16. *City of Los Angeles, Dep't. of Water & Power v. Manhart*, 435 U.S. 702, 17 FEP 395 (1978).
17. Blumrosen, Ruth G. "Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964", 12 *University of Michigan Journal of Law Reform* (No. 3, Spring, 1979).
18. U.S. Bureau of Labor Statistics, cited by David Lauter, "Pay Bias Enters a New Age," *The National Law Journal* (January 2, 1984), p.25.
19. Flores, George T. "Comparable Worth Theory of Title VII Sex Discrimination in Compensation", 47 *Missouri Law Review* 1982, 495. See also Cook, Alice. "Equal Pay: Where is it?" 14 *Industrial Relations* 1975, pp.158-77.
20. Barrett, Nancy S. "Obstacles to Economic Parity for Women," 72 *American Economic Review* (No.2, May 1982), pp.160-65.
21. *County of Washington v. Gunther*, 452 U.S. 161, 25 FEP 1521 (1981).
22. *Di Salvo v. Chamber of Commerce of Kansas City*, 568 F.2d 593, 596, 20 FEP 825, 826-27 (8th Cir. 1978).
23. *American Federation of State, County, and Municipal Employees et al v. State of Washington et al*, 33 FEP Cases 808.
24. 35 FEP 217 (9th Cir. 1984), *cert. denied*, 36 FEP 464 (Nov. 26, 1984). See also Lauter, David. "'Comparable Worth' Cases Face a New Hurdle", *The National Law Journal*, (July 23, 1984), p.5.
25. *Supra*, note 23.
26. *The Comparable Worth Issue: A BNA Special Report*, Washington, 1981.
27. The Bureau of National Affairs, cited in *The Toronto Star*, August 17, 1984.
28. *Supra*, note 26.
29. Agarwal, Naresh C., "Male-Female Pay Inequality and Public Policy in Canada and the U.S.", 37 *Relations Industrielles* 4 (1982) 780. See also Gunderson, Morley. *The Male-Female Earnings Gap in Ontario: A Summary*. Employment Information Series No. 22. Toronto: Ontario Ministry of Labour, Research Branch, 1982.
30. *Supra*, note 14.
31. Section 11(b).
32. Under Title VII, a private membership club is exempted. The courts are divided as to whether religious organizations are covered. ADEA is also not applicable to age limitations for apprenticeship program.
33. Prohibitions do not extend to applicants for jobs under ADEA.
34. Section 7(b), ADEA.
35. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976).
36. *Williams v. City & County of San Francisco*, 483 F.Supp. 335, 22 FEP 1241 (N.D. Cal. 1979).
37. 19 FEP 1622 (D. Conn. 1979).
38. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 12 FEP 1233 (5th Cir. 1976).
39. See 216 *Daily Lab. Rep.* A-16 (BNA, Nov. 8, 1977).
40. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 19 FEP 1167 (1979).

41. *Marshall v. Sun Oil Co.*, 605 F.2d 1331, 21 FEP 257 (5th Cir. 1979).

#### SECTION IV

1. *City of Los Angeles, Dep't. of Water & Power v. Manhart*, 435 U.S. 702, 17 FEP 395 (1978).
2. *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 1 FEP 656 (5th Cir. 1969).
3. *Ibid.*, at 235, n. 5.
4. *Ibid.*
5. 433 U.S. 321, 15 FEP 10 (1977), even though it held against the woman applicant because of the particularly hostile environment in the prison.
6. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 3 FEP 337 (5th Cir.) *cert. denied*, 404 U.S. 950 (1971).
7. *Chrapliwy v. Uniroyal, Inc.*, 15 FEP 822, 826 (N.D. Ind. 1977).
8. *Supra*, note 1.
9. *Polston v. Metropolitan Life Ins. Co.*, 11 FEP 380 (W.D. Ky. 1975) *remanded mem.*, 538 F.2d 329, 13 FEP 1360 (6th Cir. 1976).
10. 429 U.S. 125, 13 FEP 1657 (1976).
11. This quite remarkable holding does not become clearer when the case is read: "While it is true that only women can become pregnant.... pregnancy is not a 'disease' at all, and is often a voluntarily undertaken and desired condition".
12. 434 U.S. 136, 16 FEP 136 (1977).
13. H.R. Rep. No. 95-948, 95th Cong., 2d Sess.6.
14. 414 U.S. 632, 6 FEP 1253 (1974).
15. For example, police officers.
16. In *Byrd v. Unified School Dist.*, 435 F. Supp. 621, 24 FEP 739 (E.D. Wis. 1978), the court distinguished *Gilbert* and held that providing men with a one-day paid leave for childbirth had an adverse impact on women who were invariably on unpaid childbirth leave.
17. *Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651, 10 FEP 601 (8th Cir. 1975).
18. 411 F.2d 1, 1 FEP 746, *petition for rehearing denied*, 416 F.2d 1257, 2 FEP 185 (5th Cir. 1969), *vacated and remanded*, 400 U.S. 542 3 FEP 40 (1971) (*per curiam*).
19. *Woody v. City of W. Miami*, 477 F.Supp. 1073, 21 FEP 315 (S.D. Fla. 1979).
20. Violation has been found where a black would-be stewardess was rejected, the interviewer noting "large lips".
21. *Morton v. Mancari*, 417 U.S., 535, 8 FEP 105 (1974).

#### SECTION V

1. Title VII of the *Civil Rights Act of 1964*; *Equal Pay Act of 1963*; *Age Discrimination in Employment Act*; *Rehabilitation Act of 1973*.
2. CFR 339 (1964-1965 Compilation), reprinted in 42 U.S.C. 2000e, as amended. Executive Order 11,246 was consolidated into Executive Order 12,086 in 1978. However, the provisions of 11,246 remain unchanged and affirmative action requirements generally refer to 11,246.
3. See Appendix and *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159, 3 FEP 395 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).
4. Section 60-2.31, Regulations.
5. The Department of Labor published proposed revised regulations in August, 1981. After more than two years of hearings, the proposals have been amended but not yet enacted.
6. See discussion on the proposed revisions in this section.
7. 41 CFR Section 60-2.10. Under the proposed revised regulations, contractors would have to declare underutilization only if current utilization was less than 80 per cent of availability.
8. *Firestone Synthetic Rubber & Latex Co. v. Marshall*, 507 F.Supp. 1330, 24 FEP 1699 (E.D. Tex. 1981).
9. "History of Federal Contract Compliance Programs in Employment", OFCCP internal memorandum.
10. Section 60-1.20(a).
11. Section 60-2.1(b).



12. Section 60-1.24(a) and Memorandum of Understanding 46 F.R. 7435 (1981). The OFCCP retains complaints alleging systemic discrimination and attempts to resolve during a compliance review any outstanding individual complaints.
13. *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 24 FEP 1168 (4th Cir. 1981).
14. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).
15. 441 U.S. 281, 19 FEP 475 (1979).
16. *Sears, Roebuck & Co. v. General Servs. Admin.*, 402 F.Supp. 378, 384 remanded, 553 F.2d 1378 (D.C. Cir.), cert. denied, 434 U.S. 826 (1977).
17. This section is drawn from material provided by Victoria Smith, Senior Consultant, Organization Resources Counselors, Inc., New York City. The author is grateful for the assistance provided by Ms. Smith.
18. 435 U.S. 702, 17 FEP 395 (1978).
19. United States Senate Committee on Labor and Human Resources, *Committee Analysis of Executive Order 11246 (The Affirmative Action Program)*. Hatch Committee Report. Washington, D.C. U.S. Government Printing Office, 1982.
20. *Ibid.*, p. 64.
21. *Ibid.*, p. 67.
22. *Ibid.*, p. VIII.
23. United States Department of Labor, Employment Standards Administration, *Employment Patterns of Minorities and Women in Federal Contractor and Non-contractor Establishments, 1974 - 1980: A Report of The Office of Federal Contract Compliance Programs*. Washington, D.C. June, 1984.
24. *Ibid.*, p. 64.
25. Leonard, Jonathan S. *The Impact of Affirmative Action: A research report undertaken in coordination with the National Bureau of Economic Research, Cambridge, Massachusetts, and The Institute of Industrial Relations and the School of Business Administration, University of California at Berkeley*, 1983.
26. Equal Employment Advisory Council, *An Analysis of the Cost of OFCCP's Compliance Activities and its Impact, as Measured by National EEO-1 Forms*.
27. Washington, D.C., 1983. Cruz, Nestor. "Is Equal Employment Opportunity Cost Effective?", *Labor Law Journal* 31, no 5 (May 1980), 295-298.
28. Shaeffer, Ruth Gilbert. *Nondiscrimination in Employment — And Beyond*. New York: The Conference Board, 1980.
29. 29 U.S.C. para 701-769i (1976 & Supp. III 1979), Pub. L. No. 93-112, as amended by Pub. L. No. 93-516, and Pub. L. No. 95-602, November 6, 1978.
30. Section 503(a), 29 U.S.C. s. 793(a) (Supp. III 1979). 41 CFR s. 60-741.4 (1980) sets out a uniform clause for all contractors.
31. The proposed revisions to OFCCP regulations would provide that the definition of employers who are required to prepare a written affirmative action plan be changed from "contractor or subcontractor holding a contract of \$50,000 or more and having 50 or more employees" to "contractor which has 100 or more employees and has a contract of \$100,000 or more". The affirmative action plan for handicapped workers would not include any "goals".
32. 41 CFR s. 60-706.7(b).
33. 41 CFR s. 60-741.2.
34. 41 CFR s. 60-741.6(c)(1) and (2) (1980).
35. 41 CFR s. 60-741.5(c)(3) (1980). Proposed amendments would require that any physical examination or inquiry be the last factor in the hiring process, i.e., after a conditional offer to hire or prior to an applicant's being placed on an eligibility list.
36. 41 CFR s. 60-741.26(a) (1980).
37. 41 CFR s. 60-741.26(b) (1980).
38. 41 CFR s. 60-741.26(g)(1) (1980).
39. *Cort v. Ash*, 422 U.S. 66 (1975).
40. 41 CFR s. 60-741.28 and s. 60-741.29 (1980).
41. Pub. L. 93-508.
42. 41 CFR s. 60-250.4(c) (1980).
43. *Connecticut Instit. for the Blind v. Connecticut Comm'n on Human Rights*, 176 Conn. 88, 18 FEP 42 (Sup. Ct. 1978).

44. *Montgomery Ward & Co. v. Oregon Bureau of Labor*, 280 Or. 163, 16 FEP 80 (Sup. Ct. 1977).

45. 41 CFR para. 60-741.2.

46. 432 U.S. 63, 14 FEP 1697 (1977).

47. Schlei and Grossman, *supra*, note 1, Section 1, p. 288.

#### SECTION VI

1. Sowell, Thomas. "Weber and Bakke, and the Presuppositions of 'Affirmative Action'". 26 *Wayne Law Review* pp. 1309-1336 (July 1980).
2. *Vuyovich v. Republic National Bank*, 505 F.Supp. 224, 24 FEP 128 (N.D. Tex. 1980).
3. *Ibid.*, 505 F. Supp. 262, 24 FEP 157.
4. *Supra*, note 1, pp. 1312-1314.
5. 416 U.S. 312 (1974).
6. *Regents of the University of California v. Bakke*, 438 U.S. 265, 17 FEP 1000 (1978).
7. *United Steelworkers of America v. Weber*, 443 U.S. 193, 20 FEP 1 (1979).
8. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).
9. 431 U.S. 324, 14 FEP 1514 (1977).
10. 433 U.S. 299, 15 FEP 1 (1977).
11. Sape, George P. "Use of Quotas After Weber". *Employee Relations Law Journal* 6, No. 2, Autumn 1980.
12. *Griggs v. Duke Power Co.*, 401 U.S. 424, 3 FEP 175 (1971).
13. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 12 FEP 1577 (1976).

#### SECTION VII

1. *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).
2. However, Title VII applies only to employers of 15 or more employees.
3. Shaeffer, Ruth Gilbert. "Nondiscrimination in Employment — And Beyond". Conference Board Report No. 782, The Conference Board, Inc. New York, 1980. See also Schlei and Grossman, *supra*, note 1, Section 1, Chapter 21.
4. 427 U.S. 273, 12 FEP 1577 (1970).
5. For example, *Runyon v. McCrary*, 427 U.S. 160 (1976).
6. For example, *Graham v. Richardson*, 403 U.S. 365 (1971).
7. For example, *Trehan v. IBM Corp.*, 24 FEP 443 (S.D.N.Y. 1980).
8. For example, *Jews, Wald v. Teamsters, Local 357*, 24 FEB 616 (C.D. Cal. 1980) but see *Marlowe v. General Motors Corp.*, 4 FEP 1160 (E.D. Mich. 1972) dismissed 11 FEP 1357 (E.D. Mich. 1975), where parties agreed Jewishness is not racial but religious and thus not covered.
9. See Schlei and Grossman, *supra*, note 1, Section 1, pp. 678-9, footnotes 40-46 for authorities.
10. 365 U.S. 715 (1961).
11. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).
12. Section 1983 incorporates the Fourteenth Amendment requirement that the state not engage in wholly irrational or "suspect" classifications that would constitute a denial of "the equal protection of the law".
13. 426 U.S. 229, 12 FEP 1415 (1976).
14. 29 U.S.C. para 151-168.
15. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 15 LRRM 708 (1944).
16. *NLRB v. Mansion House Center Management Corp.*, 473 F.2d 471, 82 LRRM 2608 (8th Cir. 1973).
17. 211 NLRB 138, 86 LRRM 1323 (1974) overruled, 228 NLRB 447, 94 LRRM 1354 (1977).
18. 228 NLRB 447, 94 LRRM 1354 (1977). The present position, affirming this case is found in *Bel & Howell Co.*, 230 NLRB 420, 95 LRRM 1333 (1977), 598 F.2d 136, 100 LRRM 2192 (D.C. Cir.) cert. denied 442 U.S. 942 (1979).
19. 20 NLRB 272, 82 LRRM 1482 (1973), *aff'd mem. sub nom. Steelworkers v. NLRB*, 504 F.2d 271, 87 LRRM 3168 (D.C. Cir. 1974).
20. *United Packinghouse, Food & Allied Workers v. NLRB*, 416 F.2d 1126, 70 LRRM 2489 (D.C. Cir.) cert. denied 396 U.S. 903 (1969).

- 21 E.g., *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 9 FEP 195 (1975).
- 22 648 F.2d 18, 24 FEP 627 (D.C. Cir. 1980).
- 23 *Supra*, note 1.
- 24 *Smouse v. General Elec. Co.*, 626 F.2d 333, 23 FEP 732 (3rd Cir. 1980).
- 25 *N.A.A.C.P. v. Federal Power Commission*, 425 U.S. 662, 12 FEP 1251 (1976).

## SECTION VIII

- 1 *Teamsters v. United States*, 431 U.S. 324, 14 FEP 1514 (1977).
- 2 *General Bldg. Contractors Ass'n v. Pennsylvania*, 102 S. Ct. 3141, 29 FEP 139 (1982).
- 3 *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 14 FEP 1510 (1977).
- 4 *Hameed v. Iron Workers, Local 396*, 637 F.2d 506, 516, 24 FEP 352, 360 (8th Cir. 1980).
- 5 *EEOC v. Longshoremen*, 623 F.2d 1054, 24 FEP 20 (5th Cir. 1980).
- 6 For example, the availability of jury trials, attorney's fees, compensatory or punitive damages, requirement to exhaust internal remedies.
- 7 *Romero v. Union Pac. R.R.*, 615 F.2d 1303, 22 FEP 338 (10th Cir. 1980).
- 8 478 F.2d 979, 989, 5 FEP 994, 1001 (D.C. Cir. 1973).
- 9 Union has a duty, e.g., *Chrapliwy v. Uniroyal, Inc.*, 15 FEP 822 (N.D. Ind. 1977). Union has no duty, e.g., *Capers v. Long Island R.R.*, 6 FEP 30 (S.D.N.Y. 1973).
- 10 For example, *Russell v. American Tobacco Co.*, 528 F.2d 357, 11 FEP 395 (4th Cir. 1975), *cert. denied* 425 U.S. 935 (1976) (rejecting union's argument that all back pay liability should be imposed on the employer).
- 11 *Grant v. Bethlehem Steel Corp.*, 22 FEP 687 (S.D.N.Y. 1978), *rev'd and remanded*, 635 F.2d 1007, 24 FEP 798, 805 (2d Cir. 1980) *cert. denied* 452 U.S. 940 (1981).
- 12 *Golden v. Fire Fighters, Local 55*, 24 FEP 1340 (9th Cir. 1980). Union defenses include lack of comparability, management prerogative, good faith, etc.
- 13 "Reconsidering Union Class Representation in Title VII", 95 *Harv. V.L.J.* 7, May, 1982.
- 14 *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 83, n.9, 25 FEP 737, 739 (1981).
- 15 *United States v. EastTex Motor Freight Sys., Inc.*, 564 F.2d 179, 16 FEP 163 (5th Cir. 1977).
- 16 *United States v. Operating Eng'rs, Local 701*, 14 FEP 1400 (D. Ore. 1977).

## APPENDIX

A History of Executive Orders Requiring Contract Compliance<sup>1</sup>

| EXECUTIVE ORDER<br>NUMBER<br>(and official<br>citation)      | PRESIDENT  | ADMINISTERED<br>BY                                                                                                                                                                         | CHAIRMAN AND<br>VICE CHAIRMAN<br>(Later Director)                                                          | COVERAGE                                                                                                                           | ENFORCED<br>BY                                                                                                                                                         | PROHIBITED<br>DISCRIMINATION<br>ON THE BASIS OF                                            |
|--------------------------------------------------------------|------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------|
| DATE                                                         |            |                                                                                                                                                                                            |                                                                                                            |                                                                                                                                    |                                                                                                                                                                        |                                                                                            |
| June 25<br>1941                                              | ROOSEVELT  | Five member Committee on<br>Fair Employment Practices<br>(nonpaid members)                                                                                                                 | Chairman and members<br>appointed by the President<br>from within the Office of Pro-<br>duction Management | All Federal employment<br>All defense contractors<br>All Federal Government voca-<br>tional and training programs                  | Committee had no enforcement<br>power                                                                                                                                  | Race, color, creed, or nation-<br>al origin in the war industries<br>or Federal Government |
| July 18<br>1941                                              | ROOSEVELT  | Amended to add an additional member to the Committee                                                                                                                                       |                                                                                                            |                                                                                                                                    |                                                                                                                                                                        |                                                                                            |
| 8802<br>(3 CFR 968)<br>Amended 8802                          |            |                                                                                                                                                                                            |                                                                                                            |                                                                                                                                    |                                                                                                                                                                        |                                                                                            |
| May 27<br>1943                                               | ROOSEVELT  | A new seven member Com-<br>mittee on Fair Employment<br>Practices                                                                                                                          | Chairman and members<br>appointed by the President<br>from within the Office of Em-<br>ployment Management | All Federal procurement contrac-<br>tors<br>All Federal departments and<br>agencies<br>All Federal vocational training<br>programs | Committee had no enforcement<br>power                                                                                                                                  | Race, color, creed, or nation-<br>al origin                                                |
| 9346<br>(3 CFR 1280)                                         |            |                                                                                                                                                                                            |                                                                                                            |                                                                                                                                    |                                                                                                                                                                        |                                                                                            |
| July 26<br>1948                                              | TRUMAN     | A Fair Employment Officer<br>appointed by the head of<br>each Federal Department                                                                                                           | Head of each Federal depart-<br>ment                                                                       | All personnel action in the Feder-<br>al Government                                                                                | The President, ultimately since<br>the Fair Employment Board at<br>CSC could only advise depart-<br>ments and recommend action to<br>the President                     | Race, color, religion, or na-<br>tional origin                                             |
| 9980<br>(3 CFR 720)                                          |            |                                                                                                                                                                                            |                                                                                                            |                                                                                                                                    |                                                                                                                                                                        |                                                                                            |
| July 26<br>1948                                              | TRUMAN     | Seven member Presidential<br>Committee on Equality of<br>Treatment and opportunity<br>in the Armed Forces                                                                                  | None                                                                                                       | All persons in the Armed Forces                                                                                                    | The Committee only examined,<br>advised and recommended<br>action to the President the<br>Secretary of Defense and Secre-<br>taries of the Army, Navy and Air<br>Force | Race, color, religion, or na-<br>tional origin                                             |
| 9981<br>(3 CFR 722)                                          |            |                                                                                                                                                                                            |                                                                                                            |                                                                                                                                    |                                                                                                                                                                        |                                                                                            |
| August 13<br>1953                                            | EISENHOWER | Fourteen member Presiden-<br>tial Committee on Govern-<br>ment Contracts Eight mem-<br>bers represented the general<br>public and six represented<br>the principal contracting<br>agencies | Vice President Nixon<br>and<br>Secretary of Labor<br>James P. Mitchell                                     | All Federal contractors and sub-<br>contractors                                                                                    | No enforcement power by the<br>Committee procurement agen-<br>cies or departments                                                                                      | Race, color, creed, or nation-<br>al origin                                                |
| 10479<br>(3 CFR 961)<br>Amended by 10482<br>Revoked by 10925 |            |                                                                                                                                                                                            |                                                                                                            |                                                                                                                                    |                                                                                                                                                                        |                                                                                            |
| August 15<br>1953                                            | EISENHOWER | Amended 10479 to add a 15th member to the Committee (from 8 to 9 members representing the public)                                                                                          |                                                                                                            |                                                                                                                                    |                                                                                                                                                                        |                                                                                            |
| 10482<br>(3 CFR 960)                                         |            |                                                                                                                                                                                            |                                                                                                            |                                                                                                                                    |                                                                                                                                                                        |                                                                                            |
| Sept 3<br>1954                                               | EISENHOWER | The Committee on Govern-<br>ment Contracts                                                                                                                                                 | Vice President Nixon<br>and the<br>Secretary of Labor                                                      | All Federal contractors and sub-<br>contractors                                                                                    | No enforcement power                                                                                                                                                   | Race, color, religion, or na-<br>tional origin                                             |
| 10557<br>(3 CFR 203)<br>Revoked by 10925                     |            |                                                                                                                                                                                            |                                                                                                            |                                                                                                                                    |                                                                                                                                                                        |                                                                                            |
| Jan 18<br>1955                                               | EISENHOWER | Five member Committee                                                                                                                                                                      | Representative of the Civil Ser-<br>vice Commission                                                        | Federal agencies (Protection for<br>Federal employees)                                                                             | Civil Service Commission                                                                                                                                               | Race, color, religion, or na-<br>tional origin                                             |
| 10590<br>(3 CFR 237)<br>Amended by 10722<br>Revoked by 10925 |            |                                                                                                                                                                                            |                                                                                                            |                                                                                                                                    |                                                                                                                                                                        |                                                                                            |
| August 5<br>1957                                             | EISENHOWER | Government contract Com-<br>mittee                                                                                                                                                         | Amended 10479 to provide for an additional committee member                                                |                                                                                                                                    |                                                                                                                                                                        |                                                                                            |
| 10733<br>(3 CFR 391)                                         |            |                                                                                                                                                                                            |                                                                                                            |                                                                                                                                    |                                                                                                                                                                        |                                                                                            |



| DATE             | EXECUTIVE ORDER<br>NUMBER<br>(and official<br>citation)                                         | PRESIDENT | ADMINISTERED<br>BY                                            | CHAIRMAN AND<br>VICE CHAIRMAN<br>(Later Director)                                  | COVERAGE                                                                                                                        | ENFORCED<br>BY                                                                                                                                                                                                                    | PROHIBITED<br>DISCRIMINATION<br>ON THE BASIS OF                                          |
|------------------|-------------------------------------------------------------------------------------------------|-----------|---------------------------------------------------------------|------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------|
| March 6<br>1961  | 10925<br>(3 CFR 448)<br>Revoked EO's                                                            | KENNEDY   | President's Committee on<br>Equal Employment Opportu-<br>nity | Vice President Johnson<br>and<br>Secretary of Labor<br>Arthur Goldberg             | Federal agencies and depart-<br>ments, Federal contractors and<br>subcontractors                                                | Committee or appropriate com-<br>pliance agency                                                                                                                                                                                   | Race, creed, color, or nation-<br>al origin                                              |
| June 22<br>1963  | 11114<br>(3 CFR 774)<br>Amended 10925<br>superseded by<br>11246                                 | KENNEDY   | President's Committee on<br>Equal Employment Opportu-<br>nity | Vice President Johnson<br>and the<br>Secretary of Labor                            | Added Federally assisted con-<br>struction to the coverage of<br>Executive Order 10925                                          | The Committee or the Procure-<br>ment Agency department                                                                                                                                                                           | Race, creed, color, or nation-<br>al origin                                              |
| July 28<br>1965  | 11162<br>(3 CFR 215)<br>Amended 10925<br>superseded by<br>11246                                 | JOHNSON   | President's Committee on<br>Equal Employment Opportu-<br>nity | Amended E.O. 10925 to add<br>the Postmaster General to the<br>Committee membership | Federal and Federally assisted<br>contractors and subcontractors                                                                | The Committee or the Procure-<br>ment Agency or department                                                                                                                                                                        | Race, creed, color, or nation-<br>al origin                                              |
| Sept. 24<br>1965 | 11246<br>(3 CFR 339)<br>Superseded 10590<br>10722, 10925,<br>11114, & 11162<br>amended by 11375 | JOHNSON   | Office of Federal Contract<br>Compliance                      | Director of OFCC                                                                   | All Federal and Federally assist-<br>ed contractors and subcontractors                                                          | Compliance agencies under the<br>general guidance and control of<br>OFCC with power to publish,<br>recommend proceedings, can-<br>cel, terminate or cause to cancel,<br>terminate or suspend any con-<br>tract or portion thereof | Race, color, religion, or na-<br>tional origin                                           |
| Oct. 13<br>1967  | 11375<br>(3 CFR 684)                                                                            | JOHNSON   | Same as above                                                 | Same as above                                                                      | Same as above                                                                                                                   | Same as above                                                                                                                                                                                                                     | Race, color, sex, religion, or<br>national origin (Notice that<br>sex has been included) |
| Aug. 8<br>1968   | 11478<br>(3 CFR 803)                                                                            | NIXON     | Civil Service Commission                                      | Representative of Civil Service<br>Commission                                      | All Federal Departments and<br>Agencies                                                                                         | CSC                                                                                                                                                                                                                               | Race, color, religion, or na-<br>tional origin                                           |
| June 30<br>1978  | 12067<br>(43 FR 28967)                                                                          | CARTER    |                                                               |                                                                                    | Coordination of Federal Equal Employment Opportunity Programs                                                                   |                                                                                                                                                                                                                                   |                                                                                          |
| June 30<br>1978  | 12068<br>(43 FR 28971)                                                                          | CARTER    |                                                               |                                                                                    | Transfer to the Attorney General certain functions under Section 707 of Title VII<br>of the Civil Rights Act of 1964 as amended |                                                                                                                                                                                                                                   |                                                                                          |
| Oct. 5<br>1978   | 12086<br>(43 FR 46501)                                                                          | CARTER    |                                                               |                                                                                    | Consolidation of contract compliance functions for equal opportunity                                                            |                                                                                                                                                                                                                                   |                                                                                          |

<sup>1</sup> Office of Federal Contract Compliance Programs, New York City



## **EQUALITY AND EMPLOYMENT: IDEAS FROM EUROPE, AUSTRALIA, AND JAPAN**

**R.S.G. Chester**

### **Sommaire**

L'étude porte sur la façon dont certains pays ailleurs qu'en Amérique du Nord règlent les problèmes que la Commission a été chargée d'étudier. L'auteur fait valoir que les analyses réalisées et les mesures adoptées au Canada ne doivent pas reposer sur les mesures d'action positive adoptées aux États-Unis pour corriger les cas de discrimination raciale ou sexuelle. Il donne un aperçu des dispositions établies par les Nations Unies et l'Organisation internationale du travail à l'égard des quatre groupes cibles. Aucun pays ne considère que les personnes handicapées, les autochtones, les femmes ou les minorités visibles ont des difficultés communes qui exigent l'adoption de politiques unifiées. En citant en exemple la situation en Angleterre, l'auteur explique pourquoi les systèmes européens de quotas pour stimuler l'embauchage des handicapés se sont effrités et ont été remplacés par des programmes spécialisés de formation et d'intégration, ainsi que par des formules avancées d'octroi de subventions et de prélèvement en République fédérale d'Allemagne et au Japon. Toutefois, il n'est guère utile de s'inspirer de la situation d'autres pays lorsqu'il s'agit de trouver des solutions aux problèmes des autochtones ou des minorités visibles. Il se peut même que le Canada ait davantage à enseigner qu'il n'a à apprendre.

Par une analyse de l'égalité des femmes, le document établit les rapports théoriques entre les politiques relatives à l'égalité de salaire, à la discrimination sexuelle et à l'égalité des chances. Il fait état des tentatives australiennes et scandinaves pour favoriser une plus grande égalité dans l'emploi. L'auteur insiste sur le fait que le Canada ne peut adopter les techniques ou les lois d'autres pays sans d'abord en faire une analyse critique. Le contexte est primordial et ceux qui forment la politique du Canada doivent absolument tenir compte des besoins particuliers ainsi que de la nature et des difficultés du marché du travail canadien.

### **Summary**

This paper looks at how selected countries outside North America are tackling the problems that form the Commission's mandate. It argues that Canadian analysis and action should not be over-influenced by the American experience of affirmative action to redress historic racial or sexual grievances. It gives an overview of United Nations and International Labour Organization provisions relevant to the four target groups. No country has treated the disabled, native peoples, women, or visible minorities as having common problems which require integrated policymaking. Through an examination of the English experience, the paper shows how European quota systems to stimulate employment for the disabled have broken down, to be replaced by specialized training and integration schemes, and in West Germany and Japan by a sophisticated grant and levy scheme. The experience of other countries is not particularly helpful for developing answers to the problems of native peoples or visible minorities. Canada may have more to teach than to learn.

In discussing equality for women, the paper explores the conceptual links among equal pay, sex discrimination, and equal opportunity policies. Recent Australian and Scandinavian efforts to stimulate greater equity in employment are canvassed. The paper stresses throughout that Canadians cannot borrow uncritically from employment experiments or legislation in other countries. Context is all important, and Canadian policymakers must be sensitive to the unique needs, nature, and problems of the Canadian labour market.





## EQUALITY AND EMPLOYMENT: IDEAS FROM EUROPE, AUSTRALIA, AND JAPAN

R.S.G. Chester\*

### I. INTRODUCTION: TELESCOPES, DOLLS, AND THE HAZARDS OF COMPARATIVE LAW

Les lois politiques et civiles de chaque nation ... doivent être tellement propres au peuple pour lequel elles sont faites, que c'est un grand hazard si celles d'une nation peuvent convenir à une autre.

(Charles de Secondat, Baron de Montesquieu  
De l'Esprit des Loix I.3.)

To date, the limited discussion of how to promote equality in employment derives in both concepts and analysis, to a remarkable degree, from the United States' experience of affirmative action to redress historic racial and sexual discrimination. Talk to Canadian employers, trade unionists, lawyers, or policymakers about the promise or the danger of affirmative action, and, for the most part, they will speak of the American experience. They will likely speak of quotas, of civil rights and the equal protection clause, of *Bakke* and *Weber*, and make categorical statements about the potential, or otherwise, of affirmative action. Yet in employment policy and employment law, the American experience is neither paradigmatic nor particularly helpful.

In particular, Canada does not so shadow the U.S.A. that problems or solutions can be easily transferred. The experience of Canada's disabled, native minorities, visible minorities, and women is quite different from that of their American counterparts. Canadian employment law and policy have different historical origins and current priorities. There are no real American counterparts of the Canadian crown corporations, hybrids of public and private enterprise. Nor, on the world stage, is America particularly progressive or imaginative in the way it approaches equality in employment. At least some of the action is elsewhere. Canadian problems are rooted in Canadian experience, require Canadian analysis and home-grown solutions. There are no pat answers either in the U.S.A., or indeed elsewhere. But what do exist are ideas, ideas that have arisen in dramatically different contexts, but ideas that can help us address domestic problems. Thus it was relevant for the Commission to look beyond the shores of North America to examine other experiences and see how other nations have tackled the problems that form its mandate.

The field is vast. This paper is no more than an overview of some interesting developments elsewhere, through a survey of the available literature on equality in employment in selected jurisdictions outside North America. It particularly addresses efforts to deal with the employment situation of the four target groups. It examines the material produced in

the form of declarations, conventions, covenants, or recommendations by international organizations such as the United Nations and the International Labour Organization. It provides a very partial overview of employment legislation and practices in this area in Great Britain, West Germany, the Netherlands, Belgium, France, Norway, Sweden, Australia, and Japan, with occasional references to experiences in Italy, India, Spain, and Northern Ireland. The survey is limited to material readily available in English in Toronto libraries, and to material provided by foreign diplomatic missions within Canada.

With any comparative analysis of legal material, particularly in the area of labour relations, there always come certain risks of misinterpretations. It is important to stress that the social, institutional, and political context in which legislative provisions are located is of prime importance in determining their practical impact. Comparative law is not a vehicle for providing pat answers to Canadian problems. Rather it represents a corpus of ideas that we may adapt or bend to our situation.

Lord Wedderburn of Charlton, the doyen of English labour lawyers, once wrote that "the bane of 'comparative law' is the spurious attempt to compare the incomparable; and labour law suffers more than most at the international level from this vice". In comparative law, context is all.

To understand a pattern of law outside our own environment requires a knowledge not only of the foreign law, but also of its social and political context, including the relationship between labour and management, the operation of collective bargaining, and the strength of government intervention. One can easily miss important but unarticulated assumptions or attitudes in an unfamiliar society. Under ideal conditions, comparisons between different legal systems in the way they promote equality in employment would be worthwhile. Such ideal conditions would include an understanding of the total context, with empirical research, and access to all relevant documentation in the original language. This study enjoys none of these necessary benefits. Only a tiny fraction of the rich national writing on employment law in Western Europe is ever translated into English or available in Canada. The field covered is a vast one, and many significant

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details have been omitted. In every sense, this paper looks down the wrong end of the telescope, with a deficient understanding, through a glass darkly. In Clyde Summer's biting words:

*Work in comparative law is constantly in danger of becoming little more than the collecting of legal rules as souvenirs for scholarly display and intellectual oneupmanship. Elaborate and finely drawn comparisons may have little more meaning and less excuse than the travelling schoolgirl's collection of foreign dolls in native dress.<sup>1</sup>*

To risk a generalization, this area globally is in a state of flux. Different experiments are being attempted. National policies are in varying stages of evolution. Different nations have different definitions and understandings of equality and discrimination. Nations differ too in their national priorities, and their commitment to equality as an abstract principle. They differ in the strength of their union movements and in the extent to which national governments maintain a commitment to tripartism. Some countries have relative homogeneity in their ethnic backgrounds; none has Canada's diversity. All these factors shape national employment policies and limit the extent to which ideas or institutions can be transplanted.

Words and concepts differ radically in different languages. A phrase may have a direct semantic equivalent in a second language and yet have connotative resonances that are untranslatable. The words "affirmative action" have different political charges and different legislative weights in otherwise similar jurisdictions. The political philosophy of equality may be limited and structured differently in Japan, Germany, and Australia. All these distinctions make comparisons hazardous.

Above all, a keen understanding of the social influence of law is necessary to penetrate another nation's laws or policies. The backdrop of industrial relations law shapes measures to achieve greater equality in employment. How active a role does a particular state take? Does it rely on voluntary measures or does it depend heavily on legal or institutional standards? For recent North American governments, wage and price stabilization has tended to rank above full employment as a policy objective. Other factors that influence the transferability of schemes are relative rates of economic growth, economic dependence on exports, the extent and nature of urbanization and industrial structure, rates of technological change, and rates of substitution of capital for labour. Other influential factors include the dominance of agriculture in a particular economy, the seasonality of particular job markets, and firm size. For example, smaller firms in Japan and Europe have better records in employing the disabled. Above all, the attitudes of both employers and unions are critically important.

This study reveals a lawyer's biases towards institutions, rules, and legislation. A manpower economist, for example, would look at the comparative examples and formulate different analyses and draw different conclusions. Differences in family structures, educational and vocational training levels, the extent of occupational segregation, age distributions, fertility rates, unemployment rates, or discriminatory attitudes between different nations may have a much higher correlation with different employment patterns or problems than

mere legal norms or normative structures. Sociologists or political scientists might interpret those patterns or problems in their own, equally valid, professional ways. Lawyers can offer no more than partial truths. Lastly, there is as always the gap, not merely between the law on the books and the law in action, but between the official reports and the factual reality. Simply passing a law will not make things so.

For all these reasons, comparative law is a hazardous business. Thus this cautionary warning. The following study consists of random observations drawn from fleeting examination of complex phenomena. A travel guide to a landscape glimpsed by lightning. It should thus be approached with caution, with scepticism, and the ever-present recognition that context is all.

There is a respectable academic tradition that states that general conclusions in comparative law are meaningless or misleading.<sup>2</sup> One cannot compare that which is incomparable. As Clyde Summers succinctly puts it:

*Such Cook's tours continue under scholarly and other auspices, and though they may contribute odd lots to our store of information and offer grab bags of insights, they can help us little in understanding the legal rules and institutions which others have used to meet the problems we must face.<sup>3</sup>*

The overall shape of employment law, rather than any abstract philosophy or goal, determines the practical operation of programs to advance equality of opportunity. However, bearing in mind the dangers of premature comparisons on the basis of inadequate information, it is possible to identify some themes and continuities. One of the major continuities is in fact a discontinuity: the fragmentation of policy toward the four target groups under study by the Commission on Equality in Employment. No country has found it helpful or worthwhile to treat visible minorities, native or indigenous peoples, women, or the disabled as having common characteristics or problems justifying integrated policy strategies. Few countries have programs specifically directed at native peoples. The disabled are viewed as a specialized minority to be treated with fundamentally paternalistic legislation and programs. The only similarities between disadvantaged groups result from the attempt in a number of countries to use race relations models in the sex discrimination area. Thus, there is some comparability between sex and race relation programs, particularly if they are at the anti-discrimination phase. However, programs to advance equal employment opportunities for women are much more developed than those for visible minorities. No jurisdiction appears to have adopted an integrated approach to the four target groups, and indeed, it is likely that the fundamental differences in needs and in situations would make such an approach illusory, impractical, and at base discriminatory.<sup>4</sup>

This study touches on only a few of the issues to be addressed by the Commission. It has been unable, because of constraints of time and unavailable information, to explore the important connections between employment policies and other social policies dealing with childcare, transportation, family allowances, tax incentives, and social services for elderly family members. Nor is it really possible to examine discrimination in employment in isolation from discrimination in other sectors — in social services, housing or education. For native peoples such a conclusion is obvious.



Ronnie Steinberg Ratner in her analysis of programs to advance equal opportunities for women<sup>5</sup> identifies three different conceptual approaches to equal opportunity. The first is a discrimination model in which the state establishes a mechanism for dealing with individual discriminatory behaviour by employers and others towards employees. The goal is to resolve the disputes through litigation in the courts, complaints made to administrative agencies, or conciliation and arbitration. It is basically a reactive mechanism, prohibitory in scope. We can see the use of this model in many of the programs launched to combat racial and at times sex discrimination. The discrimination approach may serve to remedy specific instances of direct discrimination, as well as to make manifest the extent of discrimination within a particular job market. However, it appears to be an inefficient or limited way of rooting out pervasive or systemic discrimination. Individual complaints are a spasmodic and inefficient way of enforcement.

Ratner labels her second model "affirmative action" within the labour market. This approach emphasizes the formulation and implementation of new personnel procedures within the work organization, in other words, changing the ways in which the firms recruit, select, assign, train, or promote employees. Sweden manifests the most explicit commitment to affirmative action, and to positive labour market policies.

Ratner's final category is "expanding opportunities" where the problems of discrimination and lack of opportunity are seen in the broadest possible context. In this approach, non-labour market policies that impact upon labour force participation are stressed. Social policies are seen as the key to change in the labour area. Virtually every country examined is experimenting with the expansion of opportunities. Particularly in the field of employment of the handicapped and women, nations are devising new schemes that may serve important social objectives. Implementation methods may also be important, and differ markedly from country to country. Some countries articulate very specific standards and procedures. Others leave this to be worked out at the workplace level. Framing equal employment policies in legislative form may have a strong symbolic impact,<sup>6</sup> and may have a general deterrent effect. A few countries, such as Italy, have even proclaimed their equality commitments in constitutional form. Other nations, particularly those with relatively high levels of unionization, choose to implement these policies through collective bargaining agreements, and employing tripartite monitoring machinery.

The monitoring and enforcement machinery will also vary markedly in the extent to which it relies on legal sanctions or is integrated into the mainstream of the legal system. At one extreme lie the Australian Committees on Discrimination set up in 1973, as a formal response to ILO Convention 111. They have no legal force and no effective powers of investigation or redress. Similarly, New Zealand's Ombudsman acts as a conciliator in discrimination cases. Though Sweden and Norway both use ombudsmen in promoting equality in employment, they back up the ombudsmen with appeal provisions, and ultimately access to the courts. Britain prefers to keep most employment-related matters out of the regular courts, leaving them to specialized industrial tribunals. This is the model adopted for sex discrimination and equal pay cases. Race discrimination issues in England are

handled by a specialist commission before they reach the tribunal stage. Finally, in France, the Labour Inspectorate handles investigations, though both racial and sex discrimination cases are handled within the *Code penal*, through quasi-criminal procedures.<sup>7</sup> In all the nations under study, different mechanisms signify different priorities and different social contexts. Indeed a nation that is dedicated to promoting expanded opportunities through training, apprenticeship, and job-skill enhancement may well decide that it needs a decentralized, flexible, and informal structure of state aid and intervention. Sweden is probably most open to experiment.

Methods of implementation are important, though the modality of choice rest on factors that are unique to each nation. Generally, litigation, as it has developed in the United States, France, and the Netherlands, is unlikely to be an efficient way of tackling employment opportunity. Administrative enforcement, as practised in the United Kingdom as well as the United States, also has its weaknesses. The collective agreement approach so favoured by Germany and Sweden is inextricably bound up with the role of union-management collectivities and consultative mechanisms in the formulation of national economic policies and goals. Lawyers must always be cautious in reaching for the ready weapon of legal rules and legal sanctions. Law has its limits. The survey showed few countries willing to forgo the weapon of law in their armoury of strategies to achieve equal opportunity. But they realize that it is an illusion to believe that law alone will overcome discrimination. The real problem is how legal or other rules are applied, how pervasive is a particular society's dedication to the positive principles set forth in those rules, and how effectively the machinery of labour law functions. It seems clear that new mechanisms such as Ombudsmen must be developed to serve as protectors of minority rights.

Affirmative action in the sense of reverse discrimination must be employed selectively, if it is not to boomerang. Thilo Ramm notes that "protection at one point is often compensated in practice by disadvantages in other fields. The better protection against dismissals has thus led to the development of a recruitment practice which preventively diminished the risks of the employer".<sup>8</sup> Affirmative action must command broad acceptance both in the general public and in the target group at which it is aimed. At times, such measures will be necessary to break deep-rooted patterns of discriminatory behaviour, but approaching social policy through the modality of conceding specific group rights has the danger of weakening the generality of normative standards — which represent the universal interest of accommodating all particular aspirations — and of potentially impairing equality before the law. It is a measure to be used selectively, with precision, and for determinate time periods. As Ratner points out "no one policy instrument mandating equal employment policies, whether a law, a government regulation, or a collective agreement, can, by itself, achieve equal employment opportunities".<sup>9</sup> Certainly, the Swedish approach to training programs, and to the use of specific grants to stimulate employment opportunities, is worth careful study. Likewise, there is a need for government agencies responsible for identifying patterns of inequality, for negotiating or formulating solutions, and for monitoring measures to be implemented to address problems of inequality. Such agencies would also have to tackle the question of how pro-active they are to be, and the extent to which they constitute the state's vehicle of

choice to intervene directly in employment markets. The problem becomes most visible when quota schemes are considered. Quota schemes, as classically defined, are losing favour as measures for the disabled; yet, paradoxically, they are emerging in full vigour in some of the Swedish sex discrimination programs. The German and Japanese system of levies and grants, originally developed for the handicapped, deserves more exploration.

The recent world-wide recession has had a major impact on the effectiveness of equal employment programs. Countries have differed in the extent to which they have been able to preserve social commitments to full employment policies. They also are shown to differ in the extent to which they have formulated long-term employment or labour market policies and goals. In the long run, potentially most significant are those programs that rely on strategies to promote access to training, apprenticeship, and mobility within particular occupations. A nation that has a clearly articulated industrial and economic strategy, within which a manpower and training policy is located and developed, is better able to integrate equal employment initiatives into its system than one that relies on ad hoc and uncoordinated measures and programs. Regardless of the particular economic configuration in a jurisdiction, government can and should play a leading role in developing such a strategy, and identifying possible initiatives to promote greater equality in employment. The various nations surveyed have achieved varying degrees of success in reaching this ideal goal.

At base, there must be eclecticism in policies, and in employment. The most recent studies of women's employment<sup>10</sup> reveal that diversifying employment opportunities and breaking down segregated job markets are the best long-term solutions to structural inequalities in employment opportunities. This eclecticism is as useful to the policymaker as it is frustrating to the scholar. At base there is only a diversity of programs. There is and will continue to be a succession of experiments. Because fundamentally there are no finalities, no right answers to the intractable problems of equality in employment. There are no Baedekers to the new Jerusalem. Aneurin Bevin's apophthegm remains true: "Progress is not the elimination of struggle but a change in its terms".

## II. INTERNATIONAL HUMAN RIGHTS AND EQUALITY OF OPPORTUNITY\*

International conventions are relevant to the work of the Commission on Equality in Employment in two ways. Firstly, they provide an accepted yardstick against which the provisions of the *Canadian Charter of Rights and Freedoms* and other legislation<sup>11</sup> can be measured. They also impose formal international obligations. Thus they provide outer limits within which any federal legislation or programs to promote equal opportunity in employment must be set. International conventions are also relevant for comparisons with individual states, since most have ratified the conventions in question and are subject to the same international norms as Canada. They, of course, differ in the way in which they translate international norms into national legal systems and in the meaning they attach to specific obligations.

It is a constant danger for Canadian policymakers to borrow uncritically from the American experience. In this area the U.S.A. has an undistinguished record of ratification of United Nations Human Rights Conventions because of constitutional difficulties in treaty ratification. The requirement of Senate approval has made Human Rights Conventions subject to the vagaries of domestic American politics. Thus American experience is less relevant to this study. Canada is much more similar to Great Britain or the European states.

The Universal Declaration on Human Rights, and the two International Covenants, one on Economic, Social and Cultural Rights, and the other on Civil and Political Rights, are germane. These provisions prohibit discrimination and provide for equality of treatment. Some of the United Nations norms make allowance for special programs to protect or enhance the position of particular minorities. These provisions require special treatment to be temporary, and in no case is inferior treatment to be justified under such separate provisions. The two United Nations Conventions on discrimination, the first on racial discrimination and the second on discrimination against women, both have articles directly relating to employment, and in particular they mandate equal pay.

Work is currently under way to draft a Convention on the Rights of Indigenous Peoples. There are few international instruments in this area, perhaps because the relatively small number of states with indigenous minorities has prevented native peoples being seen internationally as having a broadly protected special status. Likewise the disabled do not have a comprehensive body of international norms in the same way as women or visible minorities do. Only the Declaration on the Rights of Mentally Retarded Persons, 1971 and the Declaration on the Rights of Disabled Persons, 1975 exist for their benefit.

Legal norms may be expressed at varying levels of abstraction and applicability. At times, lawyers have a tendency to treat as norms only those directly binding obligations that have express sanctions attached to them. Particularly in common-law countries, there has, at times, been a tendency to deny the description "law" to international obligations at all. There can be no doubt that the norms set forth in the various United Nations Covenants and Conventions are at an exceptionally broad level of meaning. Professor Thilo Ramm has described the two international Covenants as having "negligible practical value".<sup>12</sup> However, such a stance significantly underestimates the potential use of international norms.

Particularly in Canada, it is appropriate that these norms be examined closely for a number of reasons. Firstly, the *Canadian Charter of Rights and Freedoms* has been explicitly drawn, in many of its sections, from the relevant United Nations Covenants, and it is to be expected that courts will look at the international experience closely in interpreting problematic sections within the Charter.<sup>13</sup> Secondly, Canada has signed the Optional Protocol to the International Covenant on Civil and Political Rights, thus accepting the possibility of direct petition by individual Canadian citizens to the Human Rights Committee when the citizen believes that his rights as guaranteed by the International Covenant have been denied or infringed. This right of access only crystallizes when the individual citizen has exhausted local remedies

\* Sections II, VIII, and IX are edited summaries of the original research study.

before petitioning the United Nations Committee. Nevertheless, as is seen in the *Sandra Lovelace* case, the Optional Protocol can be an effective tool for external criticism and assessment of Canadian legislation that is alleged to be discriminatory. Even where the Optional Protocol route of direct petition is not available, the United Nations Human Rights norms nevertheless constitute a yardstick against which national legislation can be scrutinized, and on the basis of which significant criticism can be mounted both internally and internationally. It should be remembered that most of these Human Rights Covenants require that signatory jurisdictions submit periodic reports assessing the extent to which their legislation meets the requirements of the Covenants. This publication requirement can serve to focus public attention on the international norms, and the extent of compliance of domestic legislation.

Finally, and perhaps most significantly, the United Nations Human Rights Committee is accepting that these rights must be interpreted dynamically. Meanings are never settled in legislation. As the Human Rights Committee develops experience in the interpretation and application of the norms set forth in the International Covenant, it is beginning to articulate clearer standards. In particular, at its 311th meeting of the 13th session held on the 28th of July, 1981, the Human Rights Committee examined the extent to which affirmative action measures are required in the employment sector. Under Article 40, paragraph 4 of the International Covenant on Civil and Political Rights, the Committee may make general comments to assist member jurisdictions. In considering Article 3, Article 26, and Article 2(1) the Committee has stated that affirmative action is required to meet the obligations set forth in the Covenant, and that this requires more than simply enacting laws. Comprehensive programs and policies are also required.

### III. THE INTERNATIONAL LABOUR ORGANIZATION AND EQUAL EMPLOYMENT OPPORTUNITIES

In setting limits to national legislation on employment policy<sup>14</sup> the work of the International Labour Organization is more directly helpful than that of the United Nations. The ILO's delegates are drawn from government, employers, and unions. Since its creation in 1919, the International Labour Organization has emphasized measures to promote greater equality in employment. ILO Conventions generally create binding legal obligations on member states.

The Equal Remuneration Convention (Convention No. 100) passed in 1951, and ratified by Canada in 1972,<sup>15</sup> provides for equal remuneration for men and women workers for work of equal value. In Article 1, the term "remuneration for men and women workers for work of equal value" is defined as referring to rates of remuneration<sup>16</sup> established without discrimination based on sex. Member states are required "by means appropriate to the methods in operation for determining rates of remuneration, [to] promote and, insofar as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value". They can do this through legislation, formal machinery for salary setting, or collective agreements. Objective job appraisal must be used if helpful to equal pay. Appraisal methods can be set by the body that sets wage levels. If wage differentials spring from

differences that the appraisal shows to be sex-neutral, the equal pay principle is not breached.

This Convention was supplemented by the Recommendation number 90 Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951, which required authorities to ensure that the principle of equal remuneration for work of equal value was applied to all public employees. Workers' organizations are to be consulted and equal pay can be slowly phased in. Both employers and workers' organizations must work with government to establish methods for objective job appraisal. Signatory states must also take appropriate action to raise "the productive efficiency of women workers by such methods as: (a) ensuring that workers of both sexes have equal or equivalent facilities for vocational guidance or employment counselling, for vocational training and for placement; (b) taking appropriate measures to encourage women to use [these] facilities; (c) providing welfare and social services which meet the needs of women workers, particularly those with family responsibilities, and financing such services from general public funds or from social security or industrial welfare funds financed by payments made in respect of workers without regard to sex; and (d) promoting equality of men and women workers [in access to employment, though without prejudice to international or national laws to protect] the health and welfare of women".

These instruments were supplemented by a number of instruments passed at the 60th Session of the International Labour Conference in 1975. The first was the Declaration on Equality and Opportunity and Treatment for Women Workers. Article 1 stated that "there shall be an equality of opportunity and treatment for all workers, all forms of discrimination on grounds of sex which deny or restrict such equality are unacceptable and must be eliminated. Positive special treatment during a transitional period aimed at effecting equality between the sexes shall not be regarded as discriminatory". "All measures shall be taken to guarantee women's right to work as the inalienable right of every human being and to revise, as necessary, existing laws, collective agreements, practices or customs which limit the integration of women in the workforce on a footing of equality with men."<sup>17</sup> The Convention affirmed the International Labour Organization's long-standing position on discrimination against women workers in employment or occupation, on the grounds of sex.<sup>18</sup> Article 7 reiterated the ILO commitment to the Equal Remuneration Convention No. 100 of 1951.<sup>19</sup> Finally, Articles 14 and 15 state that "equality of opportunity and treatment for women and men in working life shall be guaranteed by means of legislation, collective agreements or contractual arrangements of binding character. Measures shall be taken to enforce application of this principle including procedures for complaints, conciliation, appeal and recourse to the courts. Members shall strengthen their national administrative machinery in order to give, together with employers and workers' organizations, full effect to all measures aimed at preventing all forms of discrimination against women workers and at promoting and ensuring equality of opportunity and treatment for them".

The second instrument was the Resolution Concerning Equal Status and Equal Opportunity for Women and Men in



Occupation and Employment. It mandated the Director-General of the International Labour Office to study the need for additional international instruments concerning equal opportunities and equal treatment for women and men in occupation and employment. Some indication of possible new instruments comes from the Resolution Concerning a Plan of Action with a View to Promoting Equality of Opportunity and Treatment for Women Workers, also adopted in 1975, which sets out a collective view of the measures currently necessary to achieve equality of opportunity in employment for male and female workers. The basic principle underlying all programs must be that all human beings (men and women) have the undeniable right to work. Member states must take specific action, within the framework of national development planning, to promote equality of opportunity and treatment for women workers in education, training, employment, and occupation; and set up effective planning and monitoring machinery, on a tripartite basis, and with the participation of women.

The right to work and to free choice of profession and occupation must be guaranteed. States must integrate women in working life equally and without discrimination. With due allowance for their national circumstances, they must carry on a policy of economic and social development aimed at full employment for women and men. They must also open employment opportunities to women by breaking down any barriers in sex-divided work sectors. States must work at changing the attitudes of workers, employers, and their respective organizations to women's employment. States must develop individualized counselling, training, and employment policies and open up promotion to women at higher levels of skill and responsibility. Internal regional differences in participation rates and the character of workforce participation must be analyzed, and women's integration in work life in all national economic and social development, planning, and action ensured. Special attention must be given to women in particular difficulties, such as migrant women, who are frequently the victims of discrimination and exploitation, and rural women. The same criteria must be applied to all workers in cases of redundancy or dismissal.

Finally, there is the International Labour Organization Convention No. 111 concerning Discrimination in Respect of Employment and Occupation, ratified by Canada in 1964.<sup>20</sup> In this Convention, discrimination is defined in a broad way to encompass sex and race and a number of other factors.<sup>21</sup> However, "any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination". This is obviously a massive loophole in the Convention. For the purposes of the Convention "employment" and "occupation" include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment. The obligation imposed upon state parties is to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating discrimination. Two exceptions are provided by Article 5. Firstly, other International Labour Organization Conventions or Recommendations providing measures of protection or assistance are

deemed not to be discrimination. Secondly, there is a definitional exception for positive or affirmative action: "Any member may after consultation with representative employers' and workers' organizations, where such exists, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination".

Convention 111 is supplemented by Recommendation 111 concerning Discrimination in Respect of Employment and Occupation, adopted by the ILO on June 25, 1958. This Recommendation parallels Convention 111 and expands on the principle of equality of opportunity and treatment. Article 8(2) of the Recommendation states that "during a transitional period, special measures aimed at achieving effective equality between men and women workers should not be regarded as discrimination". The Recommendation deals at length with leave for family illness, for maternity and parental leave, with part-time, flexible, and temporary work arrangements, with social security, and with child and family services.

Convention 111 is important, but has limitations. Firstly, the limitation in Article 1(2) that deems distinctions based on inherent job requirements not to be discrimination can itself be dangerously discriminatory, unless there is an objective system of appraising the inherent requirements of any particular job. Secondly, the obligation imposed on member jurisdictions is simply to frame a suitable national policy, not necessarily to frame effective legislation or structures. For example, the Australian authorities responded to ILO Convention 111 by creating national and state committees on discrimination in employment and occupation. These consisted at the federal level of representatives of government, industry, unions, immigrant groupings, women, and aboriginal peoples. At the state level only government, industry, and unions were represented. They were ostensibly part of a national effort to promote equality of opportunity and to provide an independent third party review of grievances. However, the committees that were set up in 1973 have been widely criticized as being inaccessible to the community, as having no visible avenues of investigation or mechanisms for regressing grievances, and for having a tendency to find complaints unjustified. In short, the Convention must be supplemented by detailed legislative and policy initiatives on a broad front.

In 1981, the ILO adopted Convention No. 156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities.<sup>22</sup> This applies to men and women who have responsibilities to dependent children or other family members that restrict their possibilities of preparing for, entering, participating in, or advancing in economic activities. State parties are required to adopt national policies to enable such workers to work in the labour force without discrimination and, as far as is possible, without conflict between their employment and family responsibilities. Their needs must be taken into account in community planning and in the provision of community services such as childcare and family services and facilities. The Convention is declaratory and lacks enforcement provisions.

The work of the International Labour Organization is relevant to the Commission's work in setting general standards for labour law and employment opportunities. Canada has been an active participant in the ILO, and ILO Conventions have been of assistance in framing Canadian law. However, the language of ILO documentation, like that of the UN is very broad and vague. Often the nature of operative sanctions is unclear, and particular conventions may do little more than set outside limits to national experiments.

#### IV. EQUAL OPPORTUNITIES FOR THE DISABLED

Disability is a problematic concept because disability is a continuum, a range of departures from normal skills and potentialities (though what itself is "normal"?). Some individuals may achieve virtually total integration in regular employment markets; others lack such coordination, motor, or intellectual skills as to be excluded from the possibility of employment. Countries differ in how they define disability for social, legal, or statistical purposes.<sup>23</sup> They may treat the disabled within specialized institutions, or be committed to normalization and independent living. The promotion of employment opportunities for the disabled follows a variety of models, such as compulsory quota systems or designated job schemes; appeals to engage the voluntary cooperation of employers; demonstration projects under government agencies; and contract clauses in collective agreements. Rehabilitation services take a number of forms, with individual countries varying in the extent to which they take initiatives to place disabled workers in the private labour market. This paper does not examine in detail sheltered workshop systems, on the basis that the mandate of the Commission on Equality in Employment aims at providing job opportunities for the disabled within normal mainstream employment. Among disadvantaged workers, the disabled have their own history and problems. The goal for equality has not been advanced using traditional human rights mechanisms or sanctions. European measures to stimulate equality of employment for the handicapped and the disabled are shaped by their origin in schemes to further the employment of disabled servicemen returning from the two World Wars. Even today, many countries give preferential treatment to those disabled who have served in armed forces.<sup>24</sup>

European programs tend to be run by Departments of Labour or Employment, rather than as part of the regular health or social service structure. Though this may prevent an integrated network of services for the disabled, it does situate programs to stimulate the employment of the disabled within the context of national employment policies. European programs seem to rely heavily on rehabilitation units and work-training centres to give disabled workers greater skills. European policy also depends heavily upon quota systems, under which employers of a certain size are obligated to employ a quota of registered disabled persons. One survey in 1970 estimated that more than 2 million people in six European countries had been placed in permanent employment as a result of this type of quota scheme. However there are significant drawbacks, if it is not properly integrated with rehabilitative programs, with on-the-job training, and with positive measures to adapt the working place to the special needs of the disabled worker.

Since the disabled frequently represent high cost labour, European states recognize that they must intervene to provide positive financial incentives. In some jurisdictions this takes the place of wage subsidies, in others tax breaks, and in yet others loans to groups of disabled persons wanting to work in cooperatives or collectives and thus be self-employed. The role of government has thus been exercised through financial incentives, through the creation of special jobs in the public sector, through selective use of government purchasing power to reserve certain products or services for companies employing disabled persons, and finally by the use of the quota system.

Canadians should note, however, that the European legislative measures and other programs tend to have been put in place at a time when Europe was experiencing full (or virtually full) employment. When Sweden, for example, experienced manpower shortages, economic necessity required programs to mobilize additional workers. Countries differ, of course, in economic strategies and in the social priority they attach to full employment through an active manpower policy. In addition, the various segments of the labour force are interconnected. In some European countries there has been, if not competition, then certainly interdependence between the various target groups the Commission on Equality in Employment is studying. For example, in Sweden, the significant mobilization of the reserve female labour force in the 1970s has been seen as modifying the need for immigration, and thus the need for many visible minority workers. The existence of a reserve female labour force may affect the employment of the handicapped, since a female labour reserve can be mobilized at lower marginal rates. However, European countries have not generally adopted such a balkanized view of employment policy. They profess a strong commitment to equal employment for the disabled, stating that they attach a high value to the human well-being of the individual disabled worker, whose self-respect is enhanced by employment. Until recently, many countries held central the maintenance of full employment and the right to work. Finally, disabled workers constituted an otherwise under-utilized resource to be added to the gross national product. As we shall see, these objectives have remained intact, though somewhat battered, during the economic turmoil of the last decade.

Norman Acton, Secretary-General of Rehabilitation International, is pessimistic about the future of the employment of the disabled.<sup>25</sup> He concludes that at present "no country has found the way to provide [productive and gainful] employment or other appropriate vocational outlets for all of its disabled inhabitants". He discusses probable trends in the employment sector such as "increasing unemployment and under-employment in a rapidly changed job market, shifts in the age structure, strains on social support systems, changes in the nature of work, urbanization, and the decline in the role of the family" and states that "the problem of the employment of the disabled will get worse rather than better". He concludes "we may anticipate that the numbers of disabled people needing jobs will increase in the future, that there will be greater competition for available work, and that it will become more difficult for society to subsidize either special employment projects or disability pensions".

## V. QUOTAS FOR THE DISABLED

Many European countries, including Great Britain, the Netherlands, Italy, Luxembourg, Belgium, and France, share similar quota systems. The British system is in many respects typical. Special employment measures for the disabled started in England in 1919 with the King's National Roll Scheme to encourage employers to take on war disabled. This scheme gave a preference in tendering on government contracts to employers who took an agreed percentage of war disabled workers. The *Blind Persons Act 1920* imposed an obligation on local government to provide a range of services to all blind people. While this legislation was a useful advance, it had been criticized as fragmenting the disabled into sub-categories.<sup>26</sup> More or less voluntary schemes for the employment of the disabled continued until the Second World War. In 1941, the Labour and Health ministries started an interim scheme to train and re-settle those disabled capable of reasonable economic activity, in order to help in the war effort. In that same year, Ernest Bevin set up the Inter-Departmental Committee on the Rehabilitation of Disabled Persons (known as the Tomlinson Committee) whose 1943 Report led directly to the *Disabled Persons (Employment) Act 1944*. This legislation still provides the basic framework for the present programs dealing with the employment of the handicapped in Britain. Tomlinson believed "that the only satisfactory form of resettlement for a disabled person is employment which he can take and keep on his merits as a worker in normal competition with his fellows". The Committee recommended a quota scheme, a network of sheltered workshops, specialized employment rehabilitation agencies, and a disabled guidance and placement service.

The quota system restricts firms employing 20 or more persons in their hiring unless they employ a fixed quota of registered disabled workers. This quota was set at three per cent in 1946, and has not subsequently been revised. Secondly, when a firm falls below the quota, a permit from the Secretary of State for Employment is needed to hire a non-disabled person. Thirdly, a register of disabled persons was established. Registration is strictly voluntary. A disabled person<sup>27</sup> in order to register must be an adult resident of Great Britain, willing to work, and likely to get and keep a job. Prisoners, full-time patients, or persons of habitual bad character cannot register. Employers are obliged to keep records to ensure that they are in compliance, and there are sanctions for breaking the law of up to a £100 fine or three months' imprisonment. Special employment protection is also granted to disabled employees working within the quota system. They are entitled not to be dismissed in breach of quota requirements without "reasonable cause". This contrasts with the standard "unfair dismissals protection" which applies after only one year's continuous employment.

Immediately following the war, the quota system appeared to work quite well. The Percy Committee survey in 1954 concluded that there were few failures among employers to meet their obligations. About 66,000 employers were subject to the quota and almost all seemed to have no difficulty in surpassing the quota by 0.5 per cent. However, numbers tell their own story. The register peaked in 1950 at 936,000. When Percy reported there were fewer than 800,000 registered disabled people, of whom more than half were ex-servicemen. By 1981, the register had declined to 460,200.

What had happened? The initial apparent success coincided with an expanding post-war economy that needed all available labour. In addition, ex-servicemen had a natural claim on an employer's sympathy. As the number of ex-servicemen declined, other categories rose. It was found that persons who were mentally ill, mentally retarded, or marginal workers who happened to have a disability started to dominate the register.<sup>28</sup> Some disabled workers would not register on the grounds that it was stigmatizing and might limit their opportunities. In 1981, of 176,000 unemployed disabled workers considered eligible to register, only 72,300 had done so.

The quota system only deals with registered disabled people. It creates an artificial (and self-defeating) distinction between disabled people on the basis of whether they register or not. Employees working in a job for a long time are likely not to re-register as disabled, since they will, understandably and justifiably, consider themselves as regular employees. Yet unless they register, they are not counted in quota calculations. Disabled people not in employment may also wish not to register on the basis that this stigmatizes them, and may limit their employment opportunities. A general cynicism about the quota scheme due to non-enforcement may have contributed to a decline in registration. Currently, 65 per cent of all liable employers are failing to meet quota. However, most of those hold permits under the terms of the Act relieving them of the obligation to employ disabled persons. Only 18 per cent are breaking the law. In the entire history of the legislation, only six employers have been prosecuted. Registration supposedly gives preference in recruitment, but if this is not enforced, why register? Many disabled now take this attitude. Today, the quota still stands at three per cent. Nevertheless, if every registered disabled person were to be employed, their employment average would rise to only 1.9 per cent.

The quota principle in Britain has been re-examined. For example, in 1975 the Manpower Services Commission launched an enforcement drive in six cities to see the potential effect on employment prospects. However, the results were disappointing, since a number of firms applied for exemption permits for the first time, and there was also an increase in employed persons seeking registration as disabled. This is an interesting if unexpected result. The Manpower Services Commission concluded that strict enforcement resulted in employers applying pressure to register on long-term employees who were disabled. This may have embarrassed them, with no net benefit to unemployed disabled people. The project led to no increase in the number of job opportunities for disabled people, and was simply an exercise in purposeless paperwork with the only result being to stigmatize and offend disabled people already integrated in employment.

Can quota systems function effectively to provide enhanced equality in employment for the disabled? Some say they are unnecessary in times of full employment, and unenforceable in times of recession. The quota system itself costs £2,000,000, because a third of all employers apply for permits to hire non-disabled people. It is a rough tool for dealing with individual circumstances. Though it may have helped some people to get jobs, it can also be counter-productive by limiting career development and complete integration into the workforce. At best, it provides a benchmark of



public commitment, and an indication of the degree of social responsibility expected of employers.

The 1944 *Disabled Persons (Employment) Act* did not apply to government, but public authorities accepted that they had a moral obligation to apply the system voluntarily. The figures published by the Civil Service Department, however, tell their own story. In 1980 only the Stationery Office and the Department of Employment Group met the quota requirement.<sup>29</sup> In July, 1981, grumblings about the quota system erupted into a major political battle. The Manpower Services Commission prepared a report to the Secretary of State for Employment entitled "Review of the Quota System for Disabled People". The report was leaked and provoked angry reaction within Parliament and from disabled organizations. The Manpower Services Commission sought a new scheme to meet the following three goals:

- sufficient protection for the disabled;
- no unfair burdens on employers; and
- simple to understand and administer.

The Commission believed "that in the long run it is through a policy of education and persuasion that the employment interests of disabled people can best be served".

The Manpower Services Commission proposed that employers be obliged by law to take reasonable steps to promote equality of employment opportunities for disabled people; to give disabled people full and fair consideration for all vacancies; and to retain newly disabled employees wherever reasonable and practicable. The new law would be linked to a Code of Practice giving employers practical assistance on how to comply. The quota principle that a certain proportion of the workforce should be disabled would be retained, and the Code of Practice will recommend a level of three per cent. However, unlike the 1944 quota scheme, the new law would apply equally to both registered and unregistered disabled people.

The report recommended a ladder of sanctions for non-compliance with the Code of Practice. Firstly, employers with deficient employment practices would be advised by the Manpower Service Commission staff on ways of improving those practices. Secondly, in the event of disagreement, an independent third party would advise on the case. Thirdly, persistent failure by an employer to meet Code obligations would result in the serving of a notice specifying ways in which the employer should improve. Finally, an employer who ignored such a notice would expose himself to prosecution. This sanction scheme is a compromise proposal, reflecting a dissensus among those concerned about how far legal sanctions should be used to promote equal employment opportunity. While all agreed that the old 1944 quota scheme was unworkable, there was no consensus on reform. Suggestions ranged from voluntarism through a variety of mandatory quota systems to anti-discrimination legislation. The Manpower Service Commission did recognize that a completely voluntary system would not bring in all employers and that the disabled would have no confidence in it. Its report was attacked in Parliament even before publication and has now been shelved. The Commission's proposals were a step forward, since they would protect newly disabled employees, who currently lack protection, and address discrimination in promotion and career development. The 1944 quota system

dealt solely with recruitment, and ignored employment opportunities for the disabled *within* employment.

At the same time, the Commission's report was weakened by its statement that it was replacing the quota scheme as opposed to strengthening it. The Commission's commitment to enforcement is unclear, given its past record on sanctions and the fact that it proposed recently to reduce its disabled resettlement service by some 120 position-years. In Britain, disabled resettlement officers work in 1,000 local offices. Their major task is to assist disabled persons (whether registered or not) in finding jobs. They help to administer the quota scheme locally, and assist disabled people to gain employment through the job introduction scheme which provides short-term subsidies to employers, grants to adapt premises and equipment, and transport subsidies. Special vocational preparation courses are provided at 27 employment rehabilitation centres to help those people who after sickness, injury, or long periods of unemployment wish to take up employment. Currently, 14,000 people are employed in 55 blind workshops, 72 workshops for the severely disabled, 35 sheltered industrial groups, and 88 Remploy factories.

The *Companies Act* was amended in 1980 to require companies who employ more than 250 employees to publish information about their policy on the employment of disabled people. A statement must be included in the company's annual report describing its policies for giving full and fair consideration to applications for employment made by disabled people, having regard to their particular attitudes and abilities; for continuing to employ and to train employees who have become disabled while employed by the company; and in general for the training, career development, and promotion of disabled employees. In addition, a Department of the Environment circular (24/81) has requested public-sector employers to publish similar statements.

The Manpower Services Commission tried to overcome prejudiced employer attitudes toward the disabled through a "fit for work" award scheme instituted to give public recognition to firms achieving excellence in carrying out constructive policies in employing disabled people; 104 awards were given in 1981.

The French quota system is broadly similar to the British, likewise starting with the war disabled. The fundamental scheme was laid down by the Law of the 23rd November, 1957<sup>31</sup> which provided for compulsory employment of war disabled and war widows by private firms. Every employer with more than 10 employees must set aside a minimum quota of 10 per cent for both war disabled and "civilian" disabled. In theory, these full quota obligations apply even in redundancy situations, and employers in breach are liable to pay fines calculated in relation to the prevailing statutory minimum wage rates.<sup>32</sup> A complex, higher set of quotas is applicable in the public sector, with different levels for different ranks and functions. Special orientation units, "COTO-REP",<sup>33</sup> have been established to look after individual employment problems of disabled adults. They are responsible for testing, administering special assistance funds, providing employment counselling, and preparing individuals for particular jobs. Workplace adaptations can receive subsidies at the rate of 80 per cent of cost and 2,500 francs per job.<sup>34</sup>

In Belgium, by contrast, the legislated principle that all employers should recruit disabled employees applies only to

the public sector. Job places have been set aside for the disabled but they number only 1,200 in central government ministries, 55 in regional and local authority organizations, and a total of 90 in state enterprises. There are no sanctions for non-compliance. The Netherlands has a scheme under its 1947 *Act on the Employment of Physically and Mentally Handicapped Persons*.<sup>35</sup> Every employer with more than 20 employees must set aside a minimum quota of two per cent on the basis of one disabled employee per 50 job places. There is power to make regulations to modify or extend the scheme to smaller business enterprises. In principle, full quota obligations apply even in redundancy situations, and employers in breach of quota requirements are liable to pay fines of up to 1,000 guilders (\$400) per offence. Spain has recently moved to adopt a similar quota system of two per cent of staff.<sup>36</sup>

In a number of European countries, criticisms of the quota system have been made along the lines we have seen in England. The European Parliament in March, 1981, recommended that Common Market states consider the West German Equalization levy system.

## VI. THE GRANT AND LEVY CONCEPT

The West German scheme again originated with the needs of war victims. Its basis was the *Disabled Persons Act* of 27th February, 1957, which provided for rehabilitation and retraining. On August 14th, 1969, an amendment provided special funding for employment opportunity. The Federal Labour Office was made responsible for the mentally disabled and arranged rehabilitation or employment placement for individuals or groups.

The *Severely Disabled Persons Act* provides special employment rights for severely handicapped persons, including job security. All employers, whether inside the private or public sector, must employ a minimum of six per cent of severely handicapped persons.<sup>37</sup> The federal government is given jurisdiction to vary the six per cent minimum within a five to ten per cent spread, depending on manpower market conditions. Where the quota cannot be filled, through lack of suitable candidates, the employer must pay into a state fund a monthly equalization levy contribution of D.M. 100 (\$50) per unfilled place, until such time as the full obligation can be met. These "equalization levy" contributions are used to promote vocational training and employment of the disabled generally. Employers who have fulfilled their six per cent target may qualify for extra grants from D.M. 8,000 to 18,000 (\$400-\$1,000) if they agree to train or employ severely handicapped persons. In the first six months of 1980, 8,000 disabled people were so assisted. Equalization contributions must continue to be made until the full obligation can be met; fines are payable only where employers fail to meet either target or equalization contribution requirements. Every employer is obliged to consider the possibility of hiring the disabled when filling vacancies, but forced hiring is no longer provided for. Dismissal of a disabled person requires the prior authorization of the local employment office. The West German system has been described as a notable success,<sup>38</sup> and was singled out by the European Parliament as the desirable model in its 1981 debate on the integration of the disabled in employment.

The West German scheme has also been adapted in Japan. Japan had adopted progressive quota system for

handicapped employment in both public and private sectors under the *Physically Handicapped Persons Employment Promotion Law*. The employment rate of the private sector as a whole exceeded the legally required quota for the first time in 1973, but more than a third of the firms fell short. Significantly, it was the major Japanese business enterprises that had the worst records. The Japanese government changed the law in 1976. The law now places a positive obligation on the employer concerning the employment of the handicapped, and adjusts the financial burden incurred from the employment of the handicapped by creating a levy and grant system. The targets established were 1.9 per cent for central government agencies, 1.8 per cent for special corporations and decentralized government bodies, and 1.5 per cent for private industries.<sup>39</sup> On June 1st, 1982, 54 per cent of all private enterprises had achieved the legal employment ratio. To encourage the others, the Minister of Labour was given power to name employers whose plans fell short and who would not change them. The Japanese levy and grant system works basically as follows. Companies of more than three employees that fail to meet the legal employment quota are required to pay 40,000 ¥ (\$210) a month for each disabled worker not employed. These levies accumulate in a central government granting fund. Companies of more than 300 employees that exceed their quota are eligible to receive a grant of 20,000 ¥ (\$105) per month for each disabled employee over the established ratio. Those who employ less than 300 are eligible to receive grants of 10,000 ¥ (\$52) per month per person, if they exceed an established ratio (either three per cent of the total number of workers, or five disabled persons, whichever is the larger). The levy funds are also used to adapt work facilities for disabled workers, to finance programs for severely disabled employees, and to provide grants for ability development programs for disabled persons.

Although the West German and Japanese schemes offer an alternative to the quota system, they are unlikely to supplant the quota systems in most European countries. Quota systems have already lost the confidence of employers, the disabled, and public authorities. The British government, for example, rejects the German model as being expensive and as giving "wholesale and preferential treatment to disabled people", contrary to established policy, and argues that employers could avoid responsibility by simply paying the levy and passing the cost on to their customers. Perhaps most fundamentally, the British authorities felt, in the prevailing economic climate, unable to impose additional costs on industry.

## VII. SCANDINAVIAN POLICIES FOR THE DISABLED

The Scandinavian response to the employment of the disabled has been outstanding, and in many ways unique. None of the Scandinavian countries adopted quota or registration systems.<sup>40</sup> Sweden is the most advanced in terms of the range and detail of its employment opportunity programs. The Norwegian government in two major reports to the Storting in 1967 and 1977 proclaimed a basic principle of integration.<sup>41</sup> The constitutional right to employment, which all Norwegian employees have, also applies to disabled people. The government's policy is to use the rehabilitation service to obtain suitable employment for disabled persons.

In Denmark, every public-sector employer must give priority to qualified disabled employees though there are no sanctions if this is not done. Private-sector employers who employ the disabled receive income rebates. This is a short-term refund from the social security authorities of up to 50 per cent of wages, where the employee is retained on the same basis as before the handicap and is thus helped to "keep his connection with the labour market".

Sweden's treatment of the disabled stands apart, as do its other employment and social policies. There is no general legislative scheme dealing with the rights of the disabled. The essential basis of the Swedish system is a commitment to equality, so that the disabled have equal rights to social welfare and to live independently.<sup>42</sup> General policy objectives are also goals for them. "The facilities of society must be made accessible to everybody.... The policy of disabled persons must help to bridge the gaps between the disabled and other people."

The Swedish goal of disabled normalization and integration within society is still held strongly: "The right of disabled persons to living conditions which are equivalent to other people must not be affected by fluctuations in the economy. Measures to create full participation and equality of opportunity for disabled people must be taken even if the economy is under severe strain. It is therefore important that the scope of the reforms with an aim like this should not be made dependent on economic growth. The measures must instead proceed from a fair and socially conscious policy of distribution". Any costs imposed on private employers as a result of this social policy are to be "regarded as a self-evident part of the costs of the work and consequently also must be financed in the same way as the rest of the work".

The central aim of Swedish employment policy is "employment for all", which includes measures to facilitate disabled persons' employment opportunities on the open market. For those who cannot find jobs on the open market, employment may be within sheltered industries, or as a self-employed person. To make more jobs open to the disabled a variety of wage subsidies are available for employers.

Much of the Swedish legislative structure consists of so-called "frame laws". These laws are formulated by the Riksdag at the national level, but are administered by 24 relatively independent county administrations (*Landsting*). They must also be supplemented with agreements between the employers' organization and the employees' unions. The *Swedish Work Environment Act* is a frame law containing regulations for the state of the work environment, general obligations for employers and employees, the disposition of working hours, and co-operation between employers and employees.<sup>43</sup> The *Swedish Work Environment Act* goes beyond Canadian Occupational Health and Safety legislation by dealing with all types of health and safety risks, physical as well as psychological. "Working conditions must be adapted to human physical and mental aptitudes. The aim must be for work to be arranged in such a way that the employee himself can influence his work situation."<sup>44</sup> "The employer must give consideration to the particular aptitudes of each employee for the work in hand. In the planning and arrangement of work due regard must be had for the fact that individual persons differ in their aptitude to perform tasks."<sup>45</sup> This has benefitted disabled employment.

The *Security of Employment Act* contains regulations concerning reasons for legal termination of employment.<sup>46</sup> The Act also provides rules concerning precedence in dismissals and preferential rights in the event of re-employment. It gives severely disabled persons and elderly workers valuable job protection through its priority guidelines for job termination. Termination may be based legitimately on shortage of work, but not on illnesses, reduced working capacity, or other disability-related features.

The *Promotion of Employment Act*, 1974, aims directly at improving the situation of disabled persons on the labour market. The Act entitles the County Labour Board to obtain information from employers on their employment of elderly employees and employees with reduced work capacities. The Board can talk to employers about measures to improve working conditions or to guarantee the continued employment or recruitment of the disabled. The Board can issue instructions concerning the employment of the disabled and, ultimately, give the labour market administration authority to prohibit firms from hiring employees other than those recommended by the employment service. The Act has been applied only sporadically. The ultimate sanction of compulsory hiring of labour assigned by the employment service has not been invoked at all. However, the National Labour Market Board has a valuable tool to stimulate employment for the disabled.

The *Promotion of Employment Regulations* also provide for the operation of so-called adjustment groups.<sup>47</sup> Such a group is an important feature of Swedish programs at the shop-floor level. They are bodies for consultation among the employment service, employer, and the trade union. There are currently 5,300 throughout Sweden. The groups' purpose is to introduce labour market policies into companies, facilitate the maintenance of employment for the elderly and disabled, increase their employment, and create positive attitudes toward them in the workforce. Adjustment groups have access to company doctors, safety engineers, and psychologists. They develop both general and specific measures concerning the workplace. When a particular case involves a specific employee, he or she is invited to attend the team's meetings. The adjustment group is a flexible tool for responding to the needs of individual workplaces and workers. It reflects the Swedish tradition of extensive consultation and cooperation among all concerned parties: employees, employers, work-design engineers, efficiency experts, safety engineers, safety representatives, and representatives of the company's health services.

Sweden emphasizes adult retraining, and vocation rehabilitation in general. The aim is to train the handicapped alongside the non-handicapped wherever possible. Throughout Sweden, there are special employability assessment centres at which job applicants in need of vocational rehabilitation are given guidance, tests, and training opportunities. These centres currently handle roughly 18,000 persons annually. The Swedish goal is to use these centres to train handicapped persons for suitable jobs. About 25 per cent of those being trained for the labour market are occupationally handicapped in some way.

Employers may also claim state financial aid, to assist in training and employing disabled workers. Wage subsidies are paid to employers hiring persons with reduced working



capacity, who would otherwise be unable to find regular employment.<sup>48</sup> Secondly, employment services are able to give employers subsidies for the individual adaptations of workplaces and work aids.<sup>49</sup> These grants will pay for alterations and workplace adjustments, and for necessary working aids and transportation.<sup>50</sup> An interesting feature of Swedish workplace alterations subsidies is that individuals get grants for the full cost of special technical aids. If they change jobs, they take the equipment. Currently 1,000 Swedish citizens take advantage of such subsidies.

The Swedish government is experimenting with training within industry. This is attractive because of lower costs, more chance for hiring back, and because schemes can be expanded without additional government buildings or staffing. However, employees are more likely to find permanent employment with other employers. One method of making the incentives more attractive to employers is to use the tax system. Training allowances provided by employers to employees are not taxable.

Sweden has a fairly extensive network of semi-sheltered employment run by the Swedish Communal Industries Group.<sup>51</sup> Although, according to a 1982 Survey, about 42 per cent of all occupationally handicapped employees state their willingness to accept jobs in the regular labour market as opposed to semi-sheltered employment, only 322 people in 1982 transferred to the regular labour market.

Finally, one experiment with crown corporations is of interest. Swedish authorities have had more success in stimulating disabled employment within the private sector than within the public sector. Economists forecast greater job creation in the public sector for the 1980s. Accordingly, the Commission on Employment recently proposed a pilot project to expand opportunities for the handicapped within crown corporations, such as the Postal Gyro system.

Scandinavian experiments are in many ways attractive, since they are multi-faceted, imaginative, and spring from a total equality policy. Nevertheless, it must be stressed that the Swedish employment situation is the product of a uniquely homogenous society and economy, one featuring significant government direction and a pervasive commitment to consultation with management and labour at all levels. Sweden offers us ideas, not easily exported answers.

### VIII. EQUAL EMPLOYMENT AND NATIVE PEOPLES

No nation has yet developed satisfactory or effective measures for providing equal employment opportunities to disadvantaged native workers. The other jurisdictions examined only seldom have native populations, and even then, their social and economic situation differs so markedly from that of Canadian native peoples that it is virtually impossible to make any meaningful comparisons or suggestions. The current government of Australia is pledged to take initiatives to promote affirmative action and equal employment opportunities for aboriginal workers in Australia. In addition, international action may be stimulated if further progress is made towards a United Nations Convention on the Rights of Indigenous Peoples. Currently international law in the area is restricted to the general human rights covenants and a set of badly outdated ILO provisions.

### IX. VISIBLE MINORITIES IN EMPLOYMENT

Most European countries have radically different attitudes to non-national workers, regarding them as migrant workers (*Gastarbeiter*), with no real roots or stake in the nation in which they work. A policy of importing short-term contract labour results in a substantially different set of priorities, laws, structures, and programs than one that treats visible minorities as permanent members of society to be integrated at all levels within a society and accepted as equal members of a permanent workforce. Thus, the continental European provisions are of no real help to us in addressing the situation of visible minorities in employment. British legislation under the various Race Relations Acts broadly follows American models, and is enforced through quasi-criminal proceedings. It does not provide an effective model for adaption to the Canadian employment scene because of the profound differences in the status and treatment of visible minorities, relative unemployment levels, overt discrimination, and active political opposition. Other European provisions on race discrimination indicate that equal employment opportunity programs in most jurisdictions are in their infancy.

### X. EQUAL OPPORTUNITY BETWEEN THE SEXES

Measures to promote equal opportunities between male and female workers have been studied extensively by the International Labour Organization, the Organization for Economic Co-operation and Development, the European Economic Commission, and by a variety of commissions and task forces in virtually every country in the world. Nevertheless, no country appears to have developed policies or legislation that can be conclusively shown to remove barriers to female participation in the labour force, promote equal opportunities within the workplace, and provide effective remedies for both individual and systemic discrimination.

Different countries have tackled the problem of promoting equal pay for work of equal value in various ways. Equal pay legislation, and indeed sex discrimination legislation in general, is itself inadequate unless accompanied by a broad-ranging set of policy initiatives designed to stimulate equality through access to training and advancement opportunities, and aimed at the breaking down of segregated job markets.

The exact relationship between equal pay policies and equal opportunities policies is complex and rapidly evolving. Because equal pay policies have been comparatively unsuccessful in eliminating sexual discrimination in remuneration, a broad range of experiments to stimulate equal opportunities are being tried. Canada's experience with respect to women's employment is quite typical in the developed world. Firstly, female labour force participation rates in virtually all developed countries have grown recently. More women are entering the workforce at the same time that labour force participation for men is declining.<sup>52</sup> The upward trend is particularly noticeable for married women; more women of child-bearing age are remaining in the labour force, and there has been an increased return to the labour force of those with grown children.<sup>53</sup>

Secondly, women workers are concentrated in certain occupations, occupations that have historically been lower paid. Even in Sweden, with its apparently progressive policies and legislation, the labour market is for all intents and purposes sex segregated.<sup>54</sup> A detailed analysis conducted for

the European Economic Community by Evelyn Sullerot in 1970 revealed that job segregation by sex was the major influence on men and women's earnings in France, Belgium, and Italy. This factor has affected the impact of equal pay legislation, and necessitated other ways of considering work of equal value, so that meaningful comparisons can be made across sex-divided labour markets. Although the gap exists in all countries, states vary in how successful they have been in narrowing it. Sweden seems to have the most successful record, with women's average hourly earnings in 1978 in industry being 87 per cent of the equivalent male earnings.<sup>55</sup> Other countries fall progressively behind with the average figure appearing to be around 70 per cent: for example, the Federal Republic of Germany had an average wage rate disparity of 72 per cent in 1976 and Britain in the same year had 71 per cent.<sup>56</sup>

Another significant factor is the extent to which women workers are engaged in part-time work. Not surprisingly, this type of work occurs disproportionately in occupations where there is a high concentration of women workers. The Swedish experience is that almost 40 per cent of all women in "typically female" jobs work less than 35 hours per week. Part-time work has been described as a compromise solution to the conflict imposed on married women with children by societies that require their labour force participation, but refuse to provide comprehensive social programs such as daycare and services for the aged, which would make it possible for married women to work in the labour force full-time.<sup>57</sup> Part-time work may be said to bow to prejudices that female workforce participation is largely marginal because of other domestic responsibilities. Part-time work also brings with it fewer opportunities for advancement and offers lower hourly wages and fewer fringe benefits.

Equal pay policies have been a priority for longer than equal opportunity policies, since they also have a direct effect on the situation of male workers. Historically unions have been very concerned to promote equal pay (and thus eliminate wage undercutting in the labour market), while union response to equal opportunity legislation has varied remarkably from country to country.

Ronnie Steinberg Ratner in her analysis in the book *Equal Employment Policy* provides a useful summary of how equal opportunity policies must supplement equal pay policies: "If women were to achieve equality in the labour market, equal pay policy needed to be supplemented by other governmental policy and non-governmental activity including: laws and collective agreements mandating equal employment opportunity and its enforcement; vocational training programs and other labour market policies to promote the entrance of women into traditionally male occupations; family policy such as daycare programs and provisions for parental leaves to enable women and men to balance work and family obligations; and efforts by trade unions and other organizations to incorporate women and to seek and sustain the elimination of employment discrimination".<sup>58</sup>

Ratner also discusses the underlying social objectives behind equal pay and equal opportunity policies in a revealing paragraph. In discussing "whether equal pay or equal opportunity is the preferred route to labour market equality for women", she states: "Where the primary concern is eliminating occupational segregation and equalizing employment

opportunities, the policy goal becomes improving women's access to better-paying male jobs. Paying women more money to keep them in the same sex-segregated jobs is not viewed as a meaningful solution to women's labour market integration. In contrast, equal pay for work of comparable worth becomes the goal of those who attach importance to improving the collective position of the majority of women who work at women's jobs. This goal is especially valued because the economic downturn has contracted the opportunities of all employees, regardless of sex. Therefore, rather than allowing all employees to fight over a smaller total number of jobs, redirecting energies toward comparable worth will result in a substantial improvement for women, one that does not come at the expense of male employees".<sup>59</sup>

All countries studied recognized that promoting equal employment opportunities between men and women requires a broad plan of action. Simply mandating equal pay legislation will do little to eradicate systemic or indirect discrimination. Accordingly, the focus must be on labour market barriers that prevent women from achieving equality, such as discriminatory decisions about education and training, hiring and job selection, on-the-job training, and promotion and mobility. Secondly, comprehensive training and affirmative action programs have been developed. Lastly, the influence of non-labour market factors upon women's employment, including family responsibilities, sex-stereotyped attitudes, and changing other social policies, are being examined.<sup>60</sup>

The clearest and most structured means of breaking down barriers are specific programs to eliminate sex discrimination. These programs largely reflect the race discrimination origins of the programs from which they have been adapted. This can be seen in the different experiences of the U.S.A., France,<sup>61</sup> and Britain. It will also be recalled that the ILO Convention 111 on Discrimination in Respect of Employment and Occupation and the two United Nations Human Rights Covenants apply equally to racial and sex discrimination. Schmidt<sup>62</sup> quotes a useful passage from a British White Paper on Equality for Women<sup>63</sup> published in 1974:

*...the adverse treatment of someone on grounds irrelevant to that person's intrinsic qualities and qualifications; the morally unacceptable and socially harmful nature of such conduct; and the pressures of prejudice, custom and conformity which encourage discrimination on either ground [are common to both]. The objectives of the law are also essentially similar in both fields: to eliminate anti-social practices; to provide remedies for the victim of unfair discrimination; and indirectly to change prejudiced attitudes expressed in discrimination.*

This White Paper led to the 1975 British *Sex Discrimination Act*, which deals generally with discrimination in the workplace by both employers and unions. Discrimination in remuneration is left to the *Equal Pay Act*, 1970. The 1975 Act established the Equal Opportunities Commission to conduct investigations, grant assistance to discrimination victims wishing to take their cases before an Industrial Tribunal, and to promote equal opportunities. In looking at individual employers the Commission has a battery of procedural options: it can issue recommendations for new policies or

procedures; and issue non-discrimination notices after hearing the positions of both sides. These notices become final and can be enforced by injunction.

The legislation deals with both individual<sup>64</sup> and systemic discrimination.<sup>65</sup> The legislation is not total since sex can be a genuine occupational qualification in cases where the "essential nature of the job calls for a man by reasons of physiology, excluding strength or stamina".<sup>66</sup> Protective legislation can also exclude women from certain jobs.<sup>67</sup> The legislation, by permitting comparisons between women as a group and men as a group, is lenient to employers.

In Belgium, primary enforcement of equal opportunity<sup>68</sup> rests with the Social Inspectorate,<sup>69</sup> with the additional possibility of penal sanctions being applied. Unions are given standing to sue on behalf of their members. Courts can award damages for discriminatory treatment, though their powers are otherwise very limited and have been narrowly interpreted. Equal pay problems can also be dealt with by the Labour Court.<sup>70</sup> The Belgian provisions have been criticized because they are inherently subjective, have no built-in guarantees, and impose no affirmative obligations on employers to have a more balanced workforce.<sup>71</sup> Anti-discrimination legislation has its uses, but it also needs to be supplemented with other measures more directly aimed at promoting equal employment opportunities.

## XI. AUSTRALIAN POLICIES FOR EQUALITY FOR WOMEN

In many ways, the recent Australian experience is illustrative. Like all other developed countries, Australian women increased their labour force participation rate markedly over the past 35 years. But the labour market position improved only slowly, if at all. Women did not move in significant numbers into "non-traditional" occupations, nor into executive or managerial positions.

Since the Labour government came into office, Australia has ratified the United Nations Convention on the Elimination of All Forms of Discrimination Against Women with two reservations,<sup>72</sup> and has passed a *Sex Discrimination Act*. The purpose of the Act is to make unlawful discrimination on the grounds of sex, marital status, and pregnancy in the areas of employment, accommodation, education, the provision of goods, facilities, and services, the disposal of land, the activities of clubs, and in the administration of all federal laws and programs. The Act establishes a Sex Discrimination Commissioner mandated to conciliate complaints of discrimination and to attempt to reach an amicable settlement. Where this process is unsuccessful, the Human Rights Commission can inquire into the complaint and make determinations as to future conduct enforceable in the Federal Court.

The Australian legislation covers both indirect<sup>73</sup> and direct<sup>74</sup> discrimination, and closely follows sex discrimination legislation in New South Wales, Victoria, and South Australia. Under an earlier version of the legislation, affirmative action plans would have been required in the Commonwealth government and all federal authorities; any financial, foreign, or trading corporation that employs more than 100 people; and any person, firm, or body that enters into a contract, sub-contract, or agreement with the federal government or its agencies for supplies or services exceeding A\$50,000. The

implementation of the plans would have been the responsibility of the Human Rights Commission with final determinations on compliance questions being made by the Federal Court.

In May, 1984, the Australian government published a two-volume policy discussion paper on *Affirmative Action for Women*.<sup>75</sup> The paper discusses a variety of measures to improve female participation at all levels and in all labour market sectors. Quota systems are rejected for women, and indeed for all disadvantaged groups. Genuine progress toward equal employment and improving workforce skills can only be achieved if jobs are awarded on merit. The major thrust is to encourage large employers to adopt affirmative action programs, though the government is careful to point out that it is not following the American examples. Every country must specifically tailor its policies to suit its business and labour relations traditions, and the specific nature of its job market and training policies.

Australia defines affirmative action very loosely as "a systematic means, determined by the employer in consultation with senior management, employees and unions, of achieving equal employment opportunity for women". Nor is affirmative action merely compatible with merit, skills, and qualification principles; ultimately it must be regarded as an employment policy to improve the skill, efficiency, and mobility of the workforce. The goal is to ensure that persons have an equal chance of getting the job, without regard to factors such as sex or marital status. To develop an effective affirmative action program requires management commitment, effective employee consultation, accurate assessment of the current employment situation, and a review of all directly or indirectly discriminatory policies, procedures, or practices. The program itself must set numerical or percentage goals or targets, and contain a monitoring or evaluation mechanism. Programs should be largely employer-determined and devised on the basis of information gathered by the employer. Government will provide expert advice, but it recognizes that it cannot impose successful programs from outside.

A number of major companies and universities are to be encouraged to participate in a voluntary affirmative action pilot program. A special Affirmative Action Resource Unit in the Prime Minister's Office will give advice to participants on designing programs, help when unanticipated problems arise, and act as a secretariat for the Working Party on Affirmative Action. To reassure affected parties, a careful process of consultation has been introduced. None of the proposals is cut in granite. The Senator designated to assist the Prime Minister on women's issues will chair a Working Party on Affirmative Action comprising representatives from business, trade unions, universities, and women's organizations. This Working Party will develop legislative proposals to apply affirmative action programs to all universities and companies employing more than 100 people. The Working Party will consider the location and functioning of a monitoring agency to act as a permanent consulting group for affirmative action and develop information and education programs. Tentatively the government feels the agency should be able to require relevant documents to be produced and to suggest variations to proposed affirmative action schemes. Current thinking is that the agency should be part of a restructured Human Rights Commission. The exact sanctions the agency should possess for non-compliance have not been settled.



In the public sector, the government will legislate to place a positive obligation on departments and statutory authorities to establish equal opportunity management programs for women, Aborigines, migrants, and the disabled. They must review their personnel practices to correct discriminatory provisions, and develop action-oriented affirmative action plans. Where numerical targets can reasonably be set, they can provide a measure of the success of a program. The Australian government's plans for public-sector affirmative action included legislation during the autumn of 1984. The fate of these initiatives remains uncertain until after the elections in December, 1984.

The new policies build upon the new Australian *Sex Discrimination Act* 1984. However the government recognized that re-active anti-discrimination measures alone could not improve the position of women in the labour market, open up greater job opportunities, or ensure equality in promotion. In addition to the affirmative action proposals, a A\$300 million Community Employment Programme Job Creation Scheme contains equal access policies. The Participation and Equity program is designed to broaden career horizons for school-leavers, and a new Computer Education program has been developed to train women workers for this sector. A special A\$4,000 tax-exempt cash rebate is available to employers who take on women apprentices.

It is felt that it is more appropriate to have greater public discussions and understanding of these proposals in Australia and to have wide-ranging consultations in advance of introduction of the legislation. Interesting experiments have also been taking place in the Australian private sector. A tripartite body known as the National Labour Consultative Council (NLCC) was established in 1977 by Act of Parliament. It is a formal channel for communication and consultation. In 1980 it issued "Guidelines for Employers — Equal Employment Opportunities for Women", to encourage employers to establish formal Equal Employment Opportunity programs. This involved the preparation of formal policy statements and implementation strategies, communication with employees, the collection and analysis of staff employment profiles, special measures relating to job advertising, recruitment, and selection, training and development, personnel policies, and public relations. No formal information is available on the success of the NLCC program initiatives.

## **XII. SCANDINAVIAN POLICIES ON EQUAL EMPLOYMENT OPPORTUNITIES FOR WOMEN**

The Norwegian *Equal Status Act*, 1978, is aimed at promoting equal status between the sexes and in particular at improving the position of women. Public authorities must facilitate equality of status between the sexes in all sectors of society. Women and men are to be given equal opportunities in education, employment, and culture, and for professional advancement. The major substantive provision of the legislation is Article 3, which states that "discrimination<sup>76</sup> between men and women is not permitted". Affirmative action is, however, saved: "Different treatment which, in conformity with the purpose of the act, promotes equal status between the sexes, does not represent a contravention." The same applies to women's special rights based on the existing differences in the situation of women and men.

The Act is enforced by an Equal Status Commissioner<sup>77</sup> and an Equal Status Appeals Board. Individuals, groups of

individuals, or organizations can complain to the equal status ombud about sex discrimination. The ombud has also status to intervene in a case on her own initiative. The ombud must first try voluntary settlement, but if this fails may bring the case before the Board for a decision. The Board is constituted as a quasi-judicial tribunal. During the first three years the legislation was in effect, some 2,500 cases were handled by the ombud, though only 16 were taken to the Appeals Board; in only three was the ombud overruled. The Act permits positive discrimination measures, if consistent with its general purposes. There has been discussion of possible use of quotas in the civil service, and this has not been ruled out as inconsistent with the legislation.<sup>78</sup>

Swedish equal employment policies are typically and singularly progressive. Sweden was the first country in the world to frame a formal government policy aimed at achieving equality between the sexes by changing the role of men as well as that of women. The policy was proclaimed in a 1968 statement to the United Nations, when the Swedish authorities declared that guaranteeing women's rights was insufficient.<sup>79</sup> The distinctive Swedish policy rests upon the unique nature of Swedish society. The country has not been at war since 1815, its population until comparatively recently has been remarkably homogeneous, the country has an extraordinary high degree of unionization and a very close working co-operation between union authorities, government, and employers. The central support of unions was won because women's issues were framed as general issues.<sup>80</sup> Unions formed equality committees at the local level to ensure that women's special concerns were addressed at all levels of union operations. The highly centralized nature of the Swedish union structure has meant that national policies can also be adopted within collective bargaining structures.<sup>81</sup>

The Scandinavian countries were the first to recognize that laws prohibiting women in certain sectors may prejudice women, and that labour legislation should aim at protecting both sexes. In 1972 the Swedish Prime Minister appointed the Advisory Council on Equality between Men and Women, reporting directly to his office. The Council suggested measures that might be used to stimulate greater employment opportunities and these were incorporated into legislation in 1974. The results were quite unexpected.

The first measure was to mandate the Labour Market Board to hire 100 employment officers who were to concentrate on placing women, and on maintaining contacts with employers and unions for this purpose. However, hiring 100 officers apparently resulted in all "women's questions" being shunted aside to them; other labour officials felt they were now justified in ignoring the issues. Secondly, special training allowances were to be paid to employers who trained women or men for certain occupations dominated by the other sex. The aim was to stimulate applications from men or women into non-traditional occupations. However, the grant has been used for only about 250 persons per year, and in only one case to encourage a man to undertake non-traditional work. The grant is comparatively low and the range of occupations to which it is available is limited. The general assessment is that the scheme has been unsuccessful. The third measure was a variation of contract compliance. The Swedish government has a grant program for firms locating or expanding in regions with economic problems. Starting in

1974, companies receiving these grants were required to engage not less than 40 per cent of either sex upon taking on new workers. This is the closest that the Swedish government has come to the use of quotas. Between 1974 and 1976 the percentage of women employees of firms receiving regional development grants increased from 19 to 21 per cent. Women account for 35 per cent of new recruits; while this is lower than the statutory level of 40 per cent, it is due to the granting of exemptions when less than three people are recruited, and in the case of staff required with special skills. The National Labour Market Board apparently regards the sex quota system as "our best instrument for equality and [hopes] to establish it on a regular footing".<sup>82</sup> The Labour Market Board is also now investigating the potential effectiveness of introducing quotas into vocational guidance and training programs, and into the placement of public service positions. It is revealing that at a time when quota structures are being abandoned for promoting the employment of the disabled, quotas are being used by a jurisdiction whose labour policies are as progressive as Sweden's.

In the late 1970s the Swedish equality effort shifted towards experiments with specialized training programs, such as one at the Volvo works near Stockholm.<sup>83</sup> Special courses were implemented in theory and practice for 17 women production workers. In addition, education courses were introduced on economics, marketing, and technology for all women working in Volvo. Another project was run in Ludvika by the National Labour Market Board, to give two years of specialized training to women with long experience in industry. Finally, experiments are taking place in the National Telecommunication Administration to break down sexual recruitment barriers. During the trial period, about a quarter of the roughly 400 recruits obtained jobs in which the opposite sex normally predominated. Women applied for male traditional jobs while men on the other hand applied for "female jobs" simply in order to obtain employment. Initial scepticism has given way and apparently male workers are positively disposed toward female telecommunications engineers. The experiment is being extended to the police, prison administration, and customs services.

The 1980 Act on Equality between Men and Women at Work is designed to promote equal rights as regards work, working conditions, and employment opportunities. The Act is enforced by a government appointed equal opportunities ombudsman. The legislation deals with both sex discrimination and active measures to promote equality. In the discrimination field, an employer is prohibited from discrimination against an employee or job seeker on the grounds of his or her sex. Exceptions are made for measures to stimulate equal employment for the under-represented sex and also to further special interests. The labour court can hold hearings and can order compensation to be paid by an employer who contravenes the ban on discrimination. Employers must actively promote equality through specific plans and goals consistent with the resources of the business. These equality promotion measures can be supplemented by means of collective agreements on equality between labour and management. Section 6 of the Swedish Act goes further than virtually any other law<sup>84</sup> in defining employer's obligations, since it states that whenever vacant posts are to be filled, the employer must ensure that candidates of both sexes apply

and must take whatever steps may be necessary, and particularly by organizing vocational training, to ensure that men and women are equally represented in various occupations and categories of workers. In cases where such equality of representation does not exist and when new workers are recruited, the employer must make a special effort to attract applications from persons of the sex that is under-represented and ensure that that proportion increases progressively.

The equal opportunities ombudsman is responsible for the administration of the Act, for investigations, and for the mobilization of public opinion. The Equal Opportunities Commission appointed by the government is responsible for imposing fines when employers decline to act to promote equality as the ombudsman suggests. The Commission is chaired by a litigation lawyer and consists of representatives of labour and management. The current equality ombudsman is a female district court judge.<sup>85</sup> In the first 18 months of operation of the legislation, 584 complaints were filed with the ombudsman, 248 relating to sex discrimination and 172 dealing with employers' active efforts to promote equality. The residue referred to the moulding of public opinion and to questions beyond the Act's jurisdiction. About 75 per cent of the sex discrimination complaints are addressed to public employers, whereas 80 per cent of the complaints concerning shortcomings in equality promotion measures come from the private sector. Five cases have so far been brought before the labour court.

In a speech before the Riksdag in 1982, the Minister of Equality for Men and Women outlined future directions for Swedish government policies. She stressed that equal opportunities must be addressed holistically and not in a vacuum. The Swedish government in the immediate future will emphasize the right to work, and the promotion of an economic policy and a labour market policy providing for the victims of unemployment. Secondly, Sweden is to re-examine the question of shorter working hours.<sup>86</sup> Approximately 45 per cent of Swedish women are employed part-time and it is necessary to adapt labour market policies to take full account of the special needs of these workers. The third major area for future policy initiatives was family policy, and in particular parental insurance and childcare. Adequate childcare is regarded as obviously necessary as universal compulsory schooling. The fourth sector for future policy development is that of immigrant women, who tend to be segregated in different areas of the job market and who have special language problems. Paradoxically, many immigrant women have been among the first to acquire "typical men's jobs" and thus to have been instrumental in breaking down sex barriers in working life. The Minister went on to deal with education, housing, family violence, the need for research, and the need for an adequate public transport policy.

The Swedish experience is alluring if only for the range and imagination of its initiatives. Policymakers can be tempted to try and draw directly on Sweden's experience. However, it must be borne in mind at all times that the Swedish labour market policy as a whole is without equal, and that in global terms it represents a fairly unique economy within a very unusual society. Any new Canadian policies must be similarly responsive to Canadian situations, problems, and traditions. Scandinavia is alluring to comparative labour lawyers, but ultimately offers us only ideas and experiments that we must

make our own, within our society and our limitations. Our policies cannot be fragmented. They must be developed within the context of more general economic and social policies. The challenge of equal opportunity in employment is the challenge of overall economic strategy, of industrial democracy, and above all of fundamental human rights.

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## NOTES

1. Clyde Summers, "American and European Labor Law: the Use and Usefulness of Foreign Experience" (1966), 16 *Buff. L.R.* 210-227.
2. Compare Otto Kahn-Freund, "Comparative Law as an Academic Subject" (1966), 82 *L.Q.R.* 40, and Otto Kahn-Freund, "On the Uses and Misuses of Comparative Law" in Otto Kahn-Freund, *Selected Writings*, London 1978 at p 294.
3. Clyde Summers, *op. cit.* at note 1, at p 217.
4. Only in the State of Victoria in Australia does the same legislative structure apply to discrimination against the handicapped, native peoples, visible minorities and women. In this, it perhaps resembles nothing more than the standard pattern of recent Canadian Human Rights legislation. See e.g., *Ontario Human Rights Code*, S.O. 1981, c. 53.
5. See generally Ronnie Steinberg Ratner, *Equal Employment Policy* (1979).
6. See Murray Edelman, *The Symbolic Uses of Politics*, Murray Edelman, *Politics as Symbolic Action*, Stuart Scheingold, *The Politics of Rights*.
7. The Mitterand Government has recently undertaken to modify the "loi du 11 Juillet 1975 relative a certaines discriminations fondees sur le sexe" to toughen it up and make it more workable.
8. Thilo Ramm, "Discrimination: International Development and Remarks of Legal Theory" in F. Schmidt, *Discrimination in Employment* (Stockholm, 1978) at p 523.
9. See Ratner, *op. cit.* at note 5, at p 420.
10. See Marion Jancic, "Diversifying Women's Employment: The Only Road to Genuine Equality of Opportunity", (1981) *International Labour Review* 149.
11. *Barley v. M.N.R.* [1980] 1 *CHRR* 193 at 209: "Resort can be had to international law and international obligations assumed by Canada, in interpreting the meaning of the Canadian Human Rights Act".
12. Thilo Ramm, "Discrimination: International Development and Remarks of Legal Theory" in F. Schmidt, *Discrimination in Employment*, (1978) at p 493.
13. A. Desjardins, "La mise en oeuvre au Canada des traites relatifs aux droits de la personne", (1981) 12 *Rev. Gen. de D.* 359-374; D. Lemieux and S. Levesque, "La 'Loi canadienne sur les droits de la personne': une Charte reconnue" (1982) 23 *C. de D.* 277-324; E.P. Mendes, "Interpreting the Canadian Charter of Rights and Freedoms: applying international and European jurisprudence on the law and practice of fundamental rights" (1982) 20 *Alta. L.R.* 383-453; John Claydon, "Application of International Human Rights Law by Canadian Courts" (1981) 30 *Buff. L.R.* 727-752.
14. Compare *Re Alberta Union of Provincial Employees et al and the Crown in Right of Alberta* (1980), 120 *D.L.R.* (3d) 590 (*Alta. Q.B.*).
15. Natalie K. Hevener, *International Law and the Status of Women* (1983) at p 110.
16. Remuneration is defined as including the ordinary basic or minimum wage or salary, and including any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker or arising out of the worker's employment.
17. See Article 3.
18. See Article 6.
19. "Special measures shall be taken to ensure equal remuneration for work of equal value for women also in occupations in which women predominate and to measure the relative value of their work with full regard to the qualities essential to performing the job. Special measures shall be taken to raise the level of women's wages as compared with men's and to eradicate the causes of lower average earnings for women possessing the same or similar qualifications for doing the same work or work of equal value. Special measures shall be taken, as necessary and appropriate, to ensure equality of treatment for workers employed regularly on a part-time basis, the majority of whom are women, particularly with respect to pro-rata fringe benefits".
20. Hevener, *International Law and the Status of Women* (1983) at 163.
21. Discrimination is "Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".
22. Though the Convention has come into force, Canada has not ratified it. It is supplemented by Recommendation 165 concerning Equal Opportunities and Equal Treatment for Men and Women Workers, Workers with Family Responsibilities.
23. Definitional problems abound in comparing programs for the disabled, they are comparatively insignificant, for example, when looking at women or visible minorities.
24. See, for example, the *British Disabled Persons (Employment) Act 1944* s. 16, Sch. 1 as amended by the *Armed Forces Act 1961*, s. 28, Sch. 5, Part 1. It should be noted, however, that the disability does not need to have occurred in, or as a result of, military service.
25. Norman Acton, "Employment of Disabled Persons: Where Are We Going?" (1981) *International Labour Review* p. 1.
26. Richard Grover and Francis Gladstone, *Disabled People—A Right to Work* (1981) at p. 6.
27. Defined by section 1(1) of the *Disabled Persons (Employment) Act 1944* as "a person who, on account of injury, disease or congenital deformity is substantially handicapped in obtaining or keeping employment, or in undertaking work on his own account of a kind which otherwise would be suited to his age, experience or qualifications".
28. "There was general agreement among disablement resettlement officers that the quality of workers on the registry has declined over the years". Joseph Stubbs, "The Quota System for the Employment of Disabled Persons" (1982), 43 *Rehabilitation Literature* (No. 5-6), p. 142.
29. The employment figures for the English equivalent of Crown corporations are, for registered disabled staff: British Aerospace, 1288 (1.8 per cent); British Airports Authority, 43 (0.6 per cent); British Airways, 357 (0.7 per cent); British Broadcasting Corporation, 151 (0.6 per cent); British Gas Corporation, 1296 (1.3 per cent); British National Oil Corporation, 2 (0.1 per cent); British Railways Board, 3926 (1.8 per cent); British Steel Corporation, 2027 (1.3 per cent); British Transport Docks Board, 169 (1.8 per cent); British Transport Hotels Limited, 140 (1.3 per cent); British Waterways Board, 47 (1.5 per cent); Cables and Wireless Limited, 16 (0.8 per cent); Civil Aviation Authority, 77 (1.0 per cent); Electricity Council, 13 (1.0 per cent); Independent Broadcasting Authority, 9 (0.7 per cent); National Coal Board, 3909 (1.3 per cent); Post Office Corporation, 6731 (1.6 per cent); U.K. Atomic Energy Authority, 182 (1.3 per cent).
30. See Acts of 31st March, 1919, 26th April, 1924, 14th May, 1930, 2nd August, 1949.
31. *Loi d'orientation sur l'aide aux personnes handicapées*.
32. The fines are currently set at around 18,000 francs (roughly \$3,500) a year per person under quota.
33. Commissions techniques d'orientation et de reclassement professionnel.
34. Aime Labregere, *Les personnes handicapées*, ch. 5 (Notes et études documentaires — la Documentation Française, 1981).
35. This too results from legislation pioneered during the Second World War. The 1947 Act is administered by the Ministry of Social Affairs through the National Employment Office and Regional Employment Centres.
36. See Act 13 respecting the social integration of disabled persons, 7 April, 1982, Title VII, s. 38.
37. Severely handicapped persons are defined as "any person who is physically, mentally or psychologically handicapped and whose handicap is such that his earning capacity is reduced, otherwise than merely temporarily, by at least 50%". See Th. Ramm, "Federal Republic of Germany" in *International Encyclopaedia for Labour Law and Industrial Relations* Vol 5 (1979) at pp. 144-145.
38. "International — The Disabled in Employment" (December, 1981) 95 *European Industrial Relations Review* 15, at 19.
39. A 1980 government survey reported that 2.4 per cent of Japanese adults were disabled.
40. Though they have not faced the scale of disabled ex-combatants that other European countries have this century.
41. "The individual disabled person shall have the opportunity, to the greatest degree possible, to establish the life situation which he would have had, had he not had his disability. To the extent to which this is possible measures and services are to be formulated and located in the individual's local environment, not connected to special institutions and institution placement. Discriminatory and segregating special arrangements must be done away with. Society's ordinary service bodies have full responsibility for the disabled. Special arrangements and specialized measures must be integrated into — not established beside — the general social apparatus". "The Disabled in Norway" (December 1982) *Royal Norwegian Ministry of Foreign Affairs U.D.A.* — 734/82.
42. *Swedish Programme of Action Concerning Disabled Persons* (1981) at p. 1.
43. *Swedish Code of Statutes SFS 1977: 1160* as amended by 1980: 245, 1980: 428, 1982: 674, consolidated as the *Swedish Work Environment Act and the Swedish Work Environment Ordinance* (January 1983).

44. Ch. 2, sec. 1, para. 2
45. Ch. 3, sec. 3, para. 2
46. SFS 1974: 12, see "Swedish Mass Dismissals Act protects Older Workers and Disabled" (1974) 12 *European Industrial Relations Review* 7-8.
47. All workplaces with more than 50 employees must have an adjustment group, which can also be established in small companies that operate over scattered regions.
48. The funding covers 100 per cent for state authorities, as well as comparable employers and regional social insurance offices. Non-profit organizations obtain 90 per cent coverage, while the rate is 75 per cent for municipalities, county councils, government owned corporations, as well as private firms during the first year of employment. However, this 75 per cent figure scales down to 50 per cent the second year and 25 per cent in the third and fourth years. Before the end of the fourth year the employment office must decide whether there is a need for a continued grant.
49. Compare the French Loi No. 75-534, June 13, 1975.
50. For further information concerning the subsidies see Chapter 8 "Supportive Measures which assist the individual in employment" in *Adapting Work Sites for People with Disabilities: Ideas from Sweden*, 1982.
51. The 1981-82 *Annual Report of the Swedish Communal Industries Group* reveals that occupationally handicapped persons found employment in the following schemes: The Swedish Communal Industries Group, 23,458; Wage Subsidized Employment, 33,802; Relief Work, 7,385; Labour Market Training, 8,505; Employability Assessment Institutes, 3,384.
52. For detailed discussion of labour force participation rates by country see Ronnie Steinberg Ratner "The Policy and Problem: Overview of Seven Countries" in Ratner (ed), *Equal Employment Policy* (1979), pp. 2-12.
53. See Organization for Economic Co-operation and Development, *The Role of Women in the Economy*, (1975), p. 108.
54. In a Survey in 1977 of nearly 300 job categories, 200 were overwhelmingly dominated by men, 70 by women and only in 10 per cent was there anything like a balanced division between the sexes, see Birgitta Wistrand, *Swedish Women on the Move*, (1981), p. 55.
55. See *Current Sweden*, "Figures on Men and Women in the Labour Market", (November, 1980), No. 260, p. 9.
56. There are two ways of looking at wage gaps. The first is to look at full-time, full-year employees and compare annual salary rates. The second is to compare hourly wages for industrial workers. Because in most of the countries under study, women tend to work less hours and be more highly represented in part-time employment, the comparison of hourly rates seems to be a more helpful measure.
57. See Nancy Smith Barrett, "Women in Industrial Society: An International Perspective", in Chapman (ed), *Economic Independence for Women*.
58. Ronnie Steinberg Ratner, *Equal Employment Policy* (1979) at p. 33.
59. *Ibid.*, at pp. 432-433.
60. See generally Ronnie Steinberg Ratner, "The Policy and Problem: Overview of Seven Countries", in Ratner (ed), *Equal Employment Policy*, pp. 41-43.
61. In France, the 1972 anti-racism legislation was extended in 1975 to cover sex. Sex discrimination constitutes a criminal offence in France. This gives the injured party a right to sue for damages, which may include compensation for moral loss. It should be noted that where a claim for damages is concerned, the prosecutor does not have the discretionary power he or she enjoys with respect to other criminal cases.
62. Folke Schmidt, "Discrimination Because of Sex" in Schmidt, *Discrimination in Employment*, (1978), at 158.
63. Cmd 5724, para. 20.
64. S. 1(1)(a). This happens when an employer or other person discriminates against a woman by treating her less favourably than a man on grounds of sex.
65. S. 1(1)(b). This is when "he applies to her a requirement ... which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it".
66. S. 7(2)(a).
67. S. 7(2)(f).
68. Act of August 4, 1978, Title V.
69. The Act applies to both public and private sectors.
70. This results from an inter-industry wide collective agreement issued by the National Labour Council on October 25, 1975.
71. *International Encyclopaedia for Labour Law and Industrial Relations*, ed. R. Blanpain, vol. 2 Chapter "Belgium" by R. Blanpain (1982).
72. The first reservation is under Article 11(2)(b) to introduce maternity leave with pay or with comparable social benefits on the basis that the introduction of paid maternity leave throughout the private sector would require unacceptably high outlays of funds. The second reservation is to reflect the present defence force practice of excluding women from active combat roles, though the defence force employment practices review is currently underway.
73. This is "a policy or practice which on the face of it appears to be neutral or non-discriminatory, by its operation, [but] results in discrimination against one particular group".
74. This is a specifically directive policy or action which treats one group less favourably than another.
75. *Affirmative Action for Women: A Policy Discussion Paper*, (2 vols., 1984).
76. "Discrimination is treatment differentiating between men and women because they are of different sex and includes treatment which in fact acts in such a manner that one sex is placed at unreasonable disadvantage as compared with the other."
77. "Ombud" is the Norwegian term.
78. See generally, *Norway Information*, "Equal Status Between Men and Women", (March 1983) and Act No. 45 of June 9, 1978 relating to equal status between the sexes.
79. See Hilda Scott, *Sweden's Right to be Human*, (1982), p. 3.
80. In part this is due to the rather unique extent to which the union policies are identical with those of the long-dominant Social Democratic Party. See Hilda Scott, *ibid.*, Chapter 5, "The Unions on the Equality Band Wagon".
81. For example, in 1961, the social partners agreed to require the elimination within five years of all contract provisions containing pay differentials between men and women engaged in the same work. The blue collar unions adopted a traditional wage policy of "solidarity" which for many years gave the lowest paid workers a higher percentage wage increment in every national contract. This resulted in wage differentials being significantly narrowed.
82. Berit Rolien, "Equality Between Men and Women in the Labour Market: The Swedish National Labour Market Board" in Ratner (ed), *Equal Employment Policy*, at p. 194.
83. See Margaret Fitch, "Women in Volvo", (1981) 1 *Equal Opportunities International* — No. 2, pp. 12-14.
84. Marion Jancic, "Diversifying Women's Employment: The Only Road to Genuine Equality of Opportunity", (1981) *International Labour Review* 149.
85. For a brief but helpful discussion of the work of the ombudsman, see Inga-Britt Tornell, "The Swedish Equal Opportunities Ombudsman at Work", (1982) 290 *Current Sweden*.
86. The European trade union movement appear to be most interested in the shortening of work hours. However, male union members want to shorten the working week. Female union members prefer to shorten the working day. The major objective set forth in the Swedish Government's manifesto is that of a six-hour working day for everyone. Ronnie Steinberg Ratner, "Equal Opportunity for Women — Summary of Themes and Issues" in Ratner (ed), *Equal Employment Policy*, at p. 428.





## THE STATUS OF WOMEN IN THE OECD COUNTRIES

Isabella Bakker

### Sommaire

Le document décrit de façon générale la situation économique des femmes au Canada par rapport à celles d'autres pays de l'Organisation de coopération et de développement économiques (OCDE). Sont étudiées les tendances du marché du travail, notamment l'emploi, le chômage, le cantonnement professionnel et les écarts salariaux, en plus de l'enseignement et de la formation, de la sécurité sociale, des impôts et des services offerts aux parents qui travaillent. Le nombre croissant des femmes qui travaillent hors du foyer est comparé à la division du travail par sexe à l'intérieur et à l'extérieur du marché du travail.

L'augmentation du nombre de femmes se joignant à la population active a été plus prononcée au Canada que dans d'autres pays industrialisés. Malgré cette augmentation, la plupart des travailleuses du Canada, voire de l'ensemble des pays de l'OCDE, sont concentrées dans le secteur des services. Les femmes constituent également une proportion démesurée de la main-d'œuvre à temps partiel. L'auteure examine la mesure selon laquelle les travailleuses à temps partiel sont sous-employées ou en chômage «camouflé». Le cantonnement professionnel par secteur d'activité et par profession est une des causes principales des salaires inférieurs que touchent les femmes. L'augmentation du nombre d'employées dans le secteur public et d'employées syndicalisées a des conséquences positives sur la situation économique des femmes.

L'enseignement et les programmes de formation contribuent énormément au décantonnement du marché du travail et à l'élimination des écarts salariaux. En général, la proportion de filles à l'école ne pose pas de problème en soi, seulement, elles suivent des programmes qui les préparent mal à un emploi.

La crainte que les systèmes de sécurité sociale et d'impôt actuels nuisent aux femmes a amené bien des pays à les réexaminer. Actuellement, ces systèmes évoluent: il y a des politiques qui visent l'égalité des femmes et des hommes, alors que d'autres renforcent les idées de dépendance des femmes et des droits tributaires.

Les difficultés qu'ont les parents qui travaillent à concilier leurs horaires de travail et le soin de leurs enfants sont considérables. Les services socio-économiques adoptés pour aider la population à fonder et à élever une famille varient d'un pays à l'autre. Il y en a qui ont formulé une politique sociale favorisant divers choix en ce qui concerne le partage des tâches fami-

### Summary

A general overview of the economic position of Canadian women compared to women in other Organization for Economic Co-operation and Development (OECD) countries is offered. The paper focuses on labour market trends such as employment, unemployment, segregation, and earnings differentials. Education and training, social security and taxation, and social infrastructure for working parents are also considered. Women's increasing participation in the formal economy is contrasted with the sexual division of labour inside and outside of the labour market.

Canada has experienced a more pronounced increase in the number of women participating in the formal labour market than a number of other industrialized nations. Despite this increase, the majority of female workers in Canada and the entire OECD region are concentrated in the service sector. Women also represent a disproportionate number of those workers engaged in part-time employment. The extent to which women are underemployed in part-time jobs or have "hidden" unemployment is considered. Labour market segregation by industry and occupation is a significant factor contributing to women's lower earnings. Greater public-sector employment for women and higher levels of unionization have a positive impact on women's economic position.

Education and training programs are of fundamental importance to desegregation of the labour market and elimination of earnings differentials. Overall, participation rates in the education system are not the problem *per se*; rather, the problem is with the lack of relevance of girls' education for employment.

Growing concern with the possible biases against women contained in existing social security and taxation systems has led to a re-evaluation of these systems in many countries. At present, social security and taxation systems are in a state of transition, with some policies based on equal treatment toward women and men while others reinforce notions of female dependency and derived rights.

The difficulties facing working parents in balancing work schedules and childcare needs are substantial. Social and economic infrastructures to meet the needs of childbearing and childrearing vary across countries, representing a continuum from those countries engaged in a social policy program directed towards an alternative and equal management of family and work needs, to those countries that have done virtually nothing in this area.

liales et le travail à l'extérieur, et d'autres qui n'ont pratiquement rien fait à cet égard.

Bien que les femmes des pays de l'OCDE aient réalisé des progrès considérables du point de vue économique, elles ont profité moins que les hommes de la croissance générale. Qui plus est, elles sont plus durement touchées par les crises économiques; en témoigne le fait qu'un nombre croissant de femmes vivent dans la pauvreté.

Although women in the OECD area have made significant inroads in the economic sphere, they have not shared the profits of growth in an equal fashion in comparison to men, and the burden of economic crisis weighs heavier on them, as can be witnessed by the increasing number of women joining the ranks of the poor.

## THE STATUS OF WOMEN IN THE OECD COUNTRIES

Isabella Bakker\*

### Introduction

A 1980 High Level Conference on the Employment of Women of the Organization for Economic Co-operation and Development member countries represented a firm commitment on the part of the ministers and delegates present, including Canada, to promote the integration of women into the economy according to a broad set of guidelines adopted by the OECD members.<sup>1</sup>

By way of a short summary, the policy aims set out in the 1980 Declaration were concerned with the following subjects:

- equal employment opportunities for full-time and part-time workers;
- equal pay for work of equal value;
- segregation in the labour market;
- employment in the public sector;
- higher unemployment rates for women;
- social infrastructure to support workers;
- education and training;
- social security and taxation;
- migrant women and women in minority ethnic groups.

A forthcoming OECD report<sup>2</sup> will review the impact of policy initiatives in these areas since the adoption of the Declaration in 1980. It will be based on surveys sent to the member countries, experts' papers, and the contribution of the national delegations to the OECD's Working Party on the Role of Women in the Economy.

What follows is a general overview of the economic position of Canadian women in comparison to women in other OECD countries. The various sections will focus on labour market trends in employment, unemployment, segregation, and earnings differentials, as well as on education and training, social security and taxation, and the availability of social infrastructure for working parents.

### 1. THE LABOUR MARKET IN THE OECD REGION

#### 1. Employment Trends of Female Workers

In most OECD countries, the post-World War II period has been characterized by a substantial increase in the number of women participating in the formal labour market.<sup>3</sup> In Canada, this change has been more pronounced than in a number

of industrialized nations. For example, in 1950 only one employed person in five was a woman, but in 1983 three in seven members of the workforce were women.<sup>4</sup>

In examining participation rates (defined here as the numbers in the total labour force divided by the numbers in the working age population) over the last decade, interesting changes can be discerned if the data is disaggregated by sex. While the male participation rate in the OECD area as a whole declined from 87.1 to 85.8 per cent in the period from 1975 to 1979, the female participation rate rose steadily from 49.3 to 52.9 per cent (Table 1). The decline in the male rate has continued since 1979 in most OECD countries, except for slight increases in Austria, Finland, Italy, Japan, and Norway. Despite some levelling off in the female participation rate since 1979, it has been on the increase in most of the OECD countries. In Canada, the female participation rate has been well above the total OECD average in the period from 1975 to 1982.

Since 1975, the participation rates of older workers (age 55 and over), both male and female, has declined steadily, this rate of decline having slowed down after 1979 in many countries. Labour force participation rates for youth, especially teenagers, have declined, with the rates for females being occasionally equal but usually substantially less than the rate for males.<sup>5</sup>

Participation behaviour can be linked to the rate of unemployment, levels of vacancies, discouraged and added workers effects, as well as longer term factors such as changes in demographic patterns, marriage and divorce patterns, inflationary pressures, and institutional interventions in the labour market such as government equal-opportunity policies. For women workers, structural changes in the OECD economies have also had a significant impact on their participation in the labour market. In the period 1975-79, the service sector was the major source of net job creation, and this trend has been even more pronounced since 1979.<sup>6</sup> By 1980, 60-85 per cent of working women in the OECD countries were concentrated in the service sector, with the exception of the southern European region, where the agricultural sector still accounts for a large share of the female labour force.<sup>7</sup>

While the private sector has expanded female employment opportunities, be it in a small range of occupations within the service sector, public sector employment growth has also been a significant contributor to the growth of female employment. A 1982 OECD study discerns several trends in female public sector employment. There is a positive correlation between the female-intensity of public sector employment and the size of the public sector, and a clear tendency

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**TABLE 1**  
**Male and Female Participation Rates, 1975-1982**

|                                    | Male |      |      |      |      | Female |      |      |      |      |
|------------------------------------|------|------|------|------|------|--------|------|------|------|------|
|                                    | 1975 | 1979 | 1980 | 1981 | 1982 | 1975   | 1979 | 1980 | 1981 | 1982 |
| Australia                          | 90.7 | 88.0 | 88.1 | 87.8 | 87.4 | 50.8   | 51.0 | 52.5 | 52.4 | 52.5 |
| Austria                            | 82.5 | 82.3 | 81.8 | 81.8 | 84.7 | 47.9   | 49.6 | 49.2 | 49.7 | 51.2 |
| Belgium                            | 83.9 | 81.2 | 80.2 | 79.7 | ..   | 44.0   | 47.5 | 48.0 | 48.7 | ..   |
| Canada                             | 86.2 | 86.4 | 86.4 | 86.4 | 84.9 | 50.0   | 55.6 | 57.3 | 58.9 | 59.0 |
| Denmark                            | 89.8 | 90.0 | ..   | 88.7 | ..   | 63.5   | 70.8 | ..   | 72.7 | ..   |
| Finland                            | 79.7 | 77.7 | 78.2 | 78.9 | 79.7 | 65.6   | 65.7 | 67.1 | 68.5 | 70.1 |
| France                             | 84.4 | 83.1 | 82.5 | 81.9 | 81.9 | 49.9   | 52.4 | 52.5 | 52.8 | 52.9 |
| Germany                            | 85.7 | 82.5 | 81.7 | 80.6 | 81.3 | 48.5   | 49.2 | 49.4 | 49.6 | 49.8 |
| Greece                             | 82.7 | 79.9 | 78.0 | 76.8 | 77.2 | 30.0   | 33.1 | 34.0 | 35.3 | 34.7 |
| Ireland                            | 89.2 | 88.0 | ..   | 87.5 | ..   | 34.0   | 34.5 | ..   | 35.7 | ..   |
| Italy                              | 84.2 | 82.7 | 82.9 | 83.2 | 83.1 | 34.6   | 38.8 | 39.8 | 40.5 | 40.7 |
| Japan                              | 89.7 | 89.3 | 89.1 | 89.2 | 89.3 | 51.7   | 54.7 | 54.9 | 55.3 | 55.0 |
| Netherlands                        | 83.3 | 78.5 | 78.3 | 77.9 | ..   | 32.0   | 34.5 | 35.7 | 36.8 | ..   |
| New Zealand                        | 88.6 | 87.3 | 86.4 | 85.7 | ..   | 41.1   | 45.0 | 45.6 | 45.8 | ..   |
| Norway                             | 85.9 | 87.0 | 87.6 | 87.7 | 87.5 | 53.3   | 61.7 | 63.2 | 64.2 | 65.4 |
| Portugal                           | 95.3 | 93.5 | 92.9 | 91.9 | ..   | 51.8   | 55.7 | 55.7 | 57.4 | ..   |
| Spain                              | 92.3 | 82.6 | 81.3 | 80.6 | 79.6 | 32.4   | 32.4 | 31.9 | 31.7 | 33.0 |
| Sweden                             | 89.2 | 87.9 | 87.8 | 86.5 | 84.7 | 67.6   | 72.9 | 74.1 | 75.3 | 74.6 |
| Switzerland                        | 97.2 | 93.3 | 93.5 | 93.2 | 91.8 | 49.5   | 49.2 | 49.2 | 50.2 | 49.8 |
| United Kingdom                     | 92.2 | 90.7 | 90.4 | 90.0 | 88.4 | 55.3   | 58.2 | 58.5 | 57.3 | 56.9 |
| United States                      | 85.4 | 85.7 | 85.4 | 85.2 | 84.8 | 53.2   | 58.9 | 59.7 | 60.7 | 61.5 |
| Seven major countries <sup>a</sup> | 86.9 | 86.2 | 85.9 | 85.6 | 85.2 | 50.5   | 54.4 | 55.0 | 55.5 | 55.9 |
| OECD Europe <sup>b</sup>           | 87.2 | 84.6 | 84.0 | 83.4 | 83.3 | 45.9   | 48.1 | 48.5 | 48.5 | 48.6 |
| Total OECD <sup>b</sup>            | 87.1 | 85.8 | 85.4 | 85.1 | 84.7 | 49.3   | 52.9 | 53.2 | 53.6 | 54.1 |

a) Canada, United States, Japan, France, Germany, Italy and the United Kingdom.  
b) Countries shown only.

Source: OECD, *Employment Outlook*, September 1983, Paris: 1983, p. 18.

for the public sector to become more female-intensive over time.<sup>8</sup> The OECD notes that in Canada, for the period 1966 to 1978, female employment in the public sector expanded at an annual rate of 5 per cent (compared to 4.3 per cent in the private sector), with females representing 40.1 per cent of public sector employment in 1978 as compared to 37.9 per cent of private sector employment.<sup>9</sup> The impact of this trend needs to be assessed in the context of the occupational distribution picture for women in this sector and in the light of a considerable slow-down in public sector growth due to budgetary restraints in many of the OECD countries.

Perhaps the most significant structural shift in the OECD area over the past two decades has been the decline in the average hours worked per person each year. This has manifested itself in the pronounced growth of part-time employment since 1973.<sup>10</sup> This holds important implications for women, as the number of jobs held by women on a part-time basis has been on the increase in every country. In several countries, namely Denmark, Norway, Sweden, and the Netherlands,

part-time employment accounts for more than 40 per cent of jobs held by women, as Table 2 points out.

Turning to the age-distribution of part-time workers in the OECD area, divergences between male and female workers are evident. For males in the European region, part-time work tends to be concentrated in the older age groups, while in North America and Australia there is a concentration of male part-time workers among the young. Female part-time workers on the other hand are concentrated in the prime age group (25-54 years of age). In Canada, the United States, and Australia, young females (under 25) account for 20-35 per cent of total female part-time employment.<sup>11</sup>

The OECD has found part-time employment in the aggregate to be more stable than full-time employment "in the sense that the overall number of part-time jobs has proved less responsive to cyclical fluctuations than the overall number of full-time jobs".<sup>12</sup> However, this need not imply that the average part-time worker has more stable employment prospects than a full-time worker, especially if part-time employ-

ment is divided into two elements: voluntary part-time employment and involuntary part-time employment. The OECD defines the latter in the following manner: "Involuntary part-time working occurs when a worker is forced to take a part-time job instead of a full-time job because of the difficulty in finding the latter (this definition thus excludes short-time working)".<sup>13</sup> Given this definition, the OECD has concluded that involuntary part-time work has risen for Canada and the United States since the mid-1970s.<sup>14</sup> A U.S. study indicates that in 1982 7.7 per cent of the female labour force was engaged in involuntary part-time work<sup>15</sup> and an Australia Office of the Status of Women report for the same year revealed that 21 per cent of the women working between 10 and 30 hours per week would have preferred working more hours.<sup>16</sup> The Economic Council of Canada has pointed out that in 1975 one woman in nine worked on a part-time basis because she could not find a full-time position. This situation changed dramatically during the 1981-82 recession, where one-quarter of the women working part-time would have preferred to be in a full-time job.<sup>17</sup> There exists a danger then that part-time employment in the OECD area will represent another form of labour market segregation and inequality as long as part-time jobs are considered to be a "niche" for

women workers. This general concern has been confirmed for the Canadian context by the Commission of Inquiry into Part-Time Work, which concludes that "...what the distribution of part-time workers across industries and occupations does show quite categorically is that part-time workers are markedly concentrated within a few industries, and that they have a limited range of occupations in comparison to the range of occupations of full-time workers".<sup>18</sup>

## 2. Unemployment Trends of Female Workers

The 1960s and 1970s witnessed a generally faster increase in female as compared to male unemployment. This trend has, however, not persisted since 1980, when male unemployment rose faster than female unemployment. The greater gap in female over male unemployment rates has narrowed from 1.8 percentage points in 1979, to 1.3 percentage points in 1981, and was further reduced to about .75 of a percentage point in 1982 (Table 3).

Conventional explanations for the narrowing of the unemployment rate gap along gender lines point to the decline in the goods producing sector (where many male workers are concentrated) as opposed to the service sector (where

**TABLE 2**  
**Overall Size and Structure of Part-Time Employment**

|                          | Ratio of part-time working |      |      |      |       |      | Women's share<br>in part-time<br>employment |      |
|--------------------------|----------------------------|------|------|------|-------|------|---------------------------------------------|------|
|                          | Both sexes                 |      | Men  |      | Women |      |                                             |      |
|                          | 1973                       | 1981 | 1973 | 1981 | 1973  | 1981 | 1973                                        | 1981 |
| Australia                | 11.4                       | 15.9 | 3.4  | 5.2  | 27.3  | 34.6 | 79.6                                        | 79.0 |
| Belgium                  | 2.8                        | 6.4  | 0.4  | 1.3  | 8.2   | 16.4 | 89.8                                        | 86.2 |
| Canada <sup>b</sup>      | 10.6                       | 13.5 | 5.1  | 6.8  | 20.3  | 31.8 | 69.5                                        | 72.0 |
| Denmark                  | 17.0                       | 20.8 | 1.9  | 3.0  | 40.3  | 43.6 | 93.4                                        | 92.0 |
| Finland <sup>c</sup>     | 3.9                        | 4.5  | 1.4  | 1.7  | 6.7   | 7.6  | 81.0                                        | 80.2 |
| France                   | 5.1                        | 7.4  | 1.4  | 1.9  | 11.2  | 15.9 | 82.1                                        | 84.6 |
| Germany                  | 7.7                        | 10.2 | 1.0  | 1.0  | 20.0  | 25.7 | 92.4                                        | 93.8 |
| Greece                   | ..                         | 2.1  | ..   | 1.1  | ..    | 4.3  | ..                                          | 63.0 |
| Ireland <sup>d</sup>     | 4.0                        | 3.1  | 1.8  | 1.3  | 10.1  | 8.0  | 67.5                                        | 68.6 |
| Italy                    | 3.9                        | 2.7  | 2.3  | 1.4  | 8.5   | 5.8  | 55.4                                        | 64.1 |
| Japan                    | 7.9                        | 10.0 | 4.8  | 4.9  | 17.3  | 19.6 | 60.9                                        | 67.3 |
| Luxembourg <sup>e</sup>  | 4.5                        | 5.8  | 1.0  | 1.0  | 13.9  | 17.1 | 83.3                                        | 87.5 |
| Netherlands <sup>e</sup> | 4.4                        | 19.4 | 1.1  | 8.4  | 15.5  | 45.2 | 80.4                                        | 67.6 |
| New Zealand              | 10.8                       | 13.9 | 4.7  | 5.0  | 22.0  | 27.4 | 71.3                                        | 78.7 |
| Norway <sup>b</sup>      | 23.5                       | 28.3 | 8.7  | 10.6 | 47.6  | 53.6 | 77.0                                        | 77.9 |
| Sweden                   | 18.0                       | 25.2 | 3.7  | 7.2  | 38.8  | 46.4 | 88.0                                        | 84.5 |
| United Kingdom           | 15.3                       | 15.4 | 1.8  | 1.4  | 38.3  | 37.1 | 92.1                                        | 94.3 |
| United States            | 13.9                       | 14.4 | 7.2  | 7.5  | 24.8  | 23.7 | 68.4                                        | 70.3 |

b) 1975 and 1981.

c) 1976 and 1981.

d) 1973 and 1979.

e) 1981 data are not comparable with 1973 data because of a change in the definition of part-time workers. For details see the Technical Annex.

Source: OECD, *Employment Outlook*, September 1983, Paris: 1983, p. 44.

**TABLE 3**  
**Unemployment Rates by Sex for Selected Years**

|                       | 1973 |        | 1975 |        | 1979 |        | 1981 |        | 1982 |        |
|-----------------------|------|--------|------|--------|------|--------|------|--------|------|--------|
|                       | Male | Female | Male | Female | Male | Female | Male | Female | Male | Female |
| Australia             | 1.6  | 3.6    | 3.7  | 7.0    | 5.0  | 8.0    | 4.7  | 7.4    | 6.2  | 8.4    |
| Austria               | 0.6  | 1.8    | 1.4  | 2.3    | 1.5  | 3.1    | 1.9  | 3.6    | 2.6  | 4.6    |
| Belgium               | 1.8  | 3.1    | 3.1  | 6.3    | 4.1  | 11.6   | 4.3  | 12.8   | ..   | ..     |
| Canada                | 4.9  | 6.7    | 6.1  | 8.1    | 6.6  | 8.7    | 7.0  | 8.3    | 11.0 | 10.8   |
| Finland               | 2.4  | 2.2    | 2.3  | 2.1    | 6.4  | 5.6    | 5.2  | 5.2    | 6.1  | 6.0    |
| France                | 1.5  | 4.6    | 2.8  | 6.3    | 4.0  | 8.9    | 5.0  | 10.9   | 5.6  | 11.7   |
| Germany               | 0.9  | 1.3    | 3.8  | 4.6    | 2.5  | 4.6    | 3.9  | 6.0    | 6.0  | 7.7    |
| Italy                 | 4.1  | 11.4   | 3.7  | 10.5   | 4.8  | 13.1   | 5.3  | 14.2   | 6.0  | 14.7   |
| Japan                 | 1.3  | 1.2    | 2.0  | 1.7    | 2.2  | 2.0    | 2.3  | 2.1    | 2.4  | 2.3    |
| New Zealand           | 0.1  | 0.3    | 0.2  | 0.3    | 1.7  | 2.3    | 3.2  | 4.6    | ..   | ..     |
| Norway                | 1.0  | 2.4    | 1.9  | 2.9    | 1.6  | 2.4    | 1.5  | 2.8    | 2.3  | 3.0    |
| Portugal              | ..   | ..     | 5.1  | 6.1    | 4.8  | 12.9   | 4.0  | 13.9   | ..   | ..     |
| Spain                 | 2.7  | 2.6    | 4.7  | 4.2    | 8.7  | 10.8   | 13.8 | 18.0   | 15.1 | 20.3   |
| Sweden                | 2.3  | 2.8    | 1.3  | 2.0    | 1.9  | 2.3    | 2.3  | 2.7    | 3.0  | 3.4    |
| Switzerland           | ..   | ..     | 0.4  | 0.2    | 0.3  | 0.5    | 0.2  | 0.2    | 0.4  | 0.4    |
| United Kingdom        | 3.0  | 1.0    | 4.4  | 1.4    | 5.5  | 3.3    | 10.9 | 6.0    | 12.7 | 7.1    |
| United States         | 4.0  | 6.0    | 7.6  | 9.3    | 5.0  | 6.8    | 7.2  | 7.9    | 9.6  | 9.4    |
| Seven major countries | 2.8  | 4.2    | 4.9  | 6.2    | 4.2  | 6.0    | 5.8  | 7.1    | 7.4  | 8.2    |

Source: OECD, *Employment Outlook: September 1983*, Paris: 1983, p. 88.

women are found, for the most part), and to a slowing down in the rate of growth of the female labour force since 1979.<sup>19</sup> Women's withdrawal from the labour market or a delay in re-entering the workforce given the lack of available work may be an alternative explanation for the narrowing of the unemployment rate differential. For example, March, 1983, figures for Australia indicate that if unemployment rate estimates included recorded discouraged workers together with those people not in the labour force, the male unemployment rate would have increased from 9.9 per cent to 12.8 per cent and the female unemployment rate from 11.25 per cent to 26.7 per cent.<sup>20</sup> This case and the example of some countries where married women do not register as unemployed because of the restricted coverage of unemployment and related benefits (for example, the United Kingdom and Australia) seem to acknowledge a tendency for unemployed women, rather than men, not to be counted in the unemployment statistics. Along with undercounting, a larger proportion of Canadian women are unemployed today as compared to 20 years ago. Combining this trend with the growth of part-time employment, the Economic Council of Canada estimates that there has been, in the last decade alone, an average decline of 15 per cent in the annual number of hours worked by women.<sup>21</sup>

A discussion of narrowing unemployment rate differentials along gender lines should not lose sight of the fact that, in the seven major OECD countries, women's unemployment rates have been consistently higher than those of their male

counterparts for the period 1973-1982. This situation is also reflected in the Canadian case except for 1982, where female rates of unemployment were slightly lower than male unemployment rates. The extent to which women are more likely to drop out of the labour force when unemployed or are underemployed in part-time jobs also needs to be taken into account.

Turning to the length of time workers remain unemployed, there has been a marked tendency since 1973 for the proportion of women in long-term unemployment (12 months or more) to rise, and this is only partly due to the rise in female participation rates. The OECD *Employment Outlook* indicates a higher incidence of long-term unemployment among older people and among those persons with below-average, unmarketable skills and health problems.<sup>22</sup>

### 3. Labour Market Segregation

Where women work and how much they earn are intimately linked. This holds true in Canada as well as in all of the OECD industrialized nations. The OECD (1984) points out that women's concentration in the low-wage occupations is the primary factor that explains their low wages.<sup>23</sup> Earnings differentials, then, are a very real manifestation of the discriminatory and structural barriers that women face in the labour market.

A 1980 OECD report on women and employment revealed that, for the period 1968-1977, the gap between men's and



women's pay had closed somewhat but that women had nowhere reached near parity with men's earnings.<sup>24</sup> Table 4 lists 19 countries and trends in the relationship between women's and men's average earnings. The report warns that these ratios of women's to men's earnings should not be used as a vehicle for making across-country comparisons, given the different statistical bases used in each country to evaluate earnings. (Statistics vary according to periods of wage payment, full- or part-time status, occupation, and other human capital variables.) Rather, the table is useful in pointing out the direction and level of overall change within each country. No matter, since Canada is the only country of the 19 where the earnings situation for women actually worsened. Two countries, the United States and France, showed no change in gains for women, and all of the others experienced a small or substantial improvement.

While many of these differences can be accounted for by human capital factors, such as age and education, special studies in a variety of countries have found residual differences that were thought to be the result of discrimination. According to the OECD (1980), "This interpretation is consistent with the findings that the earnings of men who work in female-dominated segments of the labour market tend to be lower than the average for all men".<sup>25</sup>

A 1984 update of the earlier OECD study concludes that women, on average, still earn from 20-40 per cent less than men.<sup>26</sup> Differentials do vary across countries, depending on the type of employment, the industrial sector, and the occupation. Nevertheless, the earnings differentials between women and men do remain substantial. In Canada, female hourly earnings for all activities amount to about 75 per cent of male hourly earnings, according to OECD estimates. However, for many occupations the disparity in earnings is even larger, and an overall difference of 25 per cent in the earnings between women and men is still a very significant gap. Furthermore, the average annual earnings of women (full- and part-time) were 53.2 per cent of male average annual earnings in 1981. In Sweden, the country with the smallest disparity in male-female earnings, female hourly earnings amount to 90 per cent of male hourly earnings, with the difference almost entirely accounted for by worker characteristics such as age and length of experience.<sup>27</sup>

Despite the inclusion of the equal pay for work of equal value principle in Canada's Human Rights Act of 1977 and in the Canada Labour Code, at the present time the legislation only covers about 10 per cent of the labour force.<sup>28</sup> The OECD study notes that progress toward the adoption of an equal pay for work of equal value approach has been uneven despite ILO Convention 100 of 1951, which deals with this question. An "ad hoc" Working Group on equal pay and job classification, established by the Commission of European Countries in 1979, singled out post classification and job evaluation systems as the principal sources of existing discrimination.<sup>29</sup>

Leaving aside institutional factors, several general conclusions of the OECD (1984) report can be briefly mentioned. In comparing differences in hourly, weekly, monthly, or yearly earnings, women's pay disadvantage tends to increase along with the time unit under consideration. The OECD *Employment Outlook* (1983) concludes "...that the hourly earnings of part-time manual workers are on average lower than those of

**TABLE 4**  
**Average Female Earnings as a per cent of**  
**Average Male Earnings in 19 OECD Countries,**  
**1968 and 1977**

|                | 1968      | 1977      |
|----------------|-----------|-----------|
| Australia      | .70(1972) | .82       |
| Austria        | .67(1960) | .74       |
| Belgium        | .67       | .70       |
| Canada         | .54(1961) | .50(1971) |
| Denmark        | .74       | .85       |
| France         | .86(1972) | .86       |
| Germany        | .69       | .73       |
| Greece         | .68       | .70       |
| Ireland        | .55       | .61(1973) |
| Japan          | .43(1960) | .56(1975) |
| Luxembourg     | .57       | .65       |
| Netherlands    | .74       | .81       |
| New Zealand    | .70(1972) | .79       |
| Norway         | .75       | .80       |
| Portugal       | .64(1974) | .73       |
| Sweden         | .78       | .87       |
| Switzerland    | .64       | .68       |
| United Kingdom | .60       | .72       |
| United States  | .66(1973) | .66       |

Note: Data for Belgium, Denmark, France, Germany, Greece, Ireland, Luxembourg, Netherlands, Switzerland and United Kingdom are based on average hourly wages in non-agricultural industries, from Table 16, 1978 *Yearbook of Labour Statistics*, ILO, and for Norway and Sweden Table 17, same *Yearbook*, hourly wages in manufacturing. Data for United States are average full-time, hourly estimates; for Canada, fulltime earnings. Data from National Reports are hourly wages for New Zealand, weekly for Australia monthly for Japan and Portugal, and annual for Austria.

Source: OECD, *Women and Employment: Policies for Equal Opportunities*, Paris: 1980, p. 32.

full-time manual workers in all ten countries with the sole exception of Australia".<sup>30</sup> This finding is hardly surprising, given that more women than men are employed on a part-time basis and that male workers may have greater access to working overtime than women. This conclusion needs, however, to be evaluated on a sector-by-sector basis; the OECD report (1984) notes that in retail trade, for example, part-time female workers often outearn their male counterparts. It was also concluded that pay tends to increase with age but women's pay tends to increase much less than that of men.<sup>31</sup>

Studies that have assessed returns on experience in Canada and the United States have found these to be lower for women as opposed to men.<sup>32</sup> This has led to a more intense examination, on the part of researchers, of occupational and industrial segregation as the significant institutional features of the labour market that hinder equality. In 1980, the OECD attempted for the first time to measure international differences in female segregation based on the sex distribution of employment by International Standard Industrial Classification (ISIC) category of activity, by branch of manufacturing,

and by occupation. Segregation was defined "as a difference between the female share of a category and the female share of total employment, or, equivalently, as a difference between the percentages of male and female labour forces in any category" (OECD, *op.cit.*, p. 39). The countries involved were Australia, Austria, Belgium, Canada, Finland, France, Germany, Greece, Ireland, Italy, Japan, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom, and the United States.

#### a) Segregation by Branch of Activity

The findings indicate that women are over-represented in the service categories of trade, finance, and community and personal services in most countries and under-represented in mining, construction, transport, manufacturing, and the water, gas, and energy sectors. In Canada, female representation in manufacturing and professional and technical activities declined in the period from 1971 to 1978, thus indicating that the degree of segregation has increased.<sup>33</sup> The OECD notes that about 20 per cent of employed women work in manufacturing; however, they are distributed very unevenly among the different branches. Nevertheless, the distribution is very similar in all countries. Women are over-represented, relative to their share of total manufacturing employment, in the food industry (except in New Zealand), the textile industry, and in the unclassified group of "other manufacturing". In wood products (except in Japan), mineral products, and in the metal and machinery industries women are relatively under-represented. The OECD points out that in Canada the degree of under-representation in the wood and wood product industries is increasing.<sup>34</sup>

#### b) Segregation by Occupation

As data on industry order or sector are more easily available in most countries rather than data classified by occupation, less emphasis is placed on the latter. However, as the OECD notes:

*... the distribution of persons between industries is partly, if not mainly, a reflection of the industrial distribution of occupations. Some occupations (for example nurses, farmers or miners) are concentrated in particular industries while others (for example secretaries, computer staff or electricians) are spread across all industries. This means that if the industrial segregation of the sexes is falling, it may be the result of a relative shift towards "female" occupations in that industry rather than a movement of women into jobs previously done only by men.*<sup>35</sup>

The study found that women are most under-represented in administrative and managerial occupations in all countries, although there has been an increase in the representation of women in this group in Canada and several other OECD nations. Women are also under-represented in the group of production and related workers, with male concentration typically accounting for 30 to 40 per cent of the labour force. The greatest variation across countries is for women's representation in agriculture, animal husbandry, and in the forestry, fishing, and hunting occupations.

Women are over-represented in all countries in the clerical and service occupations. In the latter, Canada has experienced small increases in concentration along with Japan and the United States.

#### c) Indexes of Segregation

In order to make comparisons between countries or between different years for one country, the OECD developed an "index of segregation" that is "a measure of the extent to which the female share of an 'average' occupation or industry differs from the actual female share of the total labour force."<sup>36</sup> This differs from the more commonly used dissimilarity index, which relates women's share of each employment category to the share of men in that category as opposed to the total numbers employed in that category. The value of this index is 0 with no segregation and 1 if there is a situation of total segregation. Table 5 shows the OECD (1980) index calculated for all of the three categories—by industry, manufacturing class, and occupation. Because women tend to be concentrated in a small range of occupations within different industries, the index of occupational segregation is higher than the index of industrial segregation for all of the countries surveyed.

Table 5 reveals Japan to have the lowest indexes of segregation based on both industrial and occupational categories. The study suggests that this may reflect high levels of concentration relatively evenly spread across industries and occupations, although not across the manufacturing industries.<sup>37</sup> Norway, Sweden, and Belgium exhibit the highest levels of industrial segregation. Australia followed by Norway and New Zealand have the highest index of occupational segregation (calculated for two years). With the exception of Germany, occupational segregation has declined, at least at this level of occupational classification.

An update of this study draws several conclusions from data using both the OECD (1980) index and the dissimilarity index. The data still reveal a high degree of occupational and industrial segregation along male-female lines in all countries. The degree of segregation continues to vary from country to country, with Canada remaining in the centre of the two extremes. The degree of segregation remains higher according to broad occupational groupings rather than industrial sectors. The conclusion of the 1980 Report is upheld: women tend to be concentrated in the clerical and service occupations while men are concentrated in the production and transport occupations.<sup>38</sup> Canada does not offer an exception to this norm, with 46.4 per cent of all female workers being concentrated in only 26 detailed categories in 1971.<sup>39</sup> There have not been substantive improvements for women since that time.

It is ironic that those countries with the highest levels of female participation (for example, Sweden) tend to have a relatively high proportion of employment in the service sector and in part-time jobs and consequently tend to exhibit a relatively high level of occupational segregation. Such trends are reinforced by the increasing growth of the service sector and of part-time employment. With continuing levels of high unemployment being forecast for the entire OECD, female workers will be increasingly pressured to accept such jobs unless special efforts are made to increase their employment opportunities. However, the long-term decline and cyclical sensitivity of employment in many areas of the manufacturing sector means that desegregation of the labour market will need to focus on the expanding areas of the economy. Women's insertion into high-level positions in occupations or sectors where a large number of women are already working

**TABLE 5**  
**Indexes<sup>(1)</sup> of Sex Segregation**  
**for Selected OECD Countries and Years<sup>(2)</sup>**

| SEX SEGREGATION BY OCCUPATIONS <sup>(2)</sup>    | Year | Index | Year | Index |
|--------------------------------------------------|------|-------|------|-------|
| Australia                                        | 1973 | 63.5  | 1977 | 63.0  |
| Belgium                                          | 1970 | 56.2  | 1977 | 54.6  |
| Canada                                           | 1971 | 55.8  | 1978 | 52.9  |
| Finland                                          | 1975 | 39.5  | 1976 | 36.7  |
| France                                           | 1968 | 50.9  | 1975 | 48.3  |
| Germany                                          | 1970 | 44.6  | 1978 | 45.7  |
| Japan                                            | 1970 | 29.8  | 1977 | 29.2  |
| New Zealand                                      | 1971 | 60.6  | 1976 | 56.9  |
| Norway                                           | 1973 | 61.3  | 1977 | 58.2  |
| Spain                                            | 1970 | 55.6  | 1976 | 40.8  |
| Sweden                                           | 1970 | 51.6  | 1977 | 50.4  |
| United States                                    | 1970 | 51.4  | 1977 | 51.1  |
| SEX SEGREGATION BY INDUSTRIES                    | Year | Index | Year | Index |
| Australia                                        | 1967 | 51.8  | 1977 | 42.3  |
| Austria                                          | 1973 | 37.1  | 1977 | 36.6  |
| Belgium                                          | 1967 | 44.8  | 1977 | 45.7  |
| Canada                                           | 1967 | 49.7  | 1977 | 39.0  |
| Denmark                                          | 1970 | 45.6  | 1977 | 40.1  |
| Finland                                          | 1967 | 38.9  | 1977 | 34.1  |
| Germany                                          | 1967 | 35.1  | 1977 | 35.5  |
| Japan                                            | 1967 | 22.1  | 1977 | 23.4  |
| Norway                                           | 1967 | 58.4  | 1977 | 47.0  |
| Sweden                                           | 1970 | 50.5  | 1977 | 45.1  |
| United Kingdom                                   | 1967 | 39.6  | 1977 | 40.9  |
| United States                                    | 1973 | 34.6  | 1977 | 33.1  |
| SEX SEGREGATION IN SUB-DIVISION OF MANUFACTURING | Year | Index | Year | Index |
| Canada                                           | 1975 | 41.8  | 1978 | 42.8  |
| Finland                                          | 1973 | 40.5  | 1977 | 38.4  |
| Germany                                          | 1973 | 32.5  | 1977 | 33.0  |
| Japan                                            | 1973 | 27.9  | 1978 | 38.1  |
| New Zealand                                      | 1973 | 53.8  | 1979 | 47.7  |
| Netherlands                                      | 1973 | 48.5  | 1977 | 44.7  |
| Norway                                           | 1973 | 49.5  | 1977 | 55.0  |
| Portugal                                         | 1976 | 43.0  | 1977 | 44.5  |
| Sweden                                           | 1973 | 43.0  | 1977 | 33.8  |
| United Kingdom                                   | 1973 | 35.2  | 1977 | 36.5  |
| United States                                    | 1973 | 35.1  | 1978 | 32.7  |

1) *Indexes 1st year*: sum of absolute differences from one of the coefficients of female representation in each category (in the 1st year) weighted by the percentages of total employment in the second year in the corresponding categories.

*Indexes 2nd year*: sum of absolute differences from one of the coefficients of female representation in each category (in the second year) weighted by the percentages of total employment in the second year in the corresponding categories.

2) For occupations we have excluded the X category ("workers not classifiable by occupation") from the calculation of the index.

Source: OECD, 1980, *op. cit.*, p. 45.

may be one focus for employment policy. In addition, newly developing occupations (that are not yet encumbered by sex-stereotypes) resulting from technological changes may be an option for some women. Greater public-sector employment and unionization are additional factors that can improve women's economic position.<sup>40</sup>

Ultimately, education and training programs are of fundamental importance in pursuing the dual goals of desegregation of the labour market and elimination of earnings differentials.

## II. EDUCATION AND TRAINING

Turning to the supply side of the labour market, the development of qualifications and marketable skills for female workers is a fundamental and necessary task, although it is not sufficient in-and-of itself. The OECD (1979) points out: "The fact that better educated women tend to have a higher labour force participation rate than those with less education may reflect their ability to locate and retain desirable jobs which are monetarily and psychologically rewarding as well as being relatively stable".<sup>41</sup>

Generally, the 1979 Report notes that participation rates are not a problem *per se*, since the gap between young men and women has closed significantly over the last decade. This, and the following trends, have been reconfirmed in an update of the international education situation in the 1984 OECD study.<sup>42</sup> Girls seem to be evenly or over-represented in the general branches and institutions but lagging behind in the vocational area. In post-secondary institutions, young women make up about half or more of the students and trainees. In Canada, their post-secondary participation has increased moderately over the last few years (at about 1 per cent per annum) and is currently close to the 50 per cent mark.

Rather than participation rates, the problem appears to lie with the lack of relevance of girl's education for employment. This indicates a difference of curricula choices, and these divisions do continue from early schooling through to university and adult education. Fewer girls and women are in mathematics, the physical sciences, and technical subjects. The tendency for them to be concentrated in the humanities and the social sciences continues. These patterns are duplicated by adult women.

Increasingly, countries are pinpointing the crucial role that teachers can play in perpetuating or reversing this process. Sex-typing on the part of the teacher can have a strong impact on curricula and career choices. On the other hand, the teacher's presentation of alternative role models can act as an impetus to reverse female educational disadvantages.

Policymakers in the OECD area have intervened in this situation, targetting three broad groups of women: those women already in the labour force who can be moved into different areas of work; older women not currently in the labour force who can be encouraged and trained to enter employment in non-traditional sectors; and younger women who can be encouraged to pursue training and entrance into non-traditional jobs.<sup>43</sup>

Many OECD countries have set up specific programs to assist women to train for traditionally "male" occupations. However, results vary a great deal according to the size and scope of the programs. Finally, the attitudes of employers



present continuing barriers, as do the attitudes of the women themselves. Women's entry into non-traditional occupations is a difficult process to sustain without sufficient support mechanisms after training for the women themselves.

A program initiated in 1976 in the Federal Republic of Germany gave support to a series of pilot projects providing training for girls in non-traditional trades. Although the project is relatively small, the proportion of girls among all trainees in some typically male branches rose steadily. This program complements Germany's widely developed apprenticeship system, where in recent years the female proportion of apprentices has been between 35 and 40 per cent. In France, prefects at the regional level have set up permanent working parties to facilitate women's access to all types of employment and to set aside a significant proportion of the vocational training grant to finance programs that will assist women to enter "male" trades.

A report by the Office of Status of Women in Australia points out that, despite young women's higher unemployment levels as compared to young men, they benefit less from training programs and are under-represented in those courses that would assist them in a diversification of career choices. Women are also less likely to know about training programs, or to be referred to job vacancies in predominantly male areas of employment.<sup>45</sup>

These specific examples help to underline a general conclusion for the OECD area: girls and young women are no longer plagued by the problem of under-participation in post-compulsory education but are faced with problems concerning the type of education that they receive. Graduating with an increasingly limited range of employable skills, they are confined to increasingly competitive areas in the labour market.

### III. TOWARDS EQUITY IN SOCIAL SECURITY AND TAXATION SYSTEMS

Within the OECD countries in recent years there has been a growing concern about the social security and income taxation systems' possible biases, both overt and discreet, against women. Part and parcel of such concerns was the realization that although certain policies might appear to be neutral in principle, in reality certain disadvantages for women might ensue. The recognition that income transfer and taxation measures might play a significant role at certain points over an individual's life cycle and strongly influence their behaviour in other areas—e.g., labour force participation—has led to an increasingly intense re-evaluation of these systems.<sup>46</sup>

The OECD points out three main factors that may put women at a disadvantage in the social security system: interruption of employment; change in marital status; and inequality of employment and earnings differentials between men and women.<sup>47</sup> All of these factors contribute to problems when the social security system is based on earnings, given women's lower wages and lower life-time earnings, as well as the career interruptions they make due to the unequal family division of labour.<sup>48</sup>

The fact that many of the main features of the social security and taxation systems of the OECD countries were developed in the post-war period, when different social and eco-

nomic circumstances prevailed, implies that different objectives now need to be met. For example, much of social security and tax policy is based on the notion of a one-earner family, with the husband responsible for the economic well-being of his wife (who is assumed to have no attachment to the labour market) and family. There is also an implicit assumption that a husband and wife will pool their income and share the benefits of that income. However, if the starting point for policy in this area were that financial resources are not necessarily pooled or shared in all households, new policy implications would ensue.<sup>49</sup> The appropriate income unit for social policy is a critical issue, as there may be an inadequate redistribution of income in some families that would lead to an underestimation of the figures describing the number of people living in poverty, if the estimates were based on the family as the income unit.<sup>50</sup> In Australia, it has been recommended that "...the social security payment structure, if it is to assist in the alleviation of poverty, should be rationalized so that in the long term, recipients of pensions and benefits (including children as recipients of family allowances) could be treated as individuals in their own right not just for entitlement to pension or benefit but for the purposes of determining the rate of pension or benefit and in applying the income test".<sup>51</sup>

At the present time, social security and taxation systems are in a state of transition, with some policies based on equal roles for men and women while others reinforce notions of female dependency and derived rights. OECD member countries have in recent years drifted away from compulsory joint taxation to individual taxation for married couples. A 1977 OECD report indicates that a desire to encourage married women to participate in the workforce was a major objective of this trend.<sup>52</sup> It appears that the long-range policy goals in this area should be clearly based on notions of equality of opportunity. However, very few countries as yet have concentrated on improving existing measures based on such long-term objectives.

### IV. SOCIAL INFRASTRUCTURE FOR WORKING PARENTS

At the present time, difficulties exist for working parents who face the conflicting demands of rigid work schedules and family responsibilities. The inability of policymakers and others to effectively address the inequitable sexual division of labour has manifested itself to some extent in women's disproportionate concentration in part-time jobs and their intensified double burden of work in the labour market and at home. Social and economic infrastructures to meet the needs of childbearing and childrearing vary across countries, representing a continuum from those countries engaged in a social policy program directed towards an alternative and equal management of family and work roles, to those countries that have virtually done nothing in this area.<sup>53</sup>

The 1980 OECD Declaration called on member countries to take action to facilitate a reconciliation of work and family responsibilities that would be consistent with the goal of equal opportunities. They were asked:

*...to encourage the development, in co-operation with employers and unions, of more flexible working-time arrangements (e.g., part-time, flexi-time) on an optional basis, in order to achieve the more efficient*

*functioning of labour markets and provide a wider range of employment choices to women and men; special consideration should be given to workers, both men and women, with responsibilities for children; ...*

*To guarantee pregnant women and women returning from maternity leave protection from dismissal and the right to return to work without loss of earned benefits...*<sup>54</sup>

A six-country study conducted by Kamerman and Kahn focuses on differing policy responses to the situation of working parents. France, the Federal Republic of Germany, the German Democratic Republic, Hungary, Sweden, and the United States are considered because of their relatively high levels of industrialization, their high rate of female labour force participation, and the distinctive contrasts they appear to offer in regard to available policy options. An important question to consider in the Canadian as well as the international context is whether income support to families with dependent children is provided in such a way as to encourage the mother to devote herself full-time to childcare rather than labour market activity.

Compensation for income loss and employment protection due to childbirth have become an urgent consideration in all European and other OECD countries. Maternity leave with protection of employment exists as an entrenched right in all of the European OECD member countries.<sup>55</sup> New Zealand, since 1981, has had a statutory period of six months' unpaid leave and, while there is no maternity cash benefit, there are such benefits for pregnant women and mothers without support. Australia and the United States have neither a general maternity leave scheme nor a general scheme of maternity benefits; there is some paid leave available to Australian government employees, and benefits are available in some U.S. states.<sup>56</sup> In most OECD countries the duration of compensated leave is between 12 and 18 weeks, though in Finland the maximum duration is 258 working days, while in Sweden it is 360 days. Parental leave, a recognition that fathers should be involved in the childrearing process as well, exists only in a few countries. The system is in its most developed stage in Sweden, and more minimal acknowledgements of parental leave also exist in Norway and the Federal Republic of Germany. Unpaid parental leave exists in Finland, in Spain since 1980, in France since 1977, and is under discussion in Austria, Belgium, and the Netherlands.

The state of institutional childcare varies a great deal across countries. The GDR represents the example, in the Kamerman and Kahn study, of a country that supports organized, out-of-home care for very young children. In 1977, more than 48 per cent of children under age three were in daycare centres, and this coverage rate reaches 60 per cent if children under 20 weeks of age (whose mothers are covered by paid maternity leave) are included.<sup>57</sup>

The FRG, which began at the same point as the GDR, provides very limited organized childcare for children under three years of age. Instead, there is support for a "mother's wage" that would encourage women to remain at home to care for children.

Hungary provides a generous cash allowance to women who have at least been in the workforce briefly, and this

allows them to remain home until their child reaches the age of three.

France represents a mixed picture, with official policy supporting both the right for women to stay in the labour force or to remain at home, with a minimum of economic hardship. The focus is on low-income mothers to have the same option as middle-income mothers, and France has in fact the greatest number of very young children of any Western country in subsidized, low-cost, licenced family or centre-based care.

Sweden has focused on the expansion of daycare centres as a means to maximize women's equality and is engaged in a policy to facilitate increased care of children by both parents through such proposals as a shortening of the workday to six hours for the parents of young children.

The United States, despite its increasing female rates of participation and growing incidence of single-parent, female-headed families, has no explicit childcare policy, especially for families with young children.<sup>58</sup> There is also no policy of family income supplementation, except the minor provisions of food subsidies and an earned income tax credit. As Kamerman and Kahn note, "There is no acknowledgement in the U.S. policy of childrearing as contributing to the continuity and betterment of society generally, and therefore, no interest in subsidizing in any way the cost of childrearing".<sup>60</sup>

Canada's involvement in this area, through the Canada Assistance Plan, is based on a 1966 definition of user need. With large increases in labour force participation for all women, and a particularly dramatic rise in participation for women with dependants, current provisions for childcare are inadequate and need to be reviewed.

## Conclusion

Canadian women, like most women in the OECD area, have made gains in the economic sphere in the last decade. However, their participation rates are now levelling off, partly, perhaps, due to the current economic crisis. With the disappearance of male jobs in the manufacturing sector, there are now indications that men are starting to compete with women for jobs that have been, up to now, considered traditionally female. The threat of job loss through technological change is an additional factor contributing to the heightened economic insecurity of women. Continued segregation and substantial gaps between male and female earnings characterize the entire OECD region. That pressures on women's domestic labour are increasing does not lead to an optimistic outlook concerning the further breakdown of the sexual division of labour.

The increasing incidence of single-parent families—now one out of six families with children and predominantly headed by women—the economic position of native women, and the disproportionate number of elderly women that are poor are all glaring examples that women have not shared equally in the economic development process.

In short, fundamental changes in the economy and in the domestic sphere are required if women are to become equal economic and social partners and the division of labour by sex is to be abolished.

## NOTES

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3. OECD, 1980, *op cit.*, p. 21.
4. Economic Council of Canada, *On the Mend: Twentieth Annual Review 1983* (Ottawa: 1983), p. 81.
5. OECD, *Employment Outlook: September 1983* (Paris: 1983) See Chapter VI.
6. *Ibid.*, p. 21.
7. Liba Paukert, "Personal preference, social change or economic necessity? Why women work", *Labour and Society* (Vol. 7, No. 4, October-December, 1982, Geneva).
8. OECD, *Employment in the Public Sector* (Paris: 1982), p. 29.
9. *Ibid.*, p. 31.
10. OECD, 1983, *op cit.*, p. 43.
11. *Ibid.*, p. 50.
12. *Ibid.*, p. 45.
13. *Idem.*
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31. OECD, 1985, *op cit.*, Chapter III.
32. Donald J. Treiman and Heidi Hartmann, *Women, Work and Wages: Equal Pay for Jobs of Equal Value* (Washington D.C., National Academy Press, 1981) See Chapter 3.
33. OECD, 1980, *op cit.*, p. 80.
34. *Ibid.*, p. 41.
35. *Ibid.*, p. 42.
36. *Ibid.*, p. 44.
37. *Ibid.*, p. 46.
38. OECD, 1985, *op cit.*, Chapter III.
39. Michael D. Ornstein, *Gender Wage Differentials in Canada: A Review of Previous Research and Theoretical Frameworks* (Women's Bureau, Labour Canada, 1982), p. 13.
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41. OECD, 1979, *op cit.*, p. 43.
42. OECD, 1985, *op cit.*, Chapter V, "The Position of Girls and Women in Education Systems of OECD Countries".
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44. Marion Janjic, "Diversifying Women's Employment: the Only Road to Genuine Equality of Opportunity" (Geneva: International Labour Organization, 1981).
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46. See, for example, *Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security, 79/7/EEC* (Brussels: EEC, 1979).
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## APPENDIX

Declaration on Policies for  
the Employment of Women

The High Level Conference on the Employment of Women of OECD Member countries

CONSIDERING that men and women, as equal members of society, should have equal opportunities for paid employment, independently of the rate of economic growth and conditions in the labour market;

CONSIDERING that Member governments have a continuing commitment to provide equality of employment opportunity and pay for women and men;

CONSIDERING that the responsibilities of men and women for the upbringing of children are dependent not only on social and educational policies but on their capacity to provide income through employment;

CONSIDERING that men and women have the joint responsibility for the upbringing and care of children;

CONSIDERING that the participation of women in the labour market has risen and is likely to continue to rise in most Member countries, and has made and will make an essential contribution to economic and social developments;

CONSIDERING that constraints on economic growth in the medium term will mean a challenge for governments to improve their policies in order to meet the aspirations of men and women for employment;

HAVING REGARD to the Declaration by Ministers of Education at the OECD in Paris, 20th October, 1978, and in particular to their statement that one of the aims deserving priority consideration was "to adopt positive educational measures which contribute to the achievement of equality between girls and boys, women and men";

HAVING REGARD to the Recommendation of the Council on a General Employment and Manpower Policy of 5th March, 1976, for "creating and maintaining employment and improved conditions of working life for all those who are able and want to work, with the support of relevant economic, employment, manpower and social policies";

TAKING INTO CONSIDERATION the arrangements, notably of a constitutional nature, which in certain Member countries affect the competence of governments in relation to the following aims:

## DECLARES

A. The following aims should be given priority consideration in the formulation of the relevant policies of Member countries, bearing in mind the possibility of constrained growth of employment opportunities:

- i) to adopt employment policies which offer men and women equal employment opportunities, independently of the rate of economic growth and conditions in the labour market;
- ii) to adopt policies to deal with unemployment which do not discriminate either directly or indirectly against women;

iii) to implement an integrated set of policies to eliminate segregation in employment and reduce differentials in average earnings between women and men by means of:

- a) the prohibition by law of direct discrimination;
- b) positive action to reduce indirect discrimination in recruitment, training and promotion, and in other terms and conditions of employment;
- c) the reduction of persistent social biases and negative institutional practices which limit the range and level of occupations open to girls and women; and
- d) the implementation of equal pay for work of equal value;<sup>1</sup>

iv) to give attention to the special problems of minority women in the relevant items herein;

v) to encourage the development, in co-operation with employers and unions, of more flexible working-time arrangements (e.g., part-time, flexi-time) on an optional basis, in order to achieve the more efficient functioning of labour markets and provide a wider range of employment choices to women and men; special consideration should be given to workers, both men and women, with responsibilities for children;

vi) to provide for part-time workers levels of pay and social security benefits which are proportional to those of full-time workers, and the same levels of working conditions and standards of protection;

vii) to endeavour to ensure that the provisions of taxation, social security and child-support systems do not bias the decisions made by both women and men as to how they allocate their time between paid employment and other activities;

viii) to stimulate and further the development of, and increased access to employment, training and "recurrent" education programmes, particularly for women whose skills need upgrading and for women re-entering the labour force, taking into account new technologies and industrial developments;

ix) to review the provisions of labour legislation, for example protective legislation for women, to ensure its consistency with the goal of equal opportunity in employment, and to improve working conditions and the environment for all workers;

x) to guarantee pregnant women and women returning from maternity leave protection from dismissal and the right to return to work without loss of earned benefits;

<sup>1</sup>) As defined, for example, in ILO Convention 100 and Directives on Equal Pay of the Council of the European Communities.

- xi) to develop education so as to progressively eliminate traditional sex role stereotyping in curricula and to provide a full range of educational choices for young women and young men, both for further education and skill qualifications for employment;
- xii) to use more actively those measures directly available to governments to expand equal opportunities for women, e.g. recruitment, training and promotion in the public sector, employment exchanges, employment creation programmes and, in certain countries, regional development policies and public procurement;
- xiii) to ensure that there are effective organisational arrangements for the co-ordination and implementation of policy over the whole range of relevant public policies which affect the equal employment opportunities for women;

- xiv) and to ensure that the special problems of migrant women are given consideration in relation to all the aims set out above.

B. That the achievement of equal opportunity in employment and the elimination of wage differentials between women and men are dependent not only on government measures but on the concerted efforts of employers and trade unions.

C. That the pursuit of these aims by Member countries will be facilitated by strengthened co-operation through the competent bodies of the OECD, in particular by studies of women's employment in the context of emerging economic and social conditions, and by periodic assessments and evaluations of the implementation of equal opportunity and wage equality policies for women.

Source: OECD, *Women and Employment: Policies for Equal Opportunities*, Paris, 1980 (Communique).





**PART V**

**THE DESIGNATED GROUPS**





## TRENDS IN THE EMPLOYMENT OPPORTUNITIES OF WOMEN IN CANADA, 1930-1980

Liviana Calzavara

### Sommaire

À l'aide de données secondaires, le rapport relève les tendances dans le marché du travail féminin depuis les 50 dernières années. Il s'intéresse à trois aspects précis de la population active: 1) le taux d'activité; 2) le revenu; 3) la ségrégation professionnelle et sectorielle. Certains obstacles à l'égalité d'accès en matière d'emploi sont identifiés et des propositions sont faites en matière de politique.

### Tendances professionnelles

#### 1) Taux d'activité

- Le nombre de femmes dans la population active a augmenté constamment depuis 1930. En 1931, 22 % des femmes faisaient partie de la population active, par rapport à 53 % en 1983. L'augmentation la plus marquée a eu lieu au cours des vingt dernières années.
- C'est au début des années 1970 que le taux de chômage des femmes a dépassé pour la première fois celui des hommes.
- Le pourcentage des travailleuses à temps partiel augmente plus vite que celui des travailleurs de la même catégorie.

#### 2) Revenu

- L'écart salarial entre les hommes et les femmes a rétréci quelque peu depuis les quinze dernières années.
- L'écart salarial est encore considérable. En 1979, les travailleuses à temps plein touchaient 63 cents pour chaque dollar gagné par les hommes. En 1911, elles touchaient 53 cents, une bien piètre amélioration en 68 ans.
- La mesure dans laquelle l'écart salarial est attribuable à la discrimination varie selon les points de vue. Même les estimations les plus prudentes attribuent au moins 10 % de cet écart à la discrimination.

#### 3) Ségrégation professionnelle et sectorielle

- La ségrégation des femmes dans certaines catégories professionnelles a baissé (le coefficient de variation est tombé de 0,985 en 1901 à 0,577 en 1971). Un nombre croissant de femmes se dirigent vers les professions traditionnellement masculines. Cette tendance est particulièrement marquée depuis les quinze dernières années.
- Quoiqu'on tende vers la déségrégation, les femmes sont toujours concentrées dans un petit nombre de professions. En 1971, le coeffi-

### Summary

Using secondary data, this report documents trends in the employment opportunities of women in the Canadian labour force over the past 50 years. It focuses on three specific aspects of the labour force: 1) participation; 2) earnings; and 3) occupational/industrial segregation. Some barriers to equal opportunity are identified and policy suggestions made.

### Trends In Employment Opportunities

#### 1) Labour Force Participation

- The number of women in the labour force has steadily increased since 1930. In 1931, 22 per cent of women were in the labour force compared to 53 per cent in 1983. The greatest increase occurred in the past 20 years.
- The early 1970s mark the first time that women's rate of unemployment has surpassed that of men.
- The percentage of women working part-time is increasing at a faster rate than it is for men.

#### 2) Earnings

- There has been a slight reduction in the earnings gap in the past 15 years.
- The earnings gap between men and women is still very large. In 1979, women (who worked full-time) were earning 63 cents for every dollar men earned; in 1911, they were earning 53 cents for every dollar—not much of an improvement in 68 years.
- The extent to which the earnings gap is attributable to discrimination varies depending on one's perspective. Even the most conservative estimate attributes at least 10 per cent of the gap to discrimination.

#### 3) Occupational/Industrial Segregation

- There has been a decline in the extent to which women are segregated in specific occupational categories (coefficient variation has declined from .985 in 1901 to .577 in 1971). More women are moving into occupations that were traditionally male-dominated. This has been especially true in the past 15 years.
- While there is a trend to desegregation, women are still concentrated in a small number of occupations. In 1971, the coefficient of variation was .577 for women compared with .300 for men. In 1980, 72 per cent of women were located in three occupational categories (clerical, service, and professional).

cient de variation s'établissait à 0,577 pour les femmes, par rapport à 0,300 pour les hommes. En 1980, 72 % des femmes travaillaient dans trois catégories professionnelles, soit le travail de bureau, les services et les professions libérales.

#### **Obstacles auxquels sont confrontées les femmes**

- Formation et études inadéquates.
- Manque d'attachement au marché du travail.
- Répartition inégale des tâches au foyer et absence de services adéquats de garde d'enfants.
- Stéréotypes sexuels à l'égard des rôles et des emplois.
- Discrimination systémique en matière d'embauche, d'affectation et de promotion.

#### **Incidences des politiques**

La législation sur l'égalité dans l'emploi et sur la parité salariale n'a pas provoqué de changements remarquables. Les obstacles qui ont été cernés indiquent que les politiques doivent viser à la fois l'offre et la demande de main-d'œuvre. Voici un résumé des politiques proposées:

- Il faudrait inciter et aider les femmes à acquérir les connaissances qui leur permettent de faire concurrence aux hommes sur un pied d'égalité.
- Il faudrait aplanir les obstacles en matière de structures et d'attitudes qui amoindrissent l'attachement des femmes au marché du travail.
- Tous les organismes gouvernementaux devraient adopter le principe de «valeur égale». En d'autres termes, les hommes et les femmes devraient recevoir un salaire égal pour un travail de valeur égale.
- Il faudrait rendre les lois sur l'égalité en matière d'emploi plus efficaces en modifiant les mécanismes d'exécution.
- Les gouvernements et les employeurs devraient déployer de véritables efforts pour favoriser la formation, le recrutement et le perfectionnement au moyen de l'action positive.
- Il faut que la société change complètement d'attitude à l'égard du rôle et des capacités des femmes.

#### **Some Barriers Faced By Women**

- Inadequate education and/or training.
- Lower labour force commitment.
- Lack of equitable division of labour in the household and absence of adequate childcare facilities.
- Sex-typing of jobs and roles.
- Systemic discrimination in hiring mechanisms and job-assignment and promotion.

#### **Policy Implications**

The changes that have occurred since the introduction of equal employment legislation and equal pay legislation have not been dramatic. The barriers that have been identified indicate that policies must be aimed at both the labour supply and demand. The following are brief summaries of policies suggested:

- Women should be encouraged and helped to acquire the education and training that will allow them to compete on equal terms with men.
- Remove some of the attitudinal and structural barriers that lower some women's labour force commitment.
- All government jurisdictions should adopt the equal-value standard. That is, male and female workers should receive equal pay for work of equal value.
- Equal employment legislation should be made more effective by modifications to the way in which it is enforced.
- Government and employers should engage in positive efforts to encourage training, recruitment, and career development through affirmative action.
- A fundamental change in social attitudes toward the role and abilities of women is necessary.

## TRENDS IN THE EMPLOYMENT OPPORTUNITIES OF WOMEN IN CANADA, 1930-1980

Liviana Calzavara\*

### I. INTRODUCTION

How much progress have women in the labour force made in the past 50 years? There are some indicators, such as the rate of labour force participation, the visibility of women in traditionally "male" occupations, and the introduction of equal pay and equal opportunity legislations, that may suggest that meaningful progress has been made. This report documents the nature of the progress by using data from existing studies on Canadian women in the labour force.<sup>1</sup>

The report addresses a number of issues concerning opportunities for women in the labour force: How extensive are the differences between men and women in the labour force? Have these differences been diminishing over the years? To what extent are they the result of discrimination? What can be done to reduce existing differences?

Section II of the report documents women's progress over time and relative to men by looking at key aspects of the labour market: participation rates, unemployment rates, part-time work, earnings, and occupational/industrial distribution. The main goals of this section are to identify the extent of male-female differences and to determine whether the differences have been reduced over time.

Section III looks at the causes of existing differences. Theories that explain the differences in terms of discrimination and those that explain them in terms of productivity and choice are presented. This is followed by the identification of some of the barriers to equal opportunity that women face. Empirical evidence is used to substantiate the existence and relative importance of each barrier in explaining differences between men and women. Where possible, changes over time in the barrier are discussed.

Section IV provides a brief discussion of the costs of discrimination for women, employers, and the economy.

Section V provides some policy suggestions for reducing the impact of the barriers that women face.

### II. WOMEN IN THE LABOUR FORCE—THE PAST 50 YEARS

A number of labour force features have been used in the literature to assess the employment opportunity of women. Among the most commonly used are: participation rate, unemployment rate, part-time work, earnings, and occupational distribution. This section documents how women have progressed, in relation to each of these aspects, over the past 50 years.

### A. Labour Force Participation

#### 1. Rate of Participation

Women's labour force participation has grown rapidly during the last 50 years. For example, 22 per cent of women were in the labour force in 1931 compared to 53 per cent in 1983 (see Table 1). The fastest growth occurred between 1961 and 1971, with an 11 per cent increase in labour force participation in the 10-year period. While comparable census figures for 1971 to 1981 are unavailable, the Labour Force Survey figures indicate that the rate of increase has remained the same (participation increased by 10 per cent in the 10-year period). The majority of Canadian women 15 years and over are now in the labour force.

While the participation rate for women has been increasing over the years, it has been slowly declining for men. In 1931, 87 per cent of men were in the labour force compared to 76 per cent in 1983. Men still make up a larger part of the labour force than women. The Labour Force Survey for May, 1983, indicates that there were 12,185,000 Canadians in the labour force, of which 59 per cent were men and 47 per cent were women. Two factors accounting for the decline in the participation rate of men aged 15-19 and 65 and over (increased time spent on education and retirement) have not had the same effect on women in the corresponding age groups.

TABLE 1

Labour Force Participation Rates of Men and Women  
in Canada, Selected Years, 1901-1983

| Year | Men  | Women |
|------|------|-------|
| 1901 | 88 % | 16 %  |
| 1911 | 91   | 19    |
| 1921 | 90   | 20    |
| 1931 | 87   | 22    |
| 1941 | 86   | 23    |
| 1951 | 84   | 24    |
| 1961 | 81   | 29    |
| 1971 | 76   | 40    |
| 1980 | 78   | 50    |
| 1983 | 76   | 53    |

Source: The figures for 1901-1971 are from Morley Gunderson, "Work Patterns", in Gail Cook (ed.) *Opportunity for Choice*, 1976, Table 4.1. They are based on census data. The 1980 and 1983 figures are calculated from the Statistics Canada survey *The Labour Force*, December, 1980, and May, 1983 (Catalogue No. 71-001).

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While the participation rate of women of all ages has increased, growth has been greatest for women between the ages of 25 and 64. In 1951, 25 per cent of women aged 25-34 and 20 per cent of women 35-64 were in the labour force. (These figures are not dramatically different from those for 1931, when they were 24 per cent and 13 per cent respectively.) By 1971, participation of the 25-34 age group had increased from 25 to 45 per cent; and for the 35-64 age group from 20 to 42 per cent.

Most analysts agree that the increase in women's participation rate (since the 1950s) has been mainly the result of the growing number of married women entering the labour force. The participation rate for married women has increased from less than 4 per cent in 1941 to 36 per cent in 1971<sup>2</sup>. There are many factors that account for the increased participation of women (and married women in particular), but most analysts agree that wages are a principal incentive.<sup>3</sup> The changing standard of living and inflation have caused more married women to seek paid employment. It has been established that the lower the husband's income the more likely that the wife will participate in the labour force. As more marriages dissolve, more and more women must rely on wages as their major source of income (Boyd, 1977). Accompanied by this financial push, women have been drawn into the labour force by the results of technological changes (such as better birth control methods, better domestic technology, and more cheaply produced consumer goods). These changes have made it possible for women to take on dual jobs (work at home and in the labour force). Women have also been drawn into the labour force as a result of the growth in demand for female workers. Armstrong and Armstrong (1983: 32-33) argue that the industries experiencing the greatest growth in terms of job creation have been those that traditionally hired many women and many part-time workers. Changes in societal attitudes have made it possible for more married women to obtain jobs. Gallup polls show that the percentage of people who feel that married women should work outside the home has increased since 1960. In 1960, 65 per cent felt that married women who do not have young children should work outside the home, compared to 86 per cent in 1982. For married women with young children, work outside the home is still not acceptable to most Canadians, but these attitudes are changing. In 1960, only 5 per cent felt it was all right for them to work outside the home, compared to 38 per cent in 1982.

In summary, the rates of labour force participation for women have increased dramatically, especially those for married women. More women than before are opting for careers rather than having children; more women are combining jobs and child-rearing. Both economic considerations and changes in societal attitudes account for these developments.

## 2. Rate of Unemployment

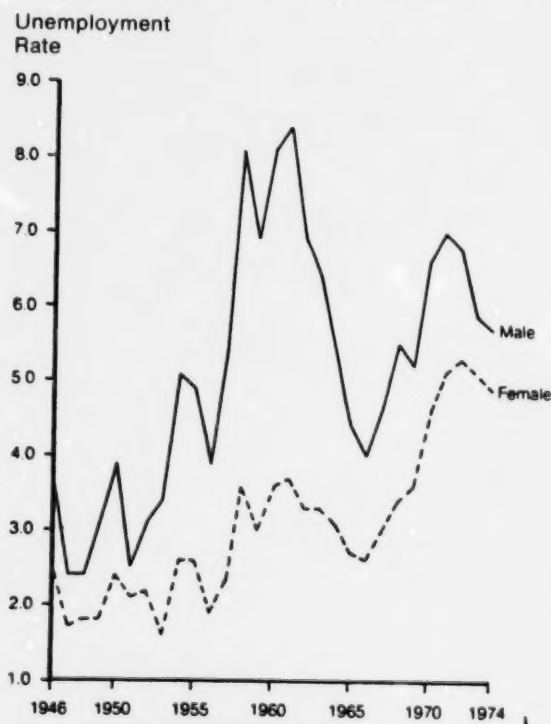
The large increase in women's labour force participation may be interpreted as a sign that they have been accepted into the labour force. It can also be interpreted as more women trying to find work, for the labour force figures include workers who are employed and those who are seeking work.

Are there sex differences in the rates of unemployment and, if so, are they improving? When the Royal Commission on the Status of Women asked that question in 1970, it found that women's rate of unemployment was lower than that of men's, suggesting that women were generally more successful than men in finding work. More recent figures show that the situation has changed. While there are discrepancies in the actual rates reported, depending on whether studies were based on census figures or on Labour Force Survey figures<sup>4</sup>, the patterns are consistent.

Between 1946 and 1970 the male rate of unemployment was consistently above the female rate<sup>5</sup>. The female rate was relatively constant around 2-3 per cent until the late 1960s, when it began to climb to around 5 per cent. Gunderson (1976a: 105) describes the ratio of female-to-male unemployment rates as a U-shaped pattern (over the 1946-1970 period). The female rate was high relative to the male rate in the immediate postwar period and in the late 1960s and early 1970s. The gap between the two was widest in 1959 (see Figure 1). The consistently lower rates of unemployment among women is partly explained by the occupational distribution of women. Women were predominantly found in "service-producing" industries (transportation, storage, communications, trade, finance, insurance, real estate,

FIGURE 1

Unemployment Rates, by Sex, Canada, 1946-74  
(12-month averages)



Source: Morley Gunderson, "Work Patterns" in G. Cook (ed.) *Opportunities for Choice*, 1976, Figure 4.1. Based on special tabulations from the Labour Force Survey Division of Statistics Canada.

recreation, business and personal services, public administration). Men tended to be found in "goods" industries (agriculture, forestry, fishing, mining, quarrying, oil wells, manufacturing, construction, utilities). Between 1946 and 1966 the service industries experienced a faster growth rate of employment than the goods industries. In 1946, 59.3 per cent of the labour force was employed in the goods industries and 40.7 per cent in the service sector, but by 1966 the figures had been reversed, with 56 per cent in the service industries and 44 per cent in the goods industries. Another reason for the lower rate for women may have been that women's true level of unemployment was under-estimated. Women who became unemployed may have been more likely than men to drop out of the labour market. Women looking for work may not have identified themselves as actively searching for work. There is a sex bias in the Labour Force Survey question used to measure unemployment. It asks, "What did this person do mostly last week?" The responses include: worked, looked for work, employed but not at work, kept house, went to school, retired or voluntarily idle. Women who did housework and looked for work may have answered "kept house" because they may have spent more time on housework than actively job searching, and because it was a more acceptable response at a time when very few women worked outside the home. Unemployed women today may be more likely to identify themselves as seeking work, since the response is more socially acceptable today.

By 1971 women's rate of unemployment had approached and surpassed that of men's<sup>5</sup> (see Table 2). As of December, 1980, the rate of unemployment for men was 6.9 per cent to 8.4 per cent for women. The reason for this change remains unclear. It may be that the growth of the "service-producing" industries has slowed down, but Gunderson (1976a: 108-109) presents some interesting data to show that the female rate of unemployment has now become higher in most occupations and industries (see Table 3). When he compared the

**TABLE 2**  
**Unemployment Rates by Sex, 1966-1980**

| Year | Unemployment Rate |       | Women as per cent of unemployed |
|------|-------------------|-------|---------------------------------|
|      | Women             | Men   |                                 |
| 1966 | 3.4 %             | 3.3 % | 31.8 %                          |
| 1967 | 3.7               | 3.9   | 31.4                            |
| 1968 | 4.4               | 4.6   | 31.8                            |
| 1969 | 4.7               | 4.3   | 35.1                            |
| 1970 | 5.8               | 5.6   | 34.7                            |
| 1971 | 6.6               | 6.0   | 36.8                            |
| 1972 | 7.0               | 5.8   | 39.1                            |
| 1973 | 6.7               | 4.9   | 42.6                            |
| 1974 | 6.4               | 4.8   | 42.6                            |
| 1975 | 8.1               | 6.2   | 43.2                            |
| 1976 | 8.4               | 6.4   | 44.2                            |
| 1977 | 9.5               | 7.3   | 44.1                            |
| 1978 | 9.6               | 7.6   | 44.8                            |
| 1979 | 8.8               | 6.6   | 46.1                            |
| 1980 | 8.4               | 6.9   | 44.8                            |

Source: Pat Armstrong and Hugh Armstrong, *A Working Majority*, 1983, Table 1. Based on Labour Force Survey data.

rate of unemployment for men and women within occupations and within industries for 1961 and 1971, Gunderson found that,

... the higher female unemployment rate for the experienced labour force in 1971 persists across all occupations except the primary and professional sectors. In the primary sector women tend to work mainly in the low-unemployment farm area. In the professional sector they dominate the low-unemployment teaching and nursing jobs, but in most other subgroups in that sector they tend to have higher unemploy-

**TABLE 3**  
**Unemployment Rates of Experienced Labour Force, by Sex and Occupation, 1961 and 1971**

| Occupation                   | 1961 |        |       |             | 1971 |        |       |             |
|------------------------------|------|--------|-------|-------------|------|--------|-------|-------------|
|                              | Male | Female | Total | Female/Male | Male | Female | Total | Female/Male |
|                              | (%)  | (%)    | (%)   |             | (%)  | (%)    | (%)   |             |
| Managerial                   | 7.0  | 6.0    | 7.0   | .86         | 1.3  | 2.9    | 1.5   | 2.23        |
| Professional/technical       | 8.0  | 5.0    | 7.0   | .63         | 3.1  | 2.8    | 3.0   | .90         |
| Clerical                     | 2.7  | 2.0    | 2.2   | .74         | 5.4  | 5.9    | 5.7   | 1.09        |
| Sales                        | 2.6  | 2.8    | 2.6   | 1.08        | 3.6  | 6.9    | 4.6   | 1.92        |
| Service                      | 3.2  | 2.9    | 2.7   | .91         | 6.3  | 7.8    | 7.0   | 1.24        |
| Primary                      | —    | —      | —     | —           | 5.1  | 2.4    | 4.7   | .47         |
| Blue collar <sup>1</sup>     | 4.4  | 3.3    | 4.3   | .75         | 7.2  | 10.0   | 7.5   | 1.39        |
| All occupations <sup>2</sup> | 3.7  | 2.2    | 3.3   | .59         | 5.8  | 6.1    | 5.9   | 1.05        |

<sup>1</sup>Blue collar covers occupations 81-95, (which include transportation, communication, and construction) in the 1971 Canadian Classification and Dictionary of Occupations (CCDO). Because of changes in occupational coding between 1961 and 1971, the occupations may not be completely comparable.

<sup>2</sup>Includes those not elsewhere classified or not stated.

Source: Morley Gunderson, "Work Patterns" in G. Cook (ed.) *Opportunity for Choice*, 1976, Table 4.4. Figures based on census data.

ment rates than males. Although women tend to have higher unemployment rates within each occupation, they tend not to be in the high unemployment occupations.

If females had the male occupational distribution but their own unemployment experience within each occupation, their employment rate in the experienced labour force would have been 9.6 percent instead of 6.1 percent, which would imply an unemployment rate of 13-14 percent in the total female labour force. Consequently, reduction of occupational segregation between the sexes would lead to higher female unemployment rates if women were to retain their same propensity to be unemployed within each occupation. To avoid extremely high female unemployment rates, therefore, occupational desegregation should be accompanied by efforts to reduce female unemployment within each occupation.

... the higher female unemployment rate and the increasing ratio of female to male unemployment also persist across almost all industries, although, again, women tend not to be in industries with high unemployment rates. In 1971 if women had had the same industrial distribution as men but had retained the female propensity to be unemployed within each industry, their unemployment rate would have been 11 percent, nearly double their actual rate of 6.1 percent for the experienced labour force. As with occupational desegregation, industrial desegregation would be accompanied by higher female unemployment rates unless policies were initiated to reduce women's propensity to be unemployed within each industry (109).

### 3. Part-Time Employment

While there has been an increase in the number of women participating in the labour force, much of this increase results from women working on a part-time basis. Between 1966 and 1980 the proportion of women in the labour force increased by 12 per cent and the proportion employed full-time increased by 6.5 per cent (see Table 4). According to Armstrong and Armstrong (1983: 65-66, 234, 249), 17 per cent of Canadian women worked part-time in 1966 compared to 3 per cent of men. In 1980, 24 per cent of the women and 6 per cent of the men worked part-time, an increase of 7 per cent for women and only 3 per cent for men. The figures over the 14-year period indicate that the proportion of women working part-time is increasing, and at a faster rate than that for men.

An issue is whether this greater rate of increase in part-time work for women is a sign of greater underemployment among women or a greater preference to work only part-time. The answer is not readily available. Some evidence sug-

**TABLE 4**  
**Full-Time and Part-Time Employment, 1966-1980**

| Year | Employment/<br>population<br>ratio |      | Full-time<br>employment/<br>population<br>ratio |      | % employed<br>part-time |     |
|------|------------------------------------|------|-------------------------------------------------|------|-------------------------|-----|
|      | Women                              | Men  | Women                                           | Men  | Women                   | Men |
| 1966 | 34.2                               | 77.1 | 28.6                                            | 74.6 | 17.0                    | 3.4 |
| 1967 | 35.1                               | 76.3 | 29.3                                            | 73.4 | 17.4                    | 3.7 |
| 1968 | 35.5                               | 75.1 | 29.1                                            | 72.0 | 18.6                    | 4.1 |
| 1969 | 35.2                               | 74.9 | 29.4                                            | 71.4 | 19.1                    | 4.4 |
| 1970 | 36.1                               | 73.4 | 29.2                                            | 69.8 | 19.6                    | 4.9 |
| 1971 | 36.8                               | 72.7 | 29.7                                            | 69.2 | 19.7                    | 5.0 |
| 1972 | 37.4                               | 73.0 | 30.2                                            | 69.5 | 19.6                    | 4.9 |
| 1973 | 39.1                               | 74.3 | 31.7                                            | 70.9 | 19.4                    | 4.7 |
| 1974 | 40.2                               | 74.9 | 32.4                                            | 71.3 | 19.9                    | 4.9 |
| 1975 | 40.8                               | 73.5 | 32.6                                            | 69.8 | 20.3                    | 5.1 |
| 1976 | 41.4                               | 72.7 | 32.6                                            | 69.0 | 21.1                    | 5.1 |
| 1977 | 41.7                               | 72.0 | 32.5                                            | 68.0 | 22.1                    | 5.5 |
| 1978 | 43.2                               | 72.1 | 33.4                                            | 68.1 | 22.6                    | 5.6 |
| 1979 | 44.6                               | 73.2 | 34.2                                            | 69.0 | 23.3                    | 5.8 |
| 1980 | 46.0                               | 72.9 | 35.1                                            | 68.6 | 23.8                    | 5.9 |

Note: The pre-1975 data have been recalculated on the basis of the revised Labour Force Survey, excluding 14 year olds and using population estimates derived from the 1976 census.

Calculated from Statistics Canada, *Historical Labour Force Statistics: Actual Data, Seasonal Factors, Seasonally Adjusted Data* (Catalogue No. 71-201) Ottawa, 1980, and from Statistics Canada, *The Labour Force, December 1975* (Catalogue No. 71-001) Ottawa, 1976, and *The Labour Force, December 1980* (Catalogue No. 71-001) Ottawa, 1981.

gests that fewer women than previously take part-time work from preference. The percentage of women who took a part-time job because they did not want to work full-time has decreased from 46 per cent (in 1975) to 42 per cent (in 1980). The percentage who took a part-time job because they could only find part-time work increased from 11 per cent (in 1975) to 17 per cent (in 1980). Other figures show that women are still more likely than men to accept part-time jobs because they do not want full-time work. In 1980, 42 per cent of women but only 16 per cent of men said they worked part-time because they did not want full-time jobs. The majority of women who prefer part-time work are married (see Table 5).

Whether by preference or need, the increase in part-time employment among women means that more of them are in a segment of the labour force that is subject to greater exploitation. Part-time workers receive lower rates of pay, fewer fringe benefits, and less job security. Members of the Royal Commission on the Status of Women (1970:104) felt that part-time work serves a number of important functions for those who can only work on a part-time basis. It gives women a chance to supplement their income, gain or maintain labour force skills, and alleviate feelings of alienation.



**TABLE 5**  
**Reasons for Part-Time Employment by Sex, 1975 and 1980**

| Reason                              | All women   |      | Married women |      | Men  |      | Both Sexes |      |
|-------------------------------------|-------------|------|---------------|------|------|------|------------|------|
|                                     | 1975        | 1980 | 1975          | 1980 | 1975 | 1980 | 1975       | 1980 |
|                                     | Percentages |      |               |      |      |      |            |      |
| Personal or family responsibilities | 16.9        | 17.3 | 24.3          | 25.2 | 1.3  | —    | 12.1       | 12.7 |
| Going to school                     | 22.9        | 20.3 | 1.6           | 1.3  | 62.1 | 56.1 | 34.8       | 30.1 |
| Could only find part-time work      | 10.8        | 17.0 | 9.4           | 13.9 | 11.3 | 19.2 | 11.0       | 17.7 |
| Did not want full-time work         | 45.9        | 41.9 | 61.1          | 56.2 | 16.3 | 16.2 | 36.8       | 34.8 |
| Other                               | 3.6         | 3.5  | 3.7           | 3.3  | 9.0  | 8.4  | 5.3        | 4.8  |

Note: Calculated from Statistics Canada, *Labour Force Annual Averages, 1975-1978* (Catalogue No. 71-529), Ottawa, 1979, Table 25, and *The Labour Force, December 1980* (Catalogue No. 71-001), Ottawa, 1981, Table 88.

Source: Table 5 and Table 6 are found in P. Armstrong and H. Armstrong, *A Working Majority*, 1983, Tables 2 and 19.

#### 4. Summary

Labour force data show that the number of women in the labour force has been increasing over time. The greatest increases have occurred in the last 20 years. Prior to 1961 the participation rate had been increasing at a rate of 2 per cent. Between 1961 and 1971 it increased by 11 per cent and this rate of growth has been sustained into 1983. Since 1961, the percentage of women in the labour force has nearly doubled. It is estimated that in 1983, 53 per cent of women aged 15 and over were in the labour force.

The early 1970s marks the first time (since 1949, when unemployment figures were first available) that women's rate of unemployment has surpassed that of men. Women in all occupations have higher rates of unemployment than men, suggesting that they are having a harder time than men in finding jobs.

The percentage of women working part-time is increasing at a faster rate than it is for men.

#### B. Earnings of Women and Men

Most analysts agree that earnings are perhaps the single most important indicator of labour market progress, since earnings reflect both the nature of labour force participation (unemployment, part-time work) and occupational distribution. In this section, earnings differences between men and women in Canada will be documented using the findings of a number of studies<sup>7</sup>. First, information on what has been happening to the earnings gap over time will be presented<sup>8</sup>. This will be followed by a brief discussion on the causes and therefore the extent to which the earnings gap between men and women reflects discrimination.

##### 1. Time-Pattern of Earnings Differentials

Studies that look at the pattern of earnings differentials without adjusting for differences in work-productivity factors (education, training, labour force commitment) indicate that there were and still are large gaps in the earnings of men and women in Canada. For example, in 1911 the average wage of employed women stood at 53 per cent of the average male wage. By 1979 the average earned income of women who worked a full year was 63 per cent of men's full-year

earnings, while the average annual income of all women (including part-time workers) was only 51 per cent of the male average.

There are no systematic studies of the time-pattern of earnings differentials over the last 50 years. Most studies deal with changes between one census and the next (specific 10-year periods); and most deal with changes since 1951. The one study that looks at a longer time period (1946-1971) is based on the Ontario labour force (see Gunderson 1976b). The findings of a number of studies will be aggregated here to provide an overview of the pattern over time.

**TABLE 6**  
**Average Annual Earnings by Sex and Occupation, 1978 and 1979**

| Earner group                          | Women    | Men      | Women/<br>Men |
|---------------------------------------|----------|----------|---------------|
| All earners, 1979                     | \$ 7,673 | \$14,981 | 51.2          |
| Full-time workers, 1979               | 11,741   | 18,537   | 63.3          |
| Full-year workers by occupation, 1978 |          |          |               |
| Managerial                            | 13,250   | 24,337   | 54.4          |
| Professional                          | 13,484   | 21,865   | 61.7          |
| Clerical                              | 9,592    | 14,403   | 66.6          |
| Sales                                 | 7,193    | 16,456   | 43.7          |
| Service                               | 6,372    | 13,258   | 48.1          |
| Primary occupations (1977)            | 4,230    | 9,805    | 43.1          |
| Processing and machining              | 8,698    | 16,271   | 53.5          |
| Fabricating                           | 8,179    | 15,728   | 52.0          |
| Transportation                        | 10,424   | 15,575   | 66.9          |
| All occupations                       | 10,008   | 17,404   | 58.0          |

Note: For 1979, calculated from Statistics Canada, *Income Distribution by Size in Canada, 1979* (Catalogue No. 13-207), Ottawa, 1981, Tables 70 and 72. For 1978, Labour Canada Women's Bureau, *Women in the Labour Force 1978-79; Part II Earnings*, Ottawa, 1981, Tables 1A and 2B.

Source: P. Armstrong and H. Armstrong, *A Working Majority* 1983, Table 23.

According to Philips and Philips (1983: 52), in 1911 the average wage of employed women was 53 per cent of that of men. By 1931, the gap had decreased and women were earning 60 per cent of what men earned. By 1961, the gap had increased again and women were earning 54 per cent of what men earned (or if we include only full-time workers, women were earning 59 per cent of what men earned; see Gunderson, 1976a). By 1971, the gap for all working women

increased further to 50 per cent, but remained the same for women who worked on a full-time basis. The latest figures available in the literature (for 1979) indicate that the wage gap among men and women in the full-time labour force has decreased since 1971. Full-time working women in 1979 earned 63 per cent of what men earned. The average annual earnings for women working full-time in 1979 were \$11,741, compared with \$18,537 for men (see Table 6). If one looks at

**TABLE 7**  
**Female/Male Earnings Ratio, a Summary of some Canadian Studies**

| Study                             | Year and Data                                   | Gross Unadjusted Ratio <sup>1</sup> | Net Adjusted Ratio | Productivity Adjustment Factors                                                                                           |
|-----------------------------------|-------------------------------------------------|-------------------------------------|--------------------|---------------------------------------------------------------------------------------------------------------------------|
| <b>ONTARIO</b>                    |                                                 |                                     |                    |                                                                                                                           |
| 1. Gunderson (1975)               | Narrowly-defined occupations same establishment | .82                                 | .93                | Human capital via occupation, incentive pay system, union status, industry, region                                        |
| 2. Robb (1978)                    | 1970 Census                                     | .60                                 | .76                | Age, marital status, education, training, time worked, occupation, and industry                                           |
|                                   |                                                 |                                     | .94                | As above plus experience                                                                                                  |
| 3. Gunderson (1980)               | 1970 Census                                     | .60                                 | .76                | Potential experience, marital status, education, training, language, time worked, occupation, industry, residence         |
| <b>CASE STUDIES</b>               |                                                 |                                     |                    |                                                                                                                           |
| 4. Schrank (1977)                 | University faculty 1973/74                      | .83                                 | .95                | Experience, seniority, rank, citizenship, faculty, administrative responsibilities, research output                       |
| 5. Stelcner (1979)                | University faculty 1976/77                      | .91                                 | .94                | Experience, seniority, department head, having Ph.D.                                                                      |
| 6. Walmsley, Ohtsu & Verma (1980) | Unnamed organization Saskatchewan, 1980         | .80                                 | .87                | Skill, effort, responsibility, working conditions (as measured by job evaluation score)                                   |
| <b>EARLIER CANADIAN STUDIES</b>   |                                                 |                                     |                    |                                                                                                                           |
| 7. Ostry (1968)                   | 1960 Census                                     | .59                                 | .81                | Age, education, occupation                                                                                                |
| 8. Robson & Lapointe (1971)       | University faculty                              | .80                                 | .90                | Age, rank, field, degree, university size and region                                                                      |
| 9. Holmes (1976)                  | 1967 Survey                                     | .49                                 | .56                | Age, marital status, education, immigration status, time worked, occupation, residence and region                         |
| <b>RECENT CANADIAN STUDIES</b>    |                                                 |                                     |                    |                                                                                                                           |
| 10. Gunderson (1979)              | 1971 Census                                     | .60                                 | .77                | Potential experience, marital status, education, training, language, time worked, occupation, industry, residence, region |
| 11. Shapiro & Stelcner (1980)     | 1971 Census                                     |                                     |                    |                                                                                                                           |
|                                   | Canada public                                   | .65                                 | .83                | Age, marital status, education, training, language, time worked, occupation, city size and region                         |
|                                   | Canada private                                  | .57                                 | .72                |                                                                                                                           |
|                                   | Quebec public                                   | .66                                 | .87                |                                                                                                                           |
|                                   | Quebec private                                  | .56                                 | .74                |                                                                                                                           |
| 12. Stelcner & Shapiro (1980)     | 1971 Census                                     |                                     |                    | As in Shapiro and Stelcner (1980)                                                                                         |
|                                   | All males and females                           | .60                                 | .82                | time worked, occupation, city size and region                                                                             |
|                                   | Single and over 30                              | .60                                 | .82                |                                                                                                                           |
| 13. Kapsalis (1980)               | 1975 Survey of Consumer Finance                 | .61                                 | .87                | Age, residence, job duration, occupation, region                                                                          |

<sup>1</sup>Based on calculating performed in the text from data given in the original articles. Some studies such as Boyd and Humphreys (1979) and Kuch and Haessel (1979) were not included since they did not enable time calculation of unadjusted and adjusted ratios.  
Source: M. Gunderson "The Male-Female Earnings Gap in Ontario", 1982, Table 2.

all women (full-time and part-time workers) the gap has actually decreased between 1971 and 1979 from 50 per cent to 51 per cent.

On the basis of these figures, it appears that there has been some slight improvement in the relative wages of women working full-time, especially between 1971 and 1979. At this point, it is not clear whether this represents only a short-term fluctuation or a continuing trend. The introduction of equal pay legislation (first enacted in 1951) has not had a dramatic effect on the wage gap. The unadjusted differences show that women who are full-time workers still earn 63 cents for every dollar earned by men. This does not represent much progress from the 53 cents women earned in 1911.

## 2. Productivity Differences or Discrimination

While most analysts agree on the historical existence of a wage gap, they disagree on the actual size of the gap and its causes. Some argue that it is a result for the most part of differences in men's and women's work-productivity. Women are paid less because they have fewer skills, less training, and less work experience; these factors should be taken into account when trying to explain the gap. Others argue that the entire gap reflects discrimination against women; that those controlling for productivity factors ignore past discrimination, which has kept women's productivity lower. A number of empirical studies have been undertaken recently to determine the extent of the earnings gap when adjustments are made for aspects of productivity.

Two basic methods have been used to measure levels of earnings discrimination. The "sampling" approach compares the earnings of men and women holding identical jobs within the same establishment and having equal qualifications, performance, and work hours. While conceptually more appropriate, this approach is operationally less feasible because of the difficulty of finding men and women who meet those criteria. The approach most often used is the "adjustment" approach. The female-to-male gross earnings ratio is computed, and net differences are then obtained by adjusting for differences in work-productivity factors. The unexplained differences that result are said to reflect discrimination.

Gunderson (1982) provides a good review of some of the Canadian studies that use these two methods (see Table 7). The variety of results in these studies reflects differences in the data base used and differences in the productivity factors dealt with. Despite the differences, Gunderson (1976a: 120) draws a number of conclusions suggested by the pattern of the results:

- Females in Canada typically earn 50-80 per cent of what males earn. When productivity adjustments are made, women typically earn 80-90 per cent of what males earn.
- If one argues that all of the earnings difference reflects discrimination, then women earn 20-50 per cent less than men because of present and past discrimination.
- If one argues that productivity differences are the result of choice (and if one makes appropriate

adjustments), women earn 10-20 per cent less than men as a result of discrimination.

- Net earnings differentials between men and women employed in the same occupation, within the same firm, are much lower, but women still earn a little under 10 per cent less than men.

Even a conservative approach to estimating earnings discrimination indicates that Canadian women with the same level of productivity, and those who do the same work in the same firm, still earn anywhere from 10-20 per cent less than men (see Table 8).

**TABLE 8**  
**Female/Male Wage Ratio**  
**of Selected Occupations in 1979**

| Occupation Type                | Number<br>of<br>Occupations | Wage<br>Ratio<br>as % |
|--------------------------------|-----------------------------|-----------------------|
| Office workers                 | 27                          | 89.3                  |
| Service workers                | 8                           | 87.3                  |
| Manual workers                 | 4                           | 79.9                  |
| Wholesale workers              | 6                           | 78.1                  |
| Retail food workers            | 4                           | 109.2                 |
| Retail workers other than food | 6                           | 79.6                  |
| Financial workers              | 6                           | 95.7                  |
| Restaurant workers             | 7                           | 92.8                  |
| Hotel workers                  | 6                           | 92.7                  |
| Hospital workers               | 8                           | 94.9                  |
| Weekly rated                   |                             |                       |
| (paid by the week)             | 22                          | 91.3                  |
| Hourly rated                   |                             |                       |
| (paid by the hour)             | 45                          | 83.2                  |

Source: P. Philips and E. Philips, *Women at Work*, 1983, Table 3.3.

It is argued that one of the main reasons women earn less than men (even after adjusting for productivity differences) is that women are concentrated in a small number of low-wage occupations. Overcrowding in these occupations further serves to keep the wages low. There is some evidence to substantiate the claim that some desegregation of occupations would reduce the earnings gap. For example, case studies of men and women in the same occupations and firm show that both the unadjusted ratio and the adjusted ratio of female-to-male earnings are much higher (see Table 7). Likewise the female-to-male wage ratios for selected occupations are much higher than those for occupational groups (see Tables 7 and 8). Evidence provided by Gunderson (1976a:122) suggests that desegregation among broad occupational groupings may serve to enlarge the wage gap but that desegregation within an occupational category would narrow the earnings gap.

*Adjusting for differences in occupational distribution by sex does not by itself raise the ratio of female to male earnings. For the broader occupational groupings, occupational desegregation would not reduce the wage gap unless accompanied by more equal wages within each occupation. Equalizing the occupational distribution*



would, to a large extent, transfer women from clerical and teaching occupations, where the earnings differential is small, to primary and blue collar jobs, where the earnings gap is large. Females may be losing ground in occupations where the earnings gap is small and gaining where the earnings gap is large. To the extent that females have the low-wage jobs within each broad grouping, desegregation within occupations would obviously narrow the earnings gap.

Another factor that helps to reduce the earnings gap is unionization. According to White (1980), unionization significantly improves women's earnings and decreases the earnings gap between men and women. White looked at 20 office occupations and found that the average difference between men's and women's wages was 10 per cent for unionized workers and 17 per cent for non-unionized workers. Likewise, Gunderson (1975) found that within narrowly defined occupations within the same establishment, unions raised the ratio of female-to-male wages from .82 to .90. Women's representation in unions has increased from 17 per cent (in 1965) to 30 per cent (in 1979), suggesting that some of the narrowing of the wage gap may have resulted from the increased unionization of women.

The one factor that should have resulted in a rapid narrowing of the earnings gap is equal pay legislation. As noted earlier, this has resulted in a slight narrowing of the gap but not a significant one. Most analysts feel that equal pay legislation has had little impact on the earnings gap for a number of reasons<sup>9</sup>. The restrictive nature of equal pay legislation makes it applicable only where both men and women are employed at the same job in the same firm. Therefore the legislation does not apply to the large number of women in segregated occupations. There are loopholes that allow employers to claim that wage differences are due to differences in seniority, experience, merit. The existence of the earnings gap between men and women who work at the same job, in the same firm, after adjusting for productivity differences, confirms that the legislation is not being enforced. The Royal Commission on the Status of Women (1970: 72-75) documents many cases where men and women should have been receiving equal pay but were not. Despite the existence of pay differences, the Commission reported that at the time of the report no complaints had been made under the federal Female Employee Equal Pay Act, and only a handful of complaints had been received in provinces with equal pay laws. (Problems with equal pay legislation will be discussed further in the section on policy implications.)

### 3. Summary

The analysis of the earnings pattern of women over time is severely restricted by the lack of studies. What has been done indicates that there has been a slight reduction in the earnings gap in the last 15 years. It is difficult at this point to conclude whether things are starting to improve or whether the reduction is merely a fluctuation.

The earnings gap between men and women is still very large. In 1979, women (full-time workers) were still earning only 63 cents for every dollar men earned. In 1911, they were earning 53 cents for every dollar. There has been not much of an improvement in 68 years.

The extent to which the earnings gap is attributable to discrimination varies depending on one's perspective. Even the most conservative estimate attributes at least 10 per cent of the gap to discrimination.

### C. Occupational and Industrial Distribution

One of the main reasons for the existence of the earnings gap between women and men is attributed to the occupational segregation of women. Women's earnings are lower because they are concentrated in lower-paying jobs (Armstrong and Armstrong, 1983). The wages in these occupations remain low because the supply of labour relative to demand has been greater. Equal pay for equal work legislation has not been effective because of the differences in the occupational distributions of men and women.

This section examines the extent to which women are segregated in particular occupations and industries. It will look at whether the occupational distribution of women has changed over time and with the introduction of equal employment legislation. It will also examine some of the reasons given for women's occupational segregation.

#### 1. Time-Patterns of Occupational and Industrial Segregation

Gunderson's (1976: 111-118) analysis of women's distribution in occupational and industrial categories from 1901 to 1971 provides a systematic view of what has been happening to Canadian women. For each census year, Gunderson calculated a coefficient of variation that indicates the extent to which women are evenly distributed across the occupational categories. The smaller the coefficient the more even the distribution. He found that from 1901 to 1971 there was a consistent decline in the coefficient. For example in 1901 it was .985, in 1931 it was .792, and in 1971 it was .577 (see Table 9). The corresponding coefficient for men during the same period has remained roughly constant at .30.

Gunderson found a similar pattern of desegregation in the industries in which women worked for the period 1931 to 1971. The coefficient of variation for industries was .907 in 1931, .769 in 1951, and .647 in 1971. Women have been and still are over-represented in non-durable manufacturing (especially knitting and clothing), retail trade, finance, insurance, real estate, and services, but they have also made inroads into some of the male-dominated industries.

Gunderson's analysis of the census figures clearly indicates that there has been a decline in the extent to which women are segregated in broad occupational categories and industries. The Labour Force Survey for 1980 indicates that the trend is continuing (see Table 9); women are expanding into more and more occupational categories.

However, the evidence also suggests that there are still high levels of segregation within the occupational categories, as well as high levels of segregation if one looks at the industries within which these occupations are located. In 1980, more than one-third of female workers (35 per cent) were employed in clerical occupations (compared with 6 per cent of men). Eighteen per cent were in service occupations (compared with 10 per cent of men); and of these most were in low-paying service sub-categories (such as cooking, cleaning, caring for children, hairdressing, waiting on tables) rather than the more highly paid protective services (such as firefighters, police). Nineteen per cent of women were in profes-

**TABLE 9**  
**Women as a Proportion of Labour Force by Occupation,**  
**Selected Years 1901-1980 (percentages)**

| Occupation               | 1901 | 1911 | 1921 | 1931 | 1941 | 1951 | 1961 | 1971 | 1980 |
|--------------------------|------|------|------|------|------|------|------|------|------|
| Managerial               | 3.6  | 4.5  | 4.3  | 4.9  | 7.2  | 8.9  | 10.3 | 15.7 | 25.2 |
| Professional             | 42.5 | 44.6 | 54.1 | 49.5 | 46.1 | 43.5 | 43.2 | 48.1 | 41.3 |
| Clerical                 | 22.1 | 32.6 | 41.8 | 45.1 | 50.1 | 56.7 | 61.5 | 68.4 | 78.2 |
| Sales                    | 10.4 | 20.2 | 25.6 | 26.0 | 32.1 | 38.3 | 40.3 | 30.4 | 39.6 |
| Service                  | 68.7 | 64.8 | 58.6 | 62.1 | 65.0 | 47.8 | 50.0 | 46.2 | 54.0 |
| Primary                  | 1.1  | 1.5  | 1.6  | 1.9  | 1.5  | 3.1  | 9.2  | 16.4 | 18.3 |
| Blue collar              | 12.6 | 10.2 | 10.1 | 8.5  | 11.0 | 11.5 | 10.6 | 12.0 | —    |
| All occupations          | 13.4 | 13.2 | 15.4 | 17.0 | 19.9 | 22.0 | 27.3 | 34.3 | 39.7 |
| Coefficient of variation | .985 | .844 | .786 | .792 | .744 | .666 | .626 | .577 | —    |

Sources: Figures for 1901-1971 are from M. Gunderson, "Work Patterns", in G. Cook (ed.) *Opportunity for Choice*, 1976, Table 4.8. Figures for 1980 are from P. Armstrong and H. Armstrong, *A Working Majority*, 1983, Table 3.

sional occupations (compared with 13 per cent of men) but mostly in lower-paid professions (such as teaching and nursing). Very few are in higher-paid professions (such as doctor, lawyer, or engineer). More than 72 per cent of women in 1980 were employed in clerical, professional, and service occupations (Armstrong and Armstrong, 1983, see Table 10).

A ranking of the 25 occupations employing the largest number of women (1971) shows that many jobs are occupied almost entirely by women (see Table 11). In 1971, for example, 97 per cent of secretaries and stenographers were women, 96 per cent of telephone operators were women, and 96 per cent of typists and clerk-typists were women. Most of the 25 occupations are dead-end jobs, jobs that are low-paying, low in status, offer little opportunity for advancement, and are an extension of household activities.

**TABLE 10**  
**Occupational Distribution of Labour Force**  
**by Sex, 1971 and 1980 (percentages)**

| Occupation      | 1971 |       | 1980 |       |
|-----------------|------|-------|------|-------|
|                 | Men  | Women | Men  | Women |
| Managerial      | 5.5  | 2.0   | 9.5  | 4.9   |
| Professional    | 10.0 | 17.8  | 12.9 | 19.0  |
| Clerical        | 7.6  | 31.6  | 6.3  | 34.6  |
| Sales           | 10.0 | 8.4   | 10.4 | 10.4  |
| Service         | 9.2  | 15.1  | 10.1 | 18.1  |
| Primary         | 9.8  | 3.7   | 8.5  | 2.8   |
| Blue Collar     | 40.5 | 10.6  | 42.3 | 10.2  |
| Not Stated      | 7.4  | 10.8  | —    | —     |
| All Occupations | 100% | 100%  | 100% | 100%  |

Sources: Figures for 1971 are from M. Gunderson, "Work Patterns" in G. Cook (ed.) *Opportunity for Choice*, 1976, Table 4.6 (based on census figures). Figures for 1980 are from P. Armstrong and H. Armstrong, *A Working Majority*, 1983, Table 5.

Armstrong and Armstrong (1983: 6-19, 251) provide documentation to show that occupational segregation is even greater if one looks at the industrial sectors in which women's jobs are concentrated (see Table 12). For example, one-tenth of women in the labour force (in 1980) were in sales occupations, and four-fifths of these women worked in the trade sector.

*Most of the women in sales are behind the counter selling candies or women's underwear, and running the cash register in grocery and department stores. The rest of them are concentrated in the finance sector, selling services in banks and selling houses in real estate. Male workers are more widely distributed amongst the industrial sectors, with a higher proportion in finance and manufacturing where the pay is better and required skills are recognized. (p. 9)*

Whether one looks at the coefficient of variations using broad occupational categories, or whether one uses the more sensitive breakdowns of occupations and industries, it is clear that women still experience higher levels of occupational segregation than men. Women tend to be concentrated in occupations that are low-paying and offer few chances for advancement.

Equal opportunity legislation was first enacted in 1964 and most jurisdictions in Canada now have equal opportunity provisions that apply to women. The legislation is designed to combat discrimination in the areas of hiring, promotion, and conditions of work. According to Cook and Eberts (1976: 180), preliminary indications are that women are using equal opportunity legislation more than they have used equal pay legislation in the past. One assessment of the impact of equal opportunity laws based on the last census data available (1971) shows no dramatic change between 1961 and 1971. Gunderson (1976a: 116) found that a typical decrease in the levels of occupational segregation for a 10-year period over the 70 years he examined was 8 per cent. The introduction of the legislation in the 1960s should have caused a more dramatic drop between 1961 and 1971. But the rate of change over the period was the same as in previ-

ous decades. Gunderson's assessment may have been done too soon. More recent figures show that the pattern of occupational segregation may have changed more dramatically between 1971 and 1980 (see Tables 9 and 10).

## 2. Choice or Discrimination

Are women concentrated in clerical, service, and sales occupations by choice or as a result of discrimination? This is another major debate in the literature which, unlike the productivity or discrimination debate (when explaining earnings differentials), has received very little systematic empirical analysis. Therefore we cannot even say, as we could with earnings differences: if you take the "choice" position, "x" amount of occupational segregation is explained by discrimination. It is not clear how much of "choice" is the result of past discrimination which has kept women from obtaining the necessary qualifications and support to compete in traditionally "male" occupations.

It is important to understand the causes of the "ghettoization" of women if desegregation is to be achieved. This issue of "choice" or "discrimination" will be discussed in detail in Section III of the report, which looks at specific barriers to equal opportunity.

## 3. Summary

Census figures indicate that there has been a decline in the extent to which women are segregated in occupational categories. Between 1901 and 1971, the coefficient variation has declined from .985 to .577. More and more women are moving into occupations that were traditionally male-dominated. This has been especially true in the last 15 years.

While the trend to desegregation has continued and increased somewhat, women are still over-concentrated in a small number of occupations, most of which are dead-end jobs. In 1971, the coefficient of variation was .577 for women compared with .300 for men. In 1980, 72 per cent of women were located in three occupational categories (clerical, service, professional).

There is still a high level of segregation within occupational categories and industrial sectors. For example, more women are moving into the professional occupations category but they are mostly in lower-paid professions (such as teaching and nursing) instead of being doctors, lawyers, and engineers.

TABLE 11  
Leading Occupations of Female Labour Force, 1971

| Rank | Occupation (and CCDO Number)      | Female Labour Force | % of Female Labour Force in this Occupation | Females as % of Labour Force in Each Occupation | 1961 Rank |
|------|-----------------------------------|---------------------|---------------------------------------------|-------------------------------------------------|-----------|
| 1    | Secretaries/stenographers (4111)  | 239,810             | 8.1                                         | 97.4                                            | 1         |
| 2    | Sales clerks (5137)               | 159,820             | 5.4                                         | 66.0                                            | 2         |
| 3    | Bookkeepers/account clerks (4131) | 136,435             | 4.6                                         | 67.6                                            |           |
| 4    | Elementary teachers (2731)        | 120,160             | 4.1                                         | 82.3                                            |           |
| 5    | Waitresses (6125)                 | 105,410             | 3.6                                         | 82.9                                            | 6         |
| 6    | Tellers and cashiers (4133)       | 103,455             | 3.5                                         | 91.3                                            |           |
| 7    | Farm workers (7182)               | 93,500              | 3.2                                         | 46.2                                            | 5         |
| 8    | Nurses, graduate (3131)           | 90,850              | 3.1                                         | 95.8                                            | 7         |
| 9    | Typists & clerk-typists (4113)    | 84,880              | 2.9                                         | 95.6                                            | 10        |
| 10   | General office clerks (4197)      | 79,340              | 2.7                                         | 62.2                                            |           |
| 11   | Sewing machine operators (8563)   | 57,320              | 1.9                                         | 90.1                                            |           |
| 12   | Personal service n.e.c. (6149)    | 56,325              | 1.9                                         | 92.0                                            |           |
| 13   | Janitors/cleaners (6191)          | 54,790              | 1.9                                         | 32.4                                            |           |
| 14   | Nursing aids & orderlies (3135)   | 52,770              | 1.8                                         | 74.4                                            | 9         |
| 15   | Secondary school teachers (2733)  | 49,465              | 1.7                                         | 44.5                                            |           |
| 16   | Other clerical n.e.c. (4199)      | 44,075              | 1.5                                         | 62.0                                            |           |
| 17   | Receptionists (4171)              | 42,475              | 1.4                                         | 92.6                                            |           |
| 18   | Supervisors: sales (5130)         | 41,975              | 1.4                                         | 16.8                                            |           |
| 19   | Chefs and cooks (6121)            | 39,280              | 1.3                                         | 50.2                                            | 13        |
| 20   | Packaging n.e.c. (9317)           | 37,480              | 1.3                                         | 56.3                                            |           |
| 21   | Barbers & hairdressers (6143)     | 35,620              | 1.2                                         | 63.2                                            | 14        |
| 22   | Telephone operators (4175)        | 30,445              | 1.3                                         | 95.9                                            | 11        |
| 23   | Library & file clerks (4161)      | 27,080              | 0.9                                         | 82.2                                            |           |
| 24   | Labour & elemental work (6198)    | 23,765              | 0.8                                         | 47.0                                            | 19        |
| 25   | Baby sitters (6147)               | 20,225              | 0.7                                         | 96.6                                            | 24        |
|      | Total in 25 leading occupations   | 1,826,750           | 61.7                                        | 65.9                                            |           |

Source: M. Gunderson, "Work Patterns" in G. Cook (ed.) *Opportunity for Choice*, 1983, Table 4.7.



**TABLE 12**  
**Occupational Concentration by Sex and Industry, 1980**

| Occupation         | Sex | All Industries | Agriculture | Other Primary | Manu-<br>facturing | Construc-<br>tion | Utilities | Trade | Finance | Services | Public<br>Administra-<br>tion |
|--------------------|-----|----------------|-------------|---------------|--------------------|-------------------|-----------|-------|---------|----------|-------------------------------|
| All occupations    | M   | 100.0          | 5.5         | 4.2           | 24.0               | 8.8               | 11.1      | 16.2  | 3.9     | 18.9     | 7.6                           |
|                    | F   | 100.0          | 3.0         | 0.7           | 13.4               | 1.3               | 4.4       | 18.7  | 8.4     | 44.1     | 6.0                           |
| Managerial, etc.   | M   | 100.0          | 0.3         | 2.5           | 16.7               | 3.1               | 7.7       | 5.9   | 6.7     | 42.8     | 14.4                          |
|                    | F   | 100.0          | 0.4         | 0.6           | 4.8                | 0.6               | 2.5       | 4.2   | 5.5     | 74.8     | 6.7                           |
| Clerical           | M   | 100.0          |             | 1.5           | 22.8               | 2.0               | 23.8      | 19.4  | 5.9     | 12.3     | 12.5                          |
|                    | F   | 100.0          | 0.6         | 1.2           | 11.1               | 2.7               | 8.8       | 22.0  | 16.5    | 26.4     | 10.6                          |
| Sales              | M   | 100.0          |             |               | 10.3               | 0.7               | 1.6       | 69.2  | 13.9    | 3.6      |                               |
|                    | F   | 100.0          |             |               | 3.7                |                   |           | 81.1  | 9.4     | 4.3      |                               |
| Service            | M   | 100.0          |             | 1.1           | 6.5                | 0.6               | 3.5       | 4.0   | 4.1     | 60.5     | 19.4                          |
|                    | F   | 100.0          |             |               | 1.7                |                   | 1.2       | 3.8   | 2.2     | 87.7     | 2.7                           |
| Primary            | M   | 100.0          | 61.5        | 23.9          | 2.7                | 2.7               | 0.9       | 1.5   |         | 3.3      | 3.1                           |
|                    | F   | 100.0          | 89.4        |               |                    |                   |           |       |         | 3.3      |                               |
| Processing         | M   | 100.0          |             | 3.2           | 63.0               | 3.2               | 6.2       | 18.2  |         | 4.5      | 1.5                           |
|                    | F   | 100.0          |             |               | 86.2               |                   |           | 6.3   |         | 6.3      |                               |
| Construction       | M   | 100.0          |             | 2.3           | 8.1                | 65.4              | 13.7      | 1.9   | 0.6     | 2.8      | 4.7                           |
|                    | F   | 100.0          |             |               |                    | 62.5              |           |       |         |          |                               |
| Transportation     | M   | 100.0          |             | 3.9           | 11.2               | 3.9               | 57.3      | 13.3  |         | 5.1      | 5.1                           |
|                    | F   | 100.0          |             |               |                    |                   | 64.0      |       |         | 16.0     |                               |
| Materials handling | M   | 100.0          |             | 3.5           | 43.4               | 2.9               | 17.6      | 21.4  |         | 5.3      | 4.4                           |
|                    | F   | 100.0          |             |               | 62.3               |                   |           | 23.4  |         | 7.8      |                               |

Source: P. Armstrong and H. Armstrong, *A Working Majority*, 1983, Table 4. Calculated from Statistics Canada, unpublished data.

### III. BARRIERS TO EQUAL OPPORTUNITY: DISCRIMINATION, PRODUCTIVITY DIFFERENCES, CHOICE

It is apparent from the statistical information presented in Section II that women in the labour force still earn less than men, and that they still experience more occupational segregation than do men. It is necessary to understand why these differences occur in order to alleviate them or to ensure that no sex differentials enter into the costs and benefits of choices.

A number of theories attempt to explain why the differences exist, either in terms of women's preferences and lower productivity, or in terms of discriminatory behaviour on the part of employers, unions, and co-workers. The statistical information on women's position in the Canadian economy is interpreted differently, depending on the observer's theoretical point of view. To some, the differences reflect women's preferences and choices. To others, they reflect the constraints faced by women. Unfortunately, too few empirical studies have attempted to collect evidence on the sources of the differences. The work of those who have identified and documented some of the barriers is so recent that the issue of changes in the barriers over time has not been addressed.

This section presents a brief description of the theoretical explanations for male-female differences in earnings and occupational segregation. These theories are useful indicators to the identification of barriers to equal opportunity and can be used to inform researchers and policy makers on why

barriers may exist. This is followed by an attempt to isolate and document the existence (by empirical means) of some specific barriers faced by women, and to determine the extent to which existing differences in male and female labour force experience is attributable to specific barriers.

#### A. Theoretical Explanations for Differences

The theoretical explanations<sup>10</sup> can be divided into two camps: those that assume that discrimination exists and try to explain who discriminates and why; and those that assume that differences are not the result of discriminatory behaviour. The first three theories presented attempt to explain discrimination.

##### 1. Personal Prejudice or Aversion Model

According to this model, individuals are prepared to pay a cost in order to avoid associating with members of a disfavoured group, in this case, women. The cause of discrimination is seen as personal prejudice or aversion toward women. According to this theory (developed by Gary Becker), employers are prepared to pay a premium or sacrifice profits in order to avoid hiring women. Similarly, discriminatory employees will be prepared to accept a lower wage to avoid employment with such minorities, or require higher wages if they must work with them. Discriminatory clients will prefer to pay higher prices to avoid dealing with the disfavoured group.

This theory sees discrimination as economically irrational and costly. It therefore predicts that discrimination is likely to persist only where market structures are monopolistic. In competitive market structures, employers would be unable to compete with non-discriminatory employers. According to this theory, discriminatory behaviour reduces the income both of those who discriminate and those who are discriminated against.

## 2. Monopoly-Power Model

The monopoly-power model is based on the belief that it is possible for majority groups to gain at the expense of the disadvantaged group. In this model, discrimination is seen as a way for some workers to obtain and maintain control over jobs in order to ensure job security and higher income. Both overt and covert exclusion methods are used to reduce the labour supply. Trade unions, and more specifically craft unions and professional associations, have been known to attempt to influence pay and working conditions by limiting the available supply of labour<sup>11</sup>. The supply of labour can be limited by such tactics as licensing the occupation, restricting the numbers allowed to enter, and using informal hiring.

## 3. Dual/Segmented Labour Market Model

Economists have identified the existence of, at minimum, a dual labour market. A primary market is composed mainly of prime-aged, white males who are concentrated in stable jobs which are high-paying, offer on-the-job training, and allow for internal mobility. A secondary market is composed mainly of youth, coloured workers, and women who are concentrated in low-paying, unstable jobs which offer no skill development and no prospects for advancement. Confinement to the secondary job market not only does not allow workers to invest in further human capital but actually adversely affects work habits, thereby making workers less motivated and less committed to the labour force.

Radical economists argue that capitalists deliberately segment labour markets in order to divide workers and maximize their profits. By excluding women from "men's" jobs, employers cause women to be overcrowded into a small number of occupations. The increased supply of labour (relative to demand) depresses wages in the secondary market; and the large, cheap supply of female labour can be used as a threat to keep men in the primary labour market from demanding higher wages.

## 4. Human Capital Model

Human capital theory explains earnings and occupational distribution differentials in terms of differences in the productive capacity of men and women. The greater one's productivity, the higher one's earnings. In order to increase one's productivity, individuals invest in education, training, and experience in the labour force. The earnings differentials of men and women merely reflect the fact that men have made higher levels of human capital investment (i.e., have more education, more training, and more labour force experience).

Substantial evidence exists to support the human capital theory. In Section II, it was shown that once adjustments are made for productivity differences the earnings gap between men and women is greatly reduced.

## 5. Preference or Choice Model

There are those who argue that women are segregated in particular occupations because they choose to be. Most women choose jobs on the basis of their being complementary with household activities and child-raising. They therefore look for jobs with flexible hours, or for part-time work, so that they can combine their household responsibilities with participation in the paid labour force. Child-bearing and care of family members who are ill has meant that some women prefer jobs that allow them to leave and re-enter the labour market easily.

Some women may not apply for certain jobs because they have lower productivity than the job requires, or at least believe their productivity to be lower. They may also feel that some jobs are not "women's" work.

These five approaches indicate the number of possible explanations for differences in the employment opportunities of men and women. Where discrimination is identified as a cause, reasons for discriminatory behaviour are attributed variously to prejudice or misinformation, higher profits, higher wages, job security; potential sources of discrimination include employers, clients, co-workers, and trade unions.

## B. Documentation of Barriers

The brief survey of theoretical approaches indicates that the causes and sources of discrimination and the causes of differences are numerous and interconnected. No doubt all are at work simultaneously to produce the differences documented in Section II. In this part of the section some of the barriers that women face are discussed. An attempt is made to provide some empirical evidence for the existence of each barrier, and how important it may be in explaining the position of women in the Canadian economy.<sup>12</sup>

### 1. Education and Experience

Inadequate education and training are often mentioned as one of the barriers deterring women's advancement in the labour force. It has been repeatedly verified that education and experience explain a large percentage of income and status differences among individuals and groups. Gunderson (1976a) found that education does affect the participation rate, unemployment rate and earnings gap (see Table 13).

- Gunderson found that in 1971 the participation rate of married women between the ages of 15 and 64 increased from 36 per cent (for those who had not completed high school) to 55 per cent (for those who had completed university). The increase is even greater if one looks at more recent labour force participants (those aged 15 to 24). Their participation rate ranges from 40 per cent (for those who had not completed high school) to 78 per cent (for those who completed university).
- Higher education tends to be associated with lower rates of unemployment. The rate of unemployment in 1971 for women with elementary education or less was 8.4 per cent, compared with 6.1 per cent for women who had completed university.
- The annual earnings for full-year, full-time working women with elementary education or less in 1971 was \$3,638, compared with \$10,259 for women with an MA or PhD degree. The earnings ratio for men

**TABLE 13**  
**Education, Labour Force Participation Rates,  
 Unemployment Rates, and Earnings, 1971**

| Labour Force Participation Rates (Married Women only) |       |       |       |       |       |
|-------------------------------------------------------|-------|-------|-------|-------|-------|
| Education                                             | Age   |       |       |       | Total |
|                                                       | 15-24 | 25-34 | 35-44 | 45-64 |       |
| Incomplete high school                                | 40 %  | 34 %  | 38 %  | 35 %  | 36 %  |
| Complete high school                                  | 64    | 46    | 47    | 47    | 50    |
| Complete university                                   | 78    | 55    | 46    | 49    | 55    |

| Unemployment Rates    |      |       |           |
|-----------------------|------|-------|-----------|
| Education             | Men  | Women | Women/Men |
| Elementary or less    | 8.0% | 8.4%  | 1.1%      |
| 1-3 years high school | 8.3  | 10.3  | 1.2       |
| 4-5 years high school | 7.0  | 8.1   | 1.2       |
| Completed university  | 3.5  | 6.1   | 1.7       |

| Earnings for Full Year, Full-Time Workers |          |            |                 |
|-------------------------------------------|----------|------------|-----------------|
| Education                                 | Men (\$) | Women (\$) | Women/Men Ratio |
| Elementary or less                        | 6,610    | 3,638      | .55             |
| 1-3 years high school                     | 7,681    | 4,459      | .58             |
| 4-5 years high school                     | 8,818    | 5,269      | .60             |
| B.A. or first degree                      | 12,768   | 8,184      | .64             |
| M.A. or Ph.D.                             | 14,430   | 10,259     | .71             |

Source: M. Gunderson, "Work Patterns", in G. Cook (ed.) *Opportunity for Choice*, 1976, Tables 4.3, 4.5, 4.10.

and women increases with education. The female-to-male ratio was .55 for women and men with elementary education or less and .71 for those with an MA or PhD degree.

In general it appears that women with higher levels of education are more likely to participate in the labour force, less likely to be unemployed, and have a smaller earnings gap.

It has also been argued that current productivity differences result partly from past discrimination or pre-labour market commitments. Through socialization women have been conditioned not to invest in productivity since their primary role is seen to be outside the labour force. Education systems have conditioned and channelled women into fields of study (such as arts, education, nursing) that lead to "women's" jobs. As of 1971, enrolment figures show an increase in the number of women enrolled in traditionally male-dominated fields of study (such as law, medicine, commerce), but total female enrolment remains small<sup>13</sup>.

Whatever the reasons for the lower levels of education, studies show that women can improve their positions in the labour force to a certain extent if they invest more in education, especially in traditionally male-dominated fields.

## 2. Labour Force Commitment

It is sometimes argued that women do not do as well as men in the labour force because women are not as committed to their jobs. Because of their primary commitment to household responsibilities: a) women restrict their productivity investment; b) they apply for the kinds of jobs that accom-

modate part-time work, higher turnover rates, and high levels of absenteeism; c) employers are less likely to invest in training women; d) women are less likely to acquire as much labour force experience as men.

Evidence indicates that married women, women in their middle years who are raising children, and women with low levels of education have weak labour force commitment. Women with these characteristics are precisely the ones who suffer the greatest earnings gap. Gunderson (1976a) found that the earnings gap between men and women is greatest for those women who are married, middle aged, and who have low levels of education (see Table 14). The gap is least for women who are young and single, precisely those who are most committed to the labour force and have fewer family responsibilities.

While the reasons for the weaker labour force commitment may be seen as originating from prior discrimination, the fact that it is a factor in explaining some of the earnings differences indicates that women must either overcome the constraints that keep some women weakly committed to the labour force or accept the lower commitment as part of the reason for the differences which exist.

## 3. Lack of Equitable Division of Labour in the Household and Absence of Childcare Facilities

One of the major sources for the weaker labour force commitment of some women is the lack of equitable division of labour in the household and the absence of childcare facilities. Being married and having children entails costs and



TABLE 14

**Female-Male Earnings Gap by  
Marital Status, Education, and Age, 1971**

| Variable                                                      | Male<br>Earnings<br>(\$) | Female<br>Earnings<br>(\$) | Female/Male<br>Earnings<br>Ratio |
|---------------------------------------------------------------|--------------------------|----------------------------|----------------------------------|
| <b>Age:</b>                                                   |                          |                            |                                  |
| 15-19                                                         | 3,286                    | 2,919                      | .89                              |
| 20-24                                                         | 5,600                    | 4,300                      | .77                              |
| 25-34                                                         | 7,944                    | 5,321                      | .66                              |
| 35-44                                                         | 9,141                    | 5,132                      | .56                              |
| 45-54                                                         | 9,095                    | 5,051                      | .56                              |
| 55-64                                                         | 8,191                    | 4,906                      | .60                              |
| 65+                                                           | 6,124                    | 3,590                      | .59                              |
| <b>Marital Status:</b>                                        |                          |                            |                                  |
| Single                                                        | 5,740                    | 4,771                      | .83                              |
| Married and spouse<br>present                                 | 8,650                    | 4,847                      | .56                              |
| Separated, widowed,<br>divorced, married<br>and spouse absent | 7,562                    | 4,869                      | .64                              |
| <b>Education:</b>                                             |                          |                            |                                  |
| Elementary or less                                            | 6,610                    | 3,638                      | .55                              |
| 1-3 years high school                                         | 7,681                    | 4,459                      | .58                              |
| 4-5 years high school                                         | 8,818                    | 5,269                      | .60                              |
| B.A. or first degree                                          | 12,768                   | 8,184                      | .64                              |
| M.A. or Ph.D.                                                 | 14,430                   | 10,259                     | .71                              |

Source: M. Gunderson, "Work Patterns", 1976, Table 4.10.

benefits. Household responsibilities and child-rearing influence one's occupational choice, length of time in the labour force, and nature of labour force participation (full-time versus part-time work). What is discriminatory about the situation is the fact that the cost of being married and especially having children is much greater for working women than for working men (Cook, 1976: 1-12). Married women who work full-time in the labour force work more hours each week (in the home and labour force combined) than their husbands. Working mothers are faced with guilt and emotional strain, for society still finds it unacceptable for mothers of young children to work outside the home. A 1982 national Gallup poll shows that 54 per cent felt that women with young children should not work.

Women who must or wish to have a family and be in the labour force face a different set of options and social pressures than do their husbands. Gunderson (1976a) found that marriage has a positive effect on men in the labour force and a negative effect on women (see Table 15).

- Married men are much more likely to participate in the labour force than other men or than married women. The female-to-male participation ratio for married men and women was .43 in 1971. Eighty-five per cent of married men were in the labour force, compared with 36 per cent of married women.
- Married men had the lowest rate of unemployment (4.2 per cent in 1971) of all labour force participants, including women. The ratio of female-to-male unemployment was the highest between married women and men (1.6).

- Married men reported the highest earnings of all labour force participants; and the female-to-male earnings ratio for 1971 indicates the lowest ratio to be between men and women who were married. The ratio was .83 for single men and women, .56 for married, and .64 for others.

Some of the costs of having a family and the barriers it imposes on women who participate in the labour force can be reduced by providing more childcare facilities and by a more equitable distribution of household activities.

TABLE 15

**Marital Status, Labour Force Participation Rates,  
Unemployment Rates, and Earnings Gap  
by Sex, 1971**

| Marital Status | Labour Force Participation Rates         |         |           |
|----------------|------------------------------------------|---------|-----------|
|                | Men                                      | Women   | Women/Men |
| Single         | 64.2%                                    | 54.2%   | .84       |
| Married        | 85.0                                     | 36.3    | .43       |
| Other          | 61.4                                     | 33.2    | .54       |
| Marital Status | Unemployment Rates                       |         |           |
|                | Men                                      | Women   | Women/Men |
| Single         | 15.2%                                    | 12.7%   | .8        |
| Married        | 4.2                                      | 6.9     | 1.6       |
| Other          | 10.6                                     | 7.6     | .7        |
| Marital Status | Earnings Full-Year,<br>Full-Time Workers |         |           |
|                | Men                                      | Women   | Women/Men |
| Single         | \$5,740                                  | \$4,771 | .83       |
| Married        | 8,650                                    | 4,847   | .56       |
| Other          | 7,562                                    | 4,869   | .64       |

Source: M. Gunderson, "Work Patterns", 1976, Tables 4.2, 4.5, and 4.10.

#### 4. Social Attitudes—Sex-Typing of Jobs and Roles

Social attitudes can be a powerful source of discrimination. Society's expectations of the roles that men and women should play are usually based on past trends and patterns. Sex stereotyping starts very early in the home and is reinforced in children's books and in schools. Therefore, altering expectations and attitudes usually takes a generation. The presence of increasing numbers of women in the labour force and in non-traditional jobs should help to change and reinforce new expectations and attitudes about women's role in the labour force. There are some indications that this is slowly happening. For example, responses to a Gallup poll, asking whether married women should take a job outside the home if they have young children, demonstrates a substantial change in attitudes over a 22-year period<sup>14</sup>. In 1960 only 5 per cent said yes. By 1982, 38 per cent said yes. The idea of mothers with young children working (in 1982) was more acceptable to the younger generation (which has been exposed to larger numbers of working women) than to those who were growing up when fewer women worked. Fifty-one per cent of those between 18 and 29 years felt it was all right for these women to work, compared with only 28 per cent of

those aged 50 and over. As encouraging as the change may be, most people still disapprove of women combining family responsibilities and work outside the home; and it has taken 22 long years even for that change.

Attitudes change as new role models are created. The fact that women entering the labour force are still segregated in traditionally "women's" jobs helps to perpetuate the existing sex-typing of occupations. While some may feel that the sex-typing of occupations is based on biological and temperamental differences between men and women, there is overwhelming evidence that sex-typing of occupations is purely cultural.

*The sex composition of occupations and professions in other parts of the world shows that many of these attitudes have no basis in fact. In the early 1960's the percentage of physicians who were women was approximately seven percent in Canada, 10 percent in France and 75 percent in the U.S.S.R. For lawyers, the percentages were three percent in Canada, 26 percent in France and 30 percent in the U.S.S.R. And for dentists, the percentages were four percent in Canada, 26 percent in France and about 80 percent in the U.S.S.R. In Canada, women represented less than one percent of the engineers and in the U.S.S.R. about 30 percent. In France, the proportion of women engineers was only slightly higher than in Canada.<sup>15</sup>*

The cultural attitudes about jobs that women can and should do result in young girls preparing themselves for traditionally "women's" jobs. As of 1971, few women were enrolled in traditionally male-dominated fields of study (Robb and Spencer, 1976).

Cultural attitudes lead co-workers and employers to discriminate against women entering "men's" jobs. A 1964 Gallup poll that asked, "If you were taking a job and had your choice of a boss, would you prefer to work for a man or a woman?" showed that 64 per cent preferred a male boss. There were no differences in attitudes between the men and the women who responded. Sixty-five per cent of the men preferred a male boss compared with 64 per cent of the women. In 1965, 51 per cent of men and 54 per cent of women felt that married women should not be given equal opportunity to compete for jobs along with men<sup>16</sup>. (According to Dasko and Adams [1982] there has been a trend towards the liberalization of attitudes toward women in the last 15 to 20 years.) An experiment conducted by the Royal Commission on the Status of Women (1970:93) indicates that employers' consideration of job applicants is influenced by the sex of the applicant. Federal public service officers were asked to rate the paper qualifications of candidates: given a male name, one candidate was rated first 86 per cent of the time; with a female name, the same candidate was rated first only 58 per cent of the time. A review of some American experiments that used a similar tactic shows that interviewers gave low evaluations to female candidates applying for traditionally male-dominated jobs and low evaluations to male candidates applying for traditionally female-dominated jobs (Jain and Sloane, 1981:47).

Given the sex-typing of occupations, one should expect that wage discrimination would be least in female-dominated occupations. Gunderson (1976a:121-122) did find this to be the case. When he compared the female-to-male wage ratio he found it to be higher in those occupations in which more women are concentrated (.67 for clerical occupations, .57 for managerial and professional occupations) and lower in male-dominated occupations (.53 for blue-collar occupations, .50 for service occupations, .47 for primary occupations). It appears that women who try to work in male-dominated occupations may face greater discrimination.

The sex-typing of occupations leads women to obtain training in traditionally female-dominated fields of study and employers to exclude them from male-dominated occupations. The perpetuation of occupational segregation in turn reinforces sex-typing. This is a vicious cycle that keeps women in low-paying, "women's" occupations. In order to break the cycle, women must be allowed into traditionally male-dominated jobs. Some people suggest that the public sector should lead the way.

Given their relative newness in the labour force and limited occupational representation, women face "statistical" discrimination. That is, women entering the labour force for the first time are judged by employers on the basis of the record of other working women. Given that until recently most women were not committed to the labour force, have been concentrated in jobs with low levels of responsibility, and have had less training and experience, they have a reputation as being less productive than men. Until the stereotypes of working women are updated, women will not have an equal opportunity.

## 5. Systemic Discrimination

Overt discrimination, of the door-slammings variety, is just one of the possible manifestations of discrimination. A more common and less visible form is "systemic" discrimination, a product of employment practices and systems<sup>17</sup>. It frequently exists even when there is no intent to discriminate. But whether intended or not, hiring practices and job-assignment/promotion practices can bar women from equal access to employment opportunities.

The extent to which systemic barriers actually affect the hiring, job-assignment, and remuneration of women is difficult to assess, given that the reasons for decisions are not made public. There is therefore very little evidence on which to assess the seriousness of each possible barrier. At this point, it is important to identify these potential barriers in order that their workings can be investigated.

### a) Hiring Mechanisms

Women of equal ability to men may be unable to compete for specific jobs because they are unaware of their existence. Firms that recruit by word of mouth (informal hiring channels) attract workers similar to those already employed in the firm. Informal recruitment perpetuates existing occupational segregation (Calzavara, 1983). This is especially harmful for women since they are segregated in a small number of low-paying jobs. While it is no longer legal to show sex-bias in job advertisements, some firms have turned to employment agencies who will (illegally) screen job candidates on the basis of sex<sup>18</sup>.

Those who overcome the recruitment barrier and apply for a job may be faced with a series of other barriers. Pre-interview screening devices are subject to prejudice and statistical discrimination (examples of which were given above). Employment tests may discriminate on the basis of more than ability and productivity. Excessive use of credentials can exclude certain applicants even if the credentials are not required to perform the work. Interviews are subject to personal biases, prejudice, and stereotypes held by the interviewer. There is ample evidence to show that equally qualified candidates are rated differently depending on the interviewers (Arvey, 1979).

#### **b) Job-Assignment and Promotion**

Once hired, women may face discrimination with respect to the level at which they are hired, the rate of wage increase, and the rate at which they move up through the organizational hierarchy. These decisions, like the decisions to recruit and hire, are subject to the same kinds of discriminatory barriers. The Royal Commission on the Status of Women (1970:92-93) collected many briefs indicating that even when women are in work that can lead to senior levels, their opportunities are fewer than those of men. The most serious barrier to women's advancement (according to the Commission) is the fact that many employers think senior positions are for men. The employers' belief is based on "statistical" discrimination. (That is, they attribute to women [as a group] characteristics that result in their elimination from consideration.)

These are just some of the barriers women in the labour force must overcome to achieve equality. It is unfortunate that more systematic data on their impact and change over time is not available.

### **IV. IMPACT OF DISCRIMINATION**

There are very few studies that attempt to document the costs and benefits of discrimination, especially discrimination toward women<sup>19</sup>. Most analysts argue that discriminatory behaviour, whether deliberate or unintentional, is costly for women and the economy in general (Agarwal, 1981:128).

As indicated in the previous section, there is reason to believe that some employers and workers reap financial benefits by discriminating. Employers may maximize profits by creating antagonism between men and women in the labour force. Some workers benefit by excluding women from entering male-dominated occupations. The exclusion reduces the threat to job security and the lowering of wages associated with an increased supply of labour relative to demand.

For women, discrimination means lower financial returns on their labour. Their confinement to a small number of occupations means that a large number of women are competing for a small number of jobs. This overcrowding decreases wages and reduces job security. Their confinement to dead-end jobs means that they are not given the opportunity to acquire more training, develop skills, or demonstrate their ability to do "men's" work. Discrimination results in a reduced demand for women in the labour force, which in turn pushes down their wages.

Discrimination can backfire for employers, so that it can become a liability instead of a benefit. "Equity-theory" suggests that women who feel that they are not being treated

equitably will lower their productivity to compensate for unequal treatment (Adams, 1963). Women may respond to lower pay and poor working conditions by producing less, increasing their rate of absenteeism, and increasing job turnover.

Discrimination in job access and wages discourages women from investing in education and training (Oaxaca, 1977). If women expect to encounter discrimination, why should they invest in qualifications and skills? This lower investment in human capital is detrimental to the Canadian economy, since the changes in the composition of the labour force indicate that women constitute a critical labour source. The percentage of men in the labour force has been steadily declining, while the percentage of women has been steadily increasing. In 1901, 90 per cent of men were in the labour force, compared with 76 per cent in 1983 (a decline of 14 per cent). The participation rate of women increased from 20 per cent in 1901 to 53 per cent in 1983 (an increase of 33 per cent; see Table 1). Agarwal (1981:128) argues that aside from the ethical grounds for alleviating discrimination, there is a need to remedy the problem from pure economic necessity. The changing composition of the Canadian labour force implies that women will increasingly constitute a critical source of labour supply. It is therefore imperative that sex discrimination be alleviated to attract, retain, and motivate women.

### **V. POLICY IMPLICATIONS**

Documentation has been presented showing that there are differences in the employment opportunities of men and women. While changes over the last 50 years show that occupational segregation is lessening, and that the wage gap has narrowed slightly, the existing differences are still quite large. The change that has occurred since the introduction of equal employment legislation and equal pay legislation has not been dramatic. Some even argue that the legislation has had no impact on the rate of change. The differences between women and men are still large enough and costly enough to warrant some prompt action.

While the political debate goes on over the factors responsible for existing differences, it is clear from the empirical evidence (as poor as it is) that there are a number of interrelated barriers. Any approach that attempts to remedy the differences should attack the problem from all fronts. To put the blame on women alone or on employers alone would grossly oversimplify the problem. The barriers that have been identified indicate that policies must be aimed at both the labour supply and demand<sup>20</sup>.

#### **A. Policies Aimed at Labour Supply**

##### **1. Education and Training**

Women should be encouraged and helped to acquire the education and training that will allow them to compete on equal terms with men. When identifying the barriers, it becomes clear that adjusting for productivity differences reduces the income gap between men and women. A comparison of the educational qualifications of men and women indicates that a lower proportion of women have university degrees, and that most of those are held in traditionally female-dominated fields. Since it appears that this situation



may result from both discriminatory practices and social attitudes, solutions must address both sources.

- Women must be encouraged to invest in education and training relevant to the job market. They must be provided with goals and role models which will help them aspire to non-traditional careers.
- Educational institutions must be monitored for sources of systemic discrimination. Discriminatory practices in admittance, counselling, and other situations should be identified (via direct examination of practices and as a result of complaints). Once identified, the funding control of provincial governments can be used to force educational institutions to rectify discriminatory practices.
- Ensure that employers are giving women equal opportunity for on-the-job training. Any government-sponsored training program should actively recruit women in order to reassure them that it is acceptable for them to do "men's" work. Ensure that women who are enrolled in a training program are not being negatively sanctioned by instructors or other trainees. Both contract compliance and government-sponsored on-the-job training can be used to ensure that women are being given an equal chance to upgrade their skills.

## 2. Labour Force Commitment

Remove some of the attitudinal and structural barriers that lower some women's labour force commitment. The section on barriers showed that women with characteristics associated with lower labour force commitment (middle years, low education, and especially raising children) fare poorly in the labour market. Women suffer greater costs than men when they combine marriage and labour force participation. Most analysts attribute the greater costs to the unequal division of household work and women's responsibility for childcare. In order to reduce the burden that lowers some women's labour force commitment, a number of things can be done (Cook and Ebert, 1976).

- Family roles can be redefined (through campaigns geared to alter sex-stereotyping of roles). Husbands can be encouraged to share more equitably in the performance of household tasks.
- Restructure working conditions in the labour force to facilitate part-time work and shorter work weeks. Make these changes practical alternatives rather than a sign of lack of labour force commitment, which penalizes the worker.
- Government and employers should be encouraged to provide childcare support and extend present support by providing more childcare facilities and more subsidization of care.

## B. Policies Aimed at Demand for Labour

Some of the barriers that result from the demand side of the labour market (employers) can be reduced by a combination of improvements to present legislation, affirmative action programs, and campaigns to change social attitudes and update stereotypes.

## 1. Equal Pay Legislation

Documentation was presented in an earlier section of the report showing that at the very least 10-20 per cent of the wage difference between men and women is a result of discrimination. Equal pay legislation in Canada was first enacted in 1951. Employers are required by law to give men and women workers equal pay for equal work within the same establishment, although there are specific exceptions under which differences in wages are allowed by the legislation; these include seniority, experience, and merit. The legislation has had little effect on the wage gap. Critics have pointed out a number of problems with the legislation which make it ineffective.

Its major problem lies in its restrictive nature. It applies only to women and men who do the same or similar work within the same establishment. Given the differences in the occupational distribution of women and men, the law does not apply to two-thirds of working women—women who are employed in jobs with few or no male co-workers. Indeed, Cook and Eberts (1976:174-175) have argued that the legislation encourages employers to segregate further the jobs done by men and women. Employers who wish to escape compliance with equal pay legislation avoid having men and women do the same job, or they introduce variations in job requirements so that the jobs are no longer identical. Cook and Eberts also argue that if employers regard women as more costly or less desirable than men, equal pay legislation can provide an incentive to reduce the employment of women. The result is that legislation intended to reduce wage discrimination may be fostering job segregation and reducing women's employment opportunities.

In order to make the legislation more effective, all government jurisdictions should adopt the equal-value standard. That is, male and female workers should receive equal pay for work of equal value. This would make the legislation applicable to all workers and reduce some of the negative side-effects of the present legislation.

## 2. Equal Employment Legislation

In 1964, equal employment legislation was enacted prohibiting discrimination in the areas of hiring, promotion, and conditions of work. Some jurisdictions also make an effort to reach discrimination in recruitment (prohibit discriminatory job advertisements and job descriptions, prohibit trade unions and employment agencies from screening applicants on the basis of sex).

Evidence presented in an earlier section of the report (Section II, C) indicates that equal employment legislation has been more successful than equal pay legislation, but its success is limited. There appears to have been a dramatic change in the occupational segregation of women between 1971 and 1981, but despite the decline women are still concentrated in a small number of occupations. Another indication that the legislation is having some effect is that women are using equal opportunity legislation more than they have used equal pay legislation (Cook and Ebert, 1976:180).

While basically sound, equal employment legislation should be made more effective by modifications to the way in which it is enforced. Cook and Ebert (1976:178-183) have made a number of concrete suggestions for improving its enforcement.

- Jurisdictions that have not done so should empower government agencies to initiate action against employers on their own motion or at the insistence of third parties.

At present, complaints may be initiated only by the persons aggrieved. If an employee complainant cannot be found, there is no case. To set the case in motion, the employee must have knowledge of the legislation, the ability and resources to use it, and be motivated to take action against her employer not knowing whether she will win.

- It should be made clear in the legislation that recoveries from employers can encompass not just a single employee but all the workforce if a proper case is made.

This would be an effective way to publicize to employers the risk of discrimination. Another way to increase the costs of discrimination for the employer and hence reduce the chances that it will occur would be:

- To reword the legislation so that the employer would not only redress past grievances, as is now the case, but would be required to make a positive commitment to future action to remove discrimination against employees (that is, initiate an affirmative action program).

Despite the suggested improvements in the equal pay and equal employment laws, legislation by itself is unlikely to eliminate discrimination. Jain and Sloane (1981:74) point out that: a) legislation is limited in scope; b) it must be effectively implemented; c) the evolution of law and legal principles is a slow process; and d) it is aimed at law abiding employers and does little to restrain lawbreakers.

### 3. Affirmative Action

Besides broadening legislation, enforcing it more thoroughly, and imposing more severe penalties, governments and employers should engage in positive efforts to encourage training, recruitment, and career development through affirmative action.

Affirmative action is a comprehensive attempt to remove some of the past and present employment discrimination that women face<sup>21</sup>. This goal is achieved through a series of stages. The first stage is to examine the workforce in an establishment and obtain data on the positions held by men and women, their salaries, rates of promotion, and other rele-

vant information which can be used to assess women's status. The second stage is to review personnel practices to identify systemic discrimination (in recruiting, hiring, promotion, etc.) and to set up strategies aimed at removing any discrepancies in the workforce. The third step involves setting targets (or quotas) and timetables for overcoming identified inequalities. The fourth step is to set up a monitoring and evaluation system to assess progress. Affirmative action can be achieved on a voluntary basis, through government incentives (contract compliance), or made mandatory.

Affirmative action, especially if it can be achieved on a voluntary basis or through contract compliance (where government makes it a condition for securing funding or government contracts), would provide women with an opportunity to make up for past discrimination and update stereotypes in a short period of time without encountering too much resistance. Affirmative action may be the only chance women have to free themselves from occupational segregation and all its negative side effects.

Those women who choose to remain in traditionally "female" occupations will not find affirmative action helpful. What they require is a new wage system whereby wages are determined by the skills and experience necessary to do the work.

### 4. Changes in Attitudes

If people are to change their behaviour voluntarily and/or comply with imposed legislation, a fundamental change in social attitudes toward the role and abilities of women is necessary. This can be achieved in a number of ways.

- Government and private agencies can initiate a media campaign designed to inform and educate individuals, especially employers. Such a campaign would attempt to alleviate sex-stereotyping of roles and jobs.
- Implementation of laws and policies indirectly serve to change attitudes by recognizing, amplifying, and sanctioning discriminatory behaviour.
- Governments can influence attitudes by acting as model employers. If women are given the chance to show what they can do, their performance in the public sector can serve to change and reinforce the new attitudes in the private sector.

## NOTES

- 1 The data used in these studies are drawn either from the Canadian Census or the Labour Force Survey. Because these two sources are based on different questions and different samples, they are not entirely comparable.

Studies prior to 1976 base their interpretations on census data collected between 1901 and 1971. The few studies that have been carried out more recently (in the 1980s) are based on Labour Force Survey data because the 1981 Census data on labour force characteristics were still unpublished at the time this report was written (September, 1983).

While I attempted to provide a comprehensive description, it was limited by the nature of the secondary data available. Some data, such as unemployment rates, were not available prior to 1946. The small number of studies that take an historical perspective made it difficult to describe trends in greater detail. Most of the studies were concerned with the years after 1961 (when the great influx of women into the labour force occurred and issues of women and equal opportunity were loudly voiced). To have based the report on the original data sources would have required considerably more time.

- 2 See Gunderson, 1976a:96 and the Report of the Royal Commission on the Status of Women, 1970:54.
- 3 For a discussion on why women's rate of participation is increasing see Gunderson, 1976a:94-96; Armstrong and Armstrong, 1983:27-40.
- 4 The Labour Force Survey question uses an indirect approach, asking "What did this person do mostly last week?" The census question uses a more direct approach, asking, "Did you look for work last week?" The Labour Force Survey question may underestimate the number of women unemployed. Women who were looking for work and keeping house may answer that they "kept house". See Gunderson, (1976a:103) for a discussion of the sex bias in unemployment questionnaires.
- 5 Figures found in the Report of the Royal Commission on the Status of Women (1970:55-56) show that the unemployment rate in 1947 was 1.7 per cent for women and 2.9 per cent for men. In 1967, it was 3 per cent for women and 4.6 per cent for men.
- 6 For a discussion and documentation of the change in unemployment see the following: Jain and Sloane, 1981:5; Armstrong and Armstrong, 1983:234, 249; Gunderson, 1976a:103-111.
- 7 The findings reported are based on the data and discussions in the following books and articles: Agarwal, 1981:118-143; Armstrong and Armstrong, 1983:76-102, 268; Gunderson, 1976b, 1976a:118-126; Philips and Philips, 1983:52-76; Ostry and Denton, 1967.

- 8 Unfortunately there are no systematic analyses of the earnings gap over the 50 years for all of Canada. A thorough documentation of the change over time would have meant going back to the original data source. This was not possible given the time constraint.
- 9 See Jain and Sloane, 1981; Cook and Eberts, 1976; Report of the Royal Commission on the Status of Women, 1970. Some of these reasons are discussed in Section V, B of the Report.
- 10 For a review of the theoretical perspectives used to explain income and occupational differences, see Ornstein, 1982; Jain and Sloane, 1981:26-59.
- 11 See Jain and Sloane, 1981:144-229.
- 12 Most of the evidence presented on barriers came from the following sources: Gunderson, 1976a; Jain and Sloane, 1981; Report of the Royal Commission on the Status of Women, 1970; Cook, 1976:1-12.
- 13 For a discussion of trends in education of men and women between 1901 and 1971 see Leslie Robb and Byron Spencer, 1976:53-92.
- 14 Canadian Gallup poll found in *The Toronto Star*, 1982.
- 15 See the Report of the Royal Commission on the Status of Women, 1970:79.
- 16 See Monica Boyd's (1975) article on attitudes toward women for further details concerning the results of the Canadian Gallup polls.
- 17 For a comprehensive discussion of systemic discrimination practices see Chapter 3 of Jain and Sloan (1981). It includes a discussion of barriers found in internal and external labour markets. Unfortunately the evidence provided is based mainly on examples of racial discrimination in the U.S.
- 18 The Ontario Ministry of Labour has recently finished a study of discrimination by employment agencies.
- 19 See Jain and Sloane (1981:28) for references to American studies that have attempted to document the financial costs of discrimination.
- 20 The following are some of the resources consulted in deriving suggestions for policies: Cook and Eberts, 1976; Ontario Federation of Labour, 1982; Jain and Sloane, 1981; Agarwal, 1981; Report of the Royal Commission on the Status of Women, 1970.
- 21 For further details about affirmative action see Cook and Eberts, 1976; and Ontario Federation of Labour, 1982.



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## THE CONNECTION BETWEEN PAID AND UNPAID LABOUR AND ITS IMPLICATION FOR CREATING EQUALITY FOR WOMEN IN EMPLOYMENT

Margrit Eichler

### Sommaire

L'étude part de l'hypothèse que le travail rémunéré est fonction du travail non rémunéré utile mais quasiment invisible. L'auteur attribue à l'existence de la famille patriarcale le fait que le travail non rémunéré est resté jusqu'ici presque inconnu et explique son émergence par l'évolution du rôle féminin, lequel a modifié la nature même de la famille.

Deux modes d'analyse des travaux ménagers non rémunérés sont examinés et critiqués, soit la formule des «gages» et la formule égalitaire. Selon la première formule, les travaux ménagers non rémunérés sont une activité entièrement sociale, alors que selon la seconde il s'agit d'un travail personnel. L'auteure suggère qu'il faut combiner les deux pour obtenir une formule théorique qui servira à l'élaboration d'une politique relative au travail non rémunéré. La formule proposée est de distinguer entre les aspects sociaux utiles et les aspects personnels utiles du travail non rémunéré.

Enfin, l'auteure examine l'adoption éventuelle de politiques qui permettraient de reconnaître les aspects sociaux utiles des travaux non rémunérés. Elle fait valoir l'idée qu'il sera impossible pour les travailleuses rémunérées d'atteindre l'égalité si les aspects sociaux utiles du travail non rémunéré ne sont pas reconnus et récompensés.

### Summary

This paper starts from the premise that paid labour rests on a basis of important but mostly invisible unpaid labour. It identifies the patriarchal model of the family as the reason for the until recently almost complete invisibility of unpaid work, and locates the reasons for its gradual emergence into visibility in the changing roles of women which, in turn, have changed the nature of the family.

Two analytical approaches to unpaid housework are examined and criticized, namely the "wages for housework" approach and the equalitarian family approach. While the former identifies unpaid housework as a totally social activity, the latter sees it as a totally private labour. It is argued that combining the two approaches provides a conceptual basis for policy development concerning unpaid work. The basis proposed is to distinguish between the socially useful components and the privately useful components of unpaid work.

Finally, some possible policy directions toward recognizing socially useful but currently unpaid work are discussed, and it is argued that it will be impossible to create equality in the paid labour force for women if the socially useful aspects of unpaid work are not in some manner socially recognized and rewarded.





# THE CONNECTION BETWEEN PAID AND UNPAID LABOUR AND ITS IMPLICATION FOR CREATING EQUALITY FOR WOMEN IN EMPLOYMENT

Margrit Eichler\*

## INTRODUCTION

The performance of paid labour rests on a foundation of work that is currently largely unpaid but nevertheless crucial to the maintenance of a paid labour force. If people do not eat, clothe themselves, have shelter, get tended when sick, etc., they will not be able to perform paid labour. If children do not get raised, they will not be available to join the labour force as adults, resulting in a labour force totally consisting of adult immigrants. Such personal maintenance and rearing involves work on somebody's part, which is sometimes visible (e.g., when people eat in a cafeteria and pay for it, stay in hospitals in case of acute sickness, use daycare centres) and sometimes invisible (when they eat at home, are looked after at home during illness, or raise their children at home). In Marxist terms, this work process is referred to as the production and reproduction of the labour force.

Until very recently, this crucial interconnection between paid and unpaid labour has been largely invisible. This paper will briefly address the question of (1) why and how the importance of unpaid work has slowly come into focus, and subsequently explore (2) the nature of the interconnection between paid and unpaid labour with a focus on analytical approaches to understanding it. It will then address the issue of (3) a conceptual basis for policy development, and lastly (4) discuss some possible policy directions as well as some of the problems attached to them.

## 1. THE GRADUAL EMERGENCE INTO VISIBILITY OF THE VALUE OF UNPAID WORK

We are currently witnessing a situation in which the value of unpaid work is coming into visibility like a photograph that is developing before our eyes. This section will briefly address the combined questions of why unpaid work has been largely invisible until recently, and why it is coming into focus at this point in time.

The large bulk of unpaid work<sup>1</sup>, although not all of it, is carried out in individual households by women, although men do a bit of it as probably do some children (there is very little information available on the participation of children in housework). One obvious reason, then, for the relative invisibility of unpaid housework has to do with the conditions under which it is performed. Just as obviously this is an insufficient answer, since other work is sometimes performed in individual homes that does produce results that become public and visible, such as some arts and crafts (including writing papers for Royal Commissions). The more important and underlying reason for the invisibility of unpaid work per-

formed at home lies in the model of the patriarchal family which until recently was the major operative model for social policy purposes in Canada.

The patriarchal family model can be described by the following eight characteristics:

- (1) Household and family are treated as congruent.
- (2) The family is treated as the administrative unit.
- (3) The father/husband is seen as responsible for the economic well-being of the family.
- (4) The wife/mother is seen as responsible for the household and personal care of family members, especially childcare.
- (5) Conversely, the father/husband is *not* seen as responsible for the household and personal care of family members, especially childcare, and
- (6) the wife/mother is *not* responsible for the economic well-being of the family.
- (7) Society may give some support to the man who supports his dependent(s) (wife and/or children), but is *not* responsible for the economic well-being of the family where there is a husband present and is *not* responsible for the household and personal care of family members, especially childcare, when there is a wife present.
- (8) As a derivative of (1) and (7), a husband is equated with a father, and a wife is equated with a mother. (Eichler, 1984:28)

What is most important in this model in our context is that the woman is defined as dependent on her husband. Her work is, therefore, by implication seen as economically valueless, no matter what it may consist of and how much it would cost to replace it. Indeed, this has been (and continues to be, to some degree) an explicitly accepted aspect of economic theory. In labour economics, the labour force is equated with gainfully employed workers, i.e., with paid labour. Unpaid labour is explicitly excluded from consideration as being non-economic. To quote the *International Encyclopedia of the Social Sciences*:

*In every culture, most persons are engaged, a good part of their lives, in activities that may be considered as work. But such activities may or may not qualify for inclusion in what may be regarded technically as part of the working force. For example, in the United States the services performed by housewives, although highly desirable from a societal point of view, are not regarded as economic. Housewives are therefore excluded from what is measured as the working force because such work is outside the characteristic system of work organization or production. Moreover, their inclusion in the working force, for purposes of economic analysis, would not*

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*help policy makers to solve the significant economic problems of American society.* (Jaffe, 1972:469)

The important criterion used in deciding whether a given activity qualifies as being economic or not rests therefore on the exchange of money. Any activity that qualifies as work by virtue of its nature but that does not involve a worker who is "free to offer his services for cash hire as he sees fit" (Jaffe, 1972:470) cannot therefore be regarded as work in an economic sense. "...those persons who, for whatever reason, do not offer their services for hire in the labour market, thereby automatically exclude themselves from the working force." (Ibid.) This includes the work of all housewives, of slaves, and all forms of voluntary labour for which no payment is received. The work having been declared as uneconomic is therefore seen as economically valueless, which, in turn, allows one to see a housewife-wife as a dependent who is maintained by a wage-earning husband who in return receives services that may be agreeable to him but are valueless in monetary terms. This fiction, in turn, is dependent on treating the family rather than the individual as the smallest unit of analysis, which is, as we have seen, one of the constituent elements of a patriarchal model of the family.

For as long, then, as the patriarchal model of the family is accepted as an adequate representation of reality, the unpaid work performed within households will remain invisible because it is seen as economically valueless. In spite of this it remains essential that somebody do the work that is generally carried out within individual households, since otherwise workers both within the current adult population as well as in the next generation would not be available for the labour force.

The next question, then, is why we have slowly started to become aware of the importance of the unpaid work performed within households.

It is only since the beginning of the re-emergence of the feminist movement and the emergence of a feminist scholarship that some attention has been given in a systematic manner to the work character of housework. This work dates back to the late 1960s (e.g., Gavron, 1966; Benston, 1969) and extends to the current time (e.g., Adler and Hawrylyshyn, 1978; Eichler, 1977; Fox, 1980; Hawrylyshyn, 1976; Luxton, 1980; Proulx, 1978; Smith, 1977).

During this same time, we have seen a dramatic increase in the participation of married women in the labour force, from 37 per cent in 1971 to more than 50 per cent in 1981. The divorce rate doubled in this time period, and the rate of births to unmarried women increased considerably, from 9 per cent in 1970 to about 13 per cent in 1980. The combined effects of an increase in the rate of divorce and in the rate of births to unmarried women presumably leads to a high degree of incongruence between household and family membership. (This is a complex issue, which has been dealt with in detail elsewhere, see Eichler, 1984. It will simply be taken as a fact in this context.)

The net effect of these changes on our perception of housework and on our understanding of the family is rather profound. Now that the *majority* of wives (as well as of mothers, a group that is not identical with wives) have withdrawn from full-time homemaking, this exposes in a dual manner the fiction that unpaid work in the home is valueless in an economic sense. Where labour that had previously been

done by a housewife is replaced by purchasing it, as in the form of childcare, a cleaning woman, eating out, etc., it becomes obvious that the work involved has been worth money all along, but was essentially done for free by wives and mothers. Alternatively, if at the present time a wife or mother decides not to take a paying job, given that the majority pattern now is that wives and mothers *do* have a paying job, this is more likely to be seen as a conscious decision rather than as a self-understood automatic way of life, and therefore the wages forgone by the woman who stays at home are seen as a cost attached to being a full-time housewife.

This double vision comes into sharp relief in the case of single parents. About 17 per cent of all Canadian families with dependent children take the form of one-parent households (Economic Council of Canada, 1983:90) and this figure is likely to rise. In 1981, 43 per cent of those one-parent households headed by women were below the poverty line, and in 1978 more than one-third of all social assistance cases consisted of sole-support mothers. (Ibid.) In the case of a single parent (usually a single mother), the mother either has a paying job and therefore needs daycare for her children, or she does not have a paying job because she is looking after her children and therefore needs support for herself and her children. In either case, it is obvious that she cannot at the same time be a full-time mother and a full-time earner, and that the work of childcare is worth money, whether it is done by her on a full-time basis or by a combination of her and some other caregiver during so-called "working hours".

It is, then, due to the changing role of women and the consequently changing nature of the family that the value of unpaid work has slowly come into focus. However, this knowledge has not, as yet, been incorporated into our theories and explanatory models. In particular, the unavoidable effect of the status of unpaid work on the position of women in paid employment has remained largely opaque. This is partly due to the form that the analysis of unpaid work has taken so far.

## 2. ANALYTICAL APPROACHES TO HOUSEWORK

In the beginning, early analyses focused on the need both to recognize housework as an extremely important activity mostly performed by women, and to recognize housewives as an extremely important group of people if we wanted to understand the functioning of our society. From this very basic concern, which simply emphasized the importance of housework and of housewives, two different sets of arguments developed. One line of argument focused on the essential necessity and utility of housework for society. This took its sharpest (but not only) expression in the "wages for housework" debate. It is a view of housework that sees it as an undifferentiated activity primarily social in nature.

Parallel to this approach we can identify a different tradition which focuses primarily on the division of labour by sex, both at the macro- and at the micro-level, and which points to the inequity that housework is primarily a female activity given that both women and men tend to live in families. This approach, too, treats housework as an undifferentiated activity but sees it as largely private in nature.

In the following, I shall briefly examine both approaches and argue that *together* the two approaches complement

each other, but that even so they do not provide us with a sufficient analytical basis for social policy development. This requires a third ingredient, namely a differentiation of housework itself.

### a) The "Wages for Housework" Debate

This is not the place to recapture the wages for housework debate in its totality or to present a complete discussion of its theoretical significance. Here, I will limit myself to considering it only in terms of its capacity to provide a conceptual basis for policy development in Canada.

"Wages for housework" starts from the premise that women "produce the most precious product to appear on the capitalist market: labour power. Housework, in fact, is much more than housecleaning. It is servicing the wage earner physically, emotionally, sexually, getting him ready to work day after day for the wage. It is taking care of our children—the future workers—assisting them from birth through their school years and ensuring that they too perform in ways expected of them under capitalism." (Cox and Frederici, 1976: 4-5) Therefore, capital should pay for housework, which is defined as work that all women do, whether married or single, childed or childless, with a paying job or as a full-time housewife.

Essentially, "wages for housework" is more of an educational campaign than an attempt to develop social policy. "When we struggle for wages we *struggle unambiguously and directly against our social role*. In the same way there is a qualitative difference between the struggles of the waged worker and the struggles of the slave *for a wage against that slavery*." (Frederici, 1975:5, emphasis in the original)

The "wages for housework" literature has, in fact, done a very good job of putting the issue of the value of unpaid work forward, and of pointing to its central importance in gaining equality for women. If, however, we look at it from the perspective of social policy, certain practical as well as theoretical problems emerge. Putting the practical problems aside for a moment, as important but secondary, theoretical problems emerge around how to compute the value of housework on the one hand, and, on the other hand, and in my opinion more important, the exclusive definition of housework as a form of production and reproduction of the labour force.

As far as the method for computing the value of housework is concerned, it must be noted that the "wages for housework" literature itself is not concerned with this issue.

*Since we are not the Treasury Department and have no aspiration to be, we cannot see with their eyes, and we did not even conceive of planning for them systems of payment, wage differentials, productivity deals. It is not for us to put limits on our power, it is not for us to measure our value. It is only for us to organize a struggle to get all of what we want, for us all, and on our terms.* (Cox and Frederici, 1976:14, emphasis in the original)

It is therefore more traditional social scientists who have picked up on the question, following this debate, as to how one might measure the value of housework. Essentially, three models have been developed: the direct costing method of services rendered; the replacement cost method; and the

setting of an arbitrary figure. In my opinion, all three methods have major problems.

The direct costing method involves breaking the job of a housewife into components that are separately costed. However, can one equate the various activities across different performers? Some housewives may be gourmet cooks, others may be less than indifferent in terms of their skills and efforts with respect to this particular activity. Does it, then, make sense to focus on the work only without any thought to its quality?

As far as the replacement method is concerned, it computes the value of housework by the wages the woman forgoes by *not* being in the labour market and earning income. In other words, it values housework not by what is done but by what is not done, surely an inappropriate manner of proceeding. Some women who might be potentially high wage earners might be very poor housewives, and *vice versa*. But even if this were not so, it would remain a paradoxical approach, since it basically refuses to recognize any value of housework *per se* under the guise of costing it.

Finally, any arbitrary figure (Cook and Eberts, 1976:150, for instance, pick \$1,000 per year) is just that: arbitrary. While potentially a good heuristic device for considering consequences of policies, it is not a method of computing value, but merely of assigning value, as is the second approach.

However, the more fundamental problem is, in my opinion, the understanding of housework that underlies the "wages for housework" argument, not the difficulty of inventing satisfactory ways in which to compute the value of housework. While undoubtedly housework produces and reproduces the labour force, I do not believe that we can argue that unpaid housework performed by a woman is a necessary aspect of the maintenance of an adult male worker. There are substantial numbers of both male and female workers who are unmarried and living alone and who nevertheless manage to hold down a paying job quite satisfactorily. Nor do I believe that we can argue that housework can be reduced to the maintenance and production of the labour force. Some housework is done for the pleasure of either doing it or enjoying the results, not for simple maintenance. For instance, people in general in Canada eat at a level greatly above what is needed to simply enable them to perform their jobs; children are not "produced" so they can eventually reproduce the labour force; and some people who are absolutely incapable of performing in the labour force are maintained in households. Does this mean that the work that maintains such persons (who may have never been in the labour force, or who may have retired) is therefore socially useless and insignificant? In other words, if we conceptualize housework only in terms of its functions of producing and reproducing the labour force (which it undoubtedly serves) we are reducing people to one-dimensional images in which they have value only as wage earners and as they are associated with wage earners, but with no intrinsic value of their own due to the fact that they are human and members of our society.

While there is, therefore, an important element in the "wages for housework" approach, namely its emphasis on the social utility of housework, it does not in itself provide a sufficient basis for policy development.



### b) The Equalitarian Family Model

A second approach to addressing the question of housework is to see it basically as a problem that stems from an unequal division of labour between women and men at the macro-level and wives and husbands (or mothers and fathers) at the micro-level. There is no doubt that such imbalance does, in fact, exist on a grand scale. This approach, however, conceptualizes the resulting inequity essentially as a private issue, and consequently sees as a solution for relieving overburdened wives and mothers the redistribution of household responsibilities between husbands and wives.

Eventually, this type of thinking leads to the adoption of an equalitarian model of the family, which can be described by the following six characteristics:

- (1) Household and family are treated as congruent.
- (2) The family is treated as the administrative unit.
- (3) Both husband and wife are seen as responsible for their own support as well as that of the other.
- (4) Both father and mother are seen as responsible for the household and personal care of family members, especially childcare.
- (5) Society may give some support to families but is in principle not responsible for either the economic well-being of the family or for the personal care of family members, especially childcare, when there is either a husband or wife (or mother or father) present.
- (6) As a derivative of (1), a husband is equated with a father, and a wife with a mother. (Eichler, 1984:36-37)

Such a model of the family clearly underlies some of the reformed family laws that assign equal responsibility for housework and childcare to both husbands and wives, and for that reason also acknowledge to some degree the economic value of unpaid work for a spouse.

The problem in using such an understanding of housework as a basis for social policy derives from the fact that it conceptualizes all unpaid work performed within private households in an undifferentiated manner as only privately useful, without social relevance, in stark contrast to the "wages for housework" approach, which emphasizes the social nature of all the work done in private households. The inadequacy of such a privatized notion becomes clearest when looking at the case of a one-parent household. Utilizing an equalitarian model of the family may actually result in a deterioration of the situation of women. Given that men still do little of the housework, although it has now been defined as a shared responsibility, and given that both women and men are seen as responsible for providing economically for themselves as well as for their children, in those cases in which men are unwilling, unable, and/or absent to do their share, the woman is likely to be left saddled with the entire responsibility for earning income as well as all housework.

By contrast, when policies are based on a patriarchal model of the family, in cases in which one spouse or parent is absent, the public is likely to take over the absent or incapacitated spouse's obligation—such as social welfare payments when a married man is disabled, even though the wife may not be disabled and theoretically able to earn an income, or homemaking services for a father who has no wife to look after his dependent children.

While an equalitarian model of the family is clearly an advance over a patriarchal model in terms of sex equality, one must be conscious of the fact that if such a model is adopted wholeheartedly with an understanding that all work done within families, such as childcare, are private matters, its adoption is, as a logical necessity, likely to have a negative effect on those women who are most in need of public support.

### c) A Comparison between the "Wages for Housework" and the Equalitarian Family Approaches

"Wages for housework" conceptualizes housework as an activity that in its totality services the needs of "capital", while the equalitarian family approach conceptualizes housework as an activity that in its totality services only the members of families, and specifically husbands. The position of children is an ambiguous one in both approaches, since they are clearly beneficiaries of work performed, but this benefit is attributed to husbands in the latter approach just as it is attributed to capital in the former approach.

Both approaches have an element of truth within them, but neither alone provides an adequate conceptual basis for developing social policies. Clearly housework is not only a social responsibility. This becomes especially clear when we look at the range of activities included as work that presumably services capital in the "wages for housework" approach. It includes, for instance, sexual services. Were we to accept this argument, and actually ask for money for sexual services, this would maintain the understanding of sexual activity as a service that one sex—women—render to the other sex—men—rather than seeing it as a mutually rewarding activity. It would turn all women into state prostitutes rather than private prostitutes. In other words, counter to the assumption of the "wages for housework" approach, individual men do profit from housework that is performed by women and as individuals should be held responsible for some of the childcare and for a portion of housekeeping. On the other hand, irrespective of individuals involved, children, the sick, and the disabled must be cared for, and this is not a matter of individual concern only, since society has a responsibility to assure the maintenance of all its members.

Were we to adopt an equalitarian family model as a basis for social policy, the solution for the prevailing inequity with respect to the division of labour would be to try to persuade men to participate more. In the case of one-parent households, it would amount to a greater emphasis on getting fathers and ex-husbands to pay more support. If this is the *only* attitude taken (rather than an aspect of an overall policy) it results in a situation where the woman's position depends on the husband's earning capacity and moral inclinations irrespective of the actual needs of the woman involved. This outcome is as paradoxical as measuring the value of housework by computing wages lost by what is *not* done. In either case, what is done is relegated to the status of being seen as irrelevant.

The conclusion we must surely draw is that housework (and unpaid labour in general) can be neither understood as totally social nor totally private in nature. Instead, we must recognize that housework contains within itself both social and private elements. Having stated this, the task then becomes to differentiate housework into its social and into its

private components, in order to create a conceptual basis for social policy development.

### 3. A CONCEPTUAL BASIS FOR POLICY DEVELOPMENT CONCERNING UNPAID WORK

The "wages for housework" approach and the equalitarian family approach make different assumptions about who profits from the unpaid labour performed in private homes. Both approaches have here been criticized as one-sided, since housework obviously has both socially useful and privately useful components. The task now is to separate those functions within housework that are socially useful from those functions that are privately useful.

A very simple criterion for establishing which aspects of unpaid work are socially useful is to ask which aspects of work would be taken over by society if a family failed to perform them, for whatever reasons. Here, the answer is quite clear: when parents are unable to care for their children, the state either takes over the cost of such care (as in the case of family benefits paid to unmarried women) or it takes over the care itself, by removing children from their families and putting them into foster homes or some form of institutional care. Likewise, when adults are in need of care but cannot receive such care from their families, the state will either take over the costs for such care or provide the care itself through various institutions.

Therefore, all work concerned with the care of people who cannot care for themselves for reasons of mental and/or physical incapacity must be seen to be of social rather than of private value. By contrast, all other work performed in private homes that either serves the performer of the work herself (or himself) or another adult who is mentally and physically able to look after himself (or herself) must be seen as privately useful.

In this discussion, we have identified "society" as a beneficiary of housework, rather than "capital", as does the "wages for housework" approach. In policy terms "capital" would identify employers, especially big corporations, as beneficiaries, and would therefore lay some burden of support on them, while if we identify society at large as a beneficiary, this would imply that any benefits would be financed through the tax system.

To what degree, then, do employers profit from care that is given to dependent children, or to the sick? If there is care available for their own employees when they are sick, this must be seen as a benefit to employers, provided it speeds the recovery of their employees. As far as childcare is concerned, employers do not profit *directly* from having children available, although they do profit *indirectly*. Employers do not profit directly because they do not have a direct concern for their employees' children, but indirectly they profit from being able to draw on mothers as employees and also, of course, by being able in the future to hire grown-up children who have been appropriately raised. The benefit is therefore generalized rather than specified—i.e., individual employers might be just as well off to hire only people who have no active parenting duties, but if all employers were to do so it would significantly shrink the pool of available qualified labour. Though they may mostly not hire the children of their

own current employees, they will, in the future, hire the children of people who are currently somebody else's employees.

In addition, to the degree that Canada is committed to providing for all its members, it is indeed the entire society that profits if children, as well as the sick and severely handicapped, are well taken care of.

If, then, part of the unpaid work performed in private households is socially useful, this should be socially recognized and rewarded, while we should at the same time strive towards establishing equity in the division of labour between husbands and wives, fathers and mothers.

### 4. POSSIBLE POLICY DIRECTIONS TOWARD RECOGNIZING SOCIALLY USEFUL (BUT CURRENTLY UNPAID) WORK

We have defined the socially useful aspects of housework as care for dependent children and care for adults in need of care. These two aspects need to be separated for policy considerations, particularly in view of the fact that Canada has gone considerably further in recognizing the second aspect than in recognizing the first. In principle, Canada does at present recognize the right of every adult in need of care to such care, although there are some unfortunate exceptions (see Eichler, 1983:115-118, 320-322, and Eichler, 1984). While with the increasing aging of Canadian society we can expect that the care for the aged will take on ever increasing importance, at the present time childcare is the greater and more immediate problem and one that requires considerably more re-orientation. The subsequent discussion will therefore focus on childcare only, without pretending that this covers the entire range of issues.

While identifying childcare as a social policy issue, there are two questions in particular that need to be clarified: whose responsibility is it? and what is the proper mode of support? As far as responsibility is concerned, the above suggests that childcare is best conceptualized as a responsibility shared by father, mother, and society. Since childcare involves 24-hour care, and since in general people are held responsible for their own economic well-being unless they are aged, young, or otherwise impaired, and since the common way of providing for one's economic needs consists of earning money for eight hours a day, five days a week, it seems reasonable to identify the societal share in the responsibility for childcare on the basis of a full-time job, namely eight hours a day, five days a week, while father and mother would equally share the responsibility for the other 16 hours of the day and night as well as for the weekend.

As far as the mode of support is concerned, most people seem to think that the single best solution would be universal daycare through daycare centres. This seems to me problematic. Although daycare centres provide probably the best care for the *majority* of children and parents, one should not ignore the needs of minorities that may be different. Some young children may not flourish in relatively large organizations. Some parents, especially when there are several children of different ages involved, may suffer severe stress because of scheduling and transportation problems. Some people in outlying regions where centres would be impractical because of the small number of people involved nevertheless need childcare. Finally, daycare centres tend to be

restricted to pre-school age children, but a need for care continues into school age given that children need lunch-time supervision and often pre- and post-school supervision.

A better alternative would be, in my opinion, a voucher system pro-rated by the amount of time a child already spends in a publicly supported institution, and premised on an interpretation of a societal contribution for the equivalent of time that makes up a full-time job, currently 40 hours per week. These vouchers could be sent to all mothers via the family allowance system, so no new administration would have to be created. They could then be handed on to caretakers, whether these be at daycare centres or in privately arranged settings, or they could be retained by the mother (or father) as a wage replacement. If one assumes that taking care of four children would constitute one full-time adequately paid job for one person, parents could organize their own daycare according to their own preferences, be those linguistic, ethnic, philosophical, religious, or other.

Problems with such a schema would be costs and federal-provincial relations. As far as costs are concerned, they would undoubtedly be high; however, equality will not come about without some financial realignments. The cost of public education and of medicare are also high, yet as a society we consider the costs worth the benefits. Further, some of the costs would be offset by replacing current expenditures. A universal plan would, for instance, replace current subsidies to daycare under the Canada Assistance Plan, as well as other governments' contributions. It would also replace—totally or partially, depending on circumstances—welfare payments to mothers on family benefits. Finally, further money could be freed up by abolishing all personal exemptions in the income tax act. Any additional costs remaining would have to be financed through tax revenues, collected partly from individuals and partly from corporations.

Other problems would be the overlapping jurisdictions of provincial governments and the federal government in this area. This would have to be negotiated, but conceivably a mother might receive every month two vouchers, one from the federal government and one from the provincial government.

This proposal differs from others in significant ways. For one, it proposes a benefit for *all* mothers, whether they are in the labour force or not, and thereby avoids some of the political problems associated with a benefit going only to one group of mothers as well as the attendant real inequities. For the other, it defines government rather than the employer as the responsible third party.

Mahoney (1983:89) for instance argues that "government should employ persuasive techniques such as greater tax incentives to employers to encourage participation in provision of day care and equitable universal subsidies to allow more parents access to quality care at lower prices", along with other proposals. While this sounds attractive, it will only be of use to women (and men) who are employees of large corporations, since small employers will, simply on the basis of scale, not be able to provide such care.

Thirdly, the voucher proposal would leave the control over the quality and nature of care with the parents, rather than with government or employers, since parents would be free

to retain the vouchers for themselves if they wanted to provide the care themselves, or else pass them on to other caretakers of their choice—including government-run and employer-run daycare centres.

So far, we have addressed only one part of the issue of childcare, by arguing that it is a shared societal-parental responsibility and suggesting one manner in which the societal contribution could be made. This leaves the issue of an inequitable distribution of responsibilities between fathers and mothers as yet unaddressed. At the present time, such inequitable distribution of responsibilities is supported by a system that continues to regard women as asymmetrically responsible for childcare, and therefore puts roadblocks in the way of fathers (or husbands) who are willing to do their share of familial work. This needs to be changed by recognizing that most people have some family (whether they are married or not) and that employees (male as well as female) should be entitled, as a statutory right, to a specified number of days per year off to carry out familial duties. This is, for instance, current practice in several European countries. In addition, paternity leaves should be available to fathers as a matter of course.

#### **CONCLUSION: Why Recognizing the Socially Useful Aspects of Unpaid Labour is a Precondition for Creating Equality in Employment for Women**

Like Siamese twins, the issues of recognizing and rewarding the socially useful aspects of housework (and other unpaid work) and creating equality for women in employment are fused together. Perhaps this can be best demonstrated by asking what would happen if we fail to recognize the socially useful aspects of housework.

By definition, the socially useful aspects of housework represent necessary work. Small children must be cared for, sick and disabled people must be looked after. This need does not magically vanish if all adults enter the labour force. To the degree that in the past this work was done for free by women in the privacy of their homes, it has remained hidden. Only as women have ceased to do some of this work for free has it become visible.

Let us, then, assume that all women had a paying job and that support for childcare remained unaltered. In that case, those women with high paying jobs (professors, judges, teachers, executives) would be able to hire other women to look after their children during their working day, and pay them either very little or adequately. The vast majority of female workers, however, make such low wages that they cannot possibly pay child caretakers adequately. The net effect of such a situation would be that mothers working at jobs other than childcare would have handed over their own exploitation to a different group of women, who by necessity would constitute a very considerable proportion of the female labour force. This component of the female labour force would be extremely poorly paid. In 1980, the average income of a female babysitter was \$2,640 per year (and of a male babysitter it was \$4,311 per year). (Economic Council of Canada, 1983:89) The only way in which this income could be raised would be by raising wages, at which point in time babysitters would be priced out of the market for the majority of women who have an income.

Alternatively, mothers (and theoretically also fathers) could take several years off paid work to look after their pre-school



children. In that case, if we do not recognize and reward this as the equivalent to paid work, women will continue to suffer from interrupted work patterns and the attached financial penalties. In addition, they will accumulate correspondingly fewer financial benefits in their own right. Women will, in the case of divorce, be left—as is currently the case—significantly poorer than their ex-husbands. And when they are old, many women will be poor, as again is currently the case.

Recognizing socially necessary work performed in homes and rewarding it financially will not bring about equality in employment for women, (although it will raise the salaries of one group of predominantly female workers, namely child-care providers). However, *failing* to recognize and reward the socially necessary aspects of unpaid work will prevent us

from being able to bring about equality in employment for two reasons: women as individual and private providers of care will continue to be penalized for performing one of the most essential services for our society, and wages for those women who as a group will provide daycare for children as a public service will remain severely depressed. This will have a negative effect on efforts to raise the wages for women in general, since—because of the low wages—women in this category will be likely to accept other jobs that are also badly paid but not quite as badly as their own. Incidentally, we also cannot expect very much in terms of quality of care for our children if we are not prepared to put adequate resources into childcare.

#### NOTE

1. Unpaid work is here treated as a generic term, which includes both unpaid housework as well as unpaid voluntary work. Unpaid work and unpaid labour are treated as synonymous, and are, in effect, often equated with unpaid housework. This is a bit of conceptual sloppiness which is due to the fact that it is the unpaid nature of housework that is important here and that the analysis has not been extended to look at other forms of

unpaid work. Although this could (and probably should) be done, it was beyond the scope of this particular paper. Obviously, any distinction between socially useful and privately useful work done on a voluntary basis outside of the home would have to use a somewhat different criterion for establishing such a distinction than has been used with respect to unpaid housework.

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## NATIVE PEOPLE: SOME ISSUES

Stephen Sharzer

### Sommaire

Le document comprend une collection de courtes études sur différents sujets ayant trait aux autochtones.

La première étude renferme des données historiques sur les rapports entre le Canada et ses autochtones. Elle porte principalement sur la nature et l'établissement des distinctions entre les Indiens inscrits et les autres autochtones, lesquelles, parfois, tiennent davantage aux exigences du gouvernement qu'aux origines culturelles.

La deuxième étude est un profil démographique et socio-économique des autochtones qui s'inspire des données connues et de celles qui n'ont pas encore été publiées. Elle porte sur les statistiques démographiques, notamment la croissance et la répartition démographiques par groupe d'autochtones, âge et lieu, ainsi que sur l'enseignement, l'emploi et le revenu des autochtones.

La troisième étude porte sur les questions d'éducation et de formation des autochtones, notamment leurs besoins en matière d'éducation et de formation, les lacunes du système actuel et les solutions possibles.

La quatrième étude fournit des données de base sur les programmes et services du gouvernement fédéral à l'intention des autochtones. Les programmes de création d'emplois ainsi que les services de counselling et d'appoint, notamment les services de soins des enfants et l'adaptation au milieu urbain sont expliqués brièvement. Des suggestions sur la façon de les améliorer sont faites, en fonction des analyses actuelles.

La dernière étude résume les programmes d'action positive destinés aux autochtones dans le secteur privé et le secteur public fédéral. Les résultats de l'action positive dans la Fonction publique fédérale ne sont pas encourageants et on explique brièvement pourquoi. Les informations sur la situation dans le secteur privé ne sont guère meilleures.

### Summary

This paper represents a collection of short studies on a variety of topics pertaining to native people.

The first study contains some historical notes on Canada's relationship with its native people. It deals primarily with the nature and development of distinctions between Status Indians and other native people, distinctions that sometimes owe more to the exigencies of government than to cultural origins.

The second study is a demographic and socio-economic profile of native people that draws upon published and new unpublished data. The focus here is on population statistics, including population growth and distribution by native group, age and geographic location, and on the educational, employment, and income status of native people.

The third study is an examination of issues in education and training for native people. It attempts to identify the educational and training needs of native people, the deficiencies of the present system in meeting those needs, and possible remedies.

The fourth study provides basic information on federal government employment programs and services for native people. Job creation programs and counselling and support services, including childcare and urban adjustment, are briefly reviewed. Some suggestions for improvement, based on existing studies, are made.

The last study is a brief review of affirmative action for native people in the private sector and the federal public sector. The results of affirmative action in the federal public sector are not found to be encouraging, and the reasons for this are briefly examined. The information available on the private sector is sketchy but also not heartening.





## NATIVE PEOPLE: SOME ISSUES

Stephen Sharzer\*

I think Canadians are not too proud about their past in the way in which they treated the Indian population of Canada and I don't think we have very great cause to be proud.

Prime Minister Pierre Trudeau, August 8, 1969.<sup>1</sup>

### 1. INTRODUCTION

In recent years non-native Canadians have become more fully apprised of the sorry history of Canada's relationship with its native people. With that knowledge we have come to understand the bitterness, mistrust, and fear native people have felt for government. Their land has been taken away, their traditional government all but erased, and their customary lifestyle eroded. The setting apart of native people on reserves occurred simultaneously with attempts to assimilate them. Native people have not had much opportunity to participate in the mainstream of Canadian society. They have faced prejudice and ignorance — ignorance of their culture, values, and institutions. Years of cultural as well as social, economic, and political isolation have bequeathed a legacy of poverty.

The past 15 years have witnessed what Harold Cardinal described as the rebirth of Canada's Indians<sup>2</sup> and, for that matter, its other native peoples. We have seen a reawakening of native consciousness. Native people have evinced a commitment to preserving their identity. Participating in society means, as it does for the other cultural groups of Canada, integration, not assimilation. At the same time, native people have reaffirmed their special status within Confederation. Their political vision is finding increasing acceptance. They do not wish to be seen as another special interest group. They believe that they have a special place in the political structure of Canada. They want control over their political, economic, and social development.

To native people, improving employment opportunities means more than affirmative action writ large. It means creating opportunities through economic development. Political aspirations aside, economic development is an appropriate mechanism for allowing native people to share equally in the wealth of Canada. It is a particularly important tool for improving employment opportunities.

The mandate of the Commission on Equality in Employment requires, however, that it focus on means other than economic development for improving the employment opportunities of native people. In the course of fulfilling this mandate the need arose to examine a number of different but related topics. This paper represents an effort to meet this need.

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The Royal Commission needed some historical information, particularly on some of the distinctions among the various native peoples. This information appears in Section 2.

An overview of the socio-economic conditions of native people was also required by the Royal Commission. These conditions reflect on the employment opportunities of native people and are profiled in Section 3.

Existing education and training programs and policies that affect native people are examined in Section 4. Brief reviews of federal government employment programs and services for native people and of affirmative action for native people in the federal public sector and private sector follow, respectively, in Sections 5 and 6.

### 2. SOME HISTORICAL NOTES

Prior to the arrival of the Europeans, native people constituted, in the words of the Special Committee on Indian Self-Government, "productive, cultured, spiritual, intelligent civilizations" with "complex forms of government that go far back into history and have evolved over time".<sup>1</sup> Change came with the Europeans. The native people were gradually displaced from the land that formed the base of their civilization. In many cases land was purchased by, or surrendered by treaty to, the non-natives. In other cases the land was simply taken. In either event the native people were not in a position to resist the advance of settlement and non-native government. To this day native people are still trying to settle claims for lands in respect of which treaties were never made, as well as attempting to enforce treaties that the government never fulfilled.

The government established, usually through treaties but sometimes without them, reserves for settlement by the native people. In 1867 these reserves and Indians themselves were given over to the jurisdiction of the federal government by the *British North America Act*.<sup>2</sup> Legislation concerning the Indians and their reserves had existed for some time before the first federal statute to be called the *Indian Act* was enacted in 1876.<sup>3</sup> The *Indian Act* consolidated previous legislation and expanded on it. The outlines of the *Indian Act* have remained the same since. Land on the reserves could not be disposed of without the permission of the federal government. The *Indian Act*, as had earlier statutes, provided for a form of local government through elections. Traditional Indian governments were supplanted by band councils. The *Indian Act* also defined "Indian". This definition has been the base of native society every since.

The definition of "Indian" in the *Indian Act* was never strictly racial. Pre-Confederation legislation, designed to protect Indian lands, defined Indians in terms of those persons

belonging to the bands that had received an interest in the lands.<sup>4</sup> While in Upper Canada this type of legislation applied to "Indians, and those who may be intermarried with Indians",<sup>5</sup> in Lower Canada it did not apply to non-Indian spouses of Indian women. After Confederation the federal government consolidated this legislation and in 1869 it amended the legislation to provide that Indian women marrying non-Indians would cease to be Indians.<sup>6</sup> In 1876 the *Indian Act* defined "Indian" as follows:

*First, any male person of Indian blood reputed to belong to a particular band;*

*Secondly, any child of such person;*

*Thirdly, any woman who is or was lawfully married to such person.*<sup>7</sup>

This definition was employed despite the fact that descent was matrilineal among many Indian groups.

Indian women who married non-Indian men simply lost their status until the 1950s. In 1951 the *Indian Act* was revised to provide for the "enfranchisement" of such Indian women at the direction of the Governor-in-Council.<sup>8</sup> The children of such marriages were also "enfranchised" from 1951 on, although it was not until 1956 that the *Indian Act* was amended to allow for this. The term "enfranchisement" holds some irony for Indians. Originally the process of enfranchisement was created to allow Indians to withdraw from the "protection" of the *Indian Act* and the federal government. An Indian who had undergone enfranchisement would no longer be regarded as an Indian under the *Indian Act*. From the 1850s Indians were encouraged to become enfranchised, and inducements of land and money were offered. An early statute allowed a male Indian to become voluntarily enfranchised if he was "able to speak readily the English or the French language, of sober and industrious habits, free from debt and sufficiently intelligent to be capable of managing his own affairs".<sup>9</sup> A similar provision exists in the current *Indian Act*.<sup>10</sup> Between 1876 and 1948 only 4,102 Indians were enfranchised.<sup>11</sup> Between 1955 and 1975 more than 13,000 Indians were enfranchised, more than 80 per cent of them as a result of the marriage of an Indian woman to a non-Indian man.<sup>12</sup> Very few Indians have chosen in recent years to become voluntarily enfranchised.

There is now a large group of Indian women and children who are denied the benefits accorded Indians recognized under the *Indian Act*. These Indian people, other enfranchised Indians, certain Indians born out of wedlock, and certain Indians who never signed treaties with the government or who were never provided with reserve lands constitute the non-Status Indians, or Indians who are not entitled to be registered under the *Indian Act*. "Indian" is defined in the *Indian Act* to mean a person who is registered or entitled to be registered under the Act. Sections 11 and 12 of the Act control who may be registered. They are set out at length below:

11.(1) Subject to section 12, a person is entitled to be registered if that person

(a) on the 26th day of May 1874 was, for the purposes of An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and

Ordinance Lands, being chapter 42 of the Statutes of Canada, 1868, as amended by section 6 of chapter 6 of the Statutes of Canada, 1869, and section 8 of chapter 21 of the Statutes of Canada, 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada;

(b) is a member of a band

(i) for whose use and benefit, in common, lands have been set apart or since the 26th day of May 1874, have been agreed by treaty to be set apart, or

(ii) that has been declared by the Governor in Council to be a band for the purposes of this Act;

(c) is a male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b);

(d) is the legitimate child of

(i) a male person described in paragraph (a) or (b), or

(ii) a person described in paragraph (c);

(e) is the illegitimate child of a female person described in paragraph (a), (b) or (d); or

(f) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (a), (b), (c), (d) or (e).

(2) Paragraph (1)(e) applies only to persons born after the 13th day of August 1956. R.S., c.149, s.11; 1956,c.40, s.3.

12.(1) The following persons are not entitled to be registered, namely,

(a) a person who

(i) has received or has been allotted half-breed lands or money scrip,

(ii) is a descendant of a person described in sub-paragraph (i),

(iii) is enfranchised, or

(iv) is a person born of a marriage entered into after the 4th day of September 1951 and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph 11(1)(a), (b) or (d) or entitled to be registered by virtue of paragraph 11(1)(e), unless being a woman, that person is the wife or widow of a person described in section 11, and

(b) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

Section 12(1)(a)(i) and its companion provisions are examples of another peculiarity in the classification of Canada's native people. "Half-breed lands or money scrip" were



granted in the late 1800s and early 1900s to persons with combined Indian and non-Indian origins. Initially these grants were made only in Manitoba. Later they were extended to the rest of the Prairies and the Northwest Territories. According to Douglas E. Sanders<sup>13</sup> and Harry W. Daniels,<sup>14</sup> the legal definition of a Métis is a person who took a "half-breed grant" (or that person's descendant). Originally "Métis" was applied to those having combined French and Indian origins. Later it was used to refer to all those with combined non-Indian and Indian origins. Daniels has criticized this usage as being historically inaccurate. He maintains that, "In political terms, a Métis is the descendant of the people who developed distinctive political communities on the prairies in the fur trade period and who asserted their political existence in the Red River and Northwest rebellions".<sup>15</sup> There are, however, large numbers of persons in Quebec, Ontario, British Columbia, and the Atlantic provinces who identified themselves as Métis in the 1981 census and who are likely not all descendants of the groups identified by Daniels.<sup>16</sup> The peculiarity in the classification of native people is that a number of Status Indians are descendants of Métis or people with combined Indian and non-Indian origins. In the late 1800s and early 1900s the Métis and people with combined origins were given the option of accepting land or scrip or "taking treaty" and becoming registered Indians.<sup>17</sup> Others were allowed to "take treaty" simply as a matter of practice.<sup>18</sup>

There are therefore under federal jurisdiction many native people who are not purely of Indian origin, including the descendants of Métis and people of combined origins who "took treaty" as well as the descendants of Indian men who married non-Indian women. There are also excluded from federal jurisdiction Indian men and women of pure Indian origins who have become enfranchised.

The last group under federal jurisdiction are the Inuit. Their status under the constitution was clarified in 1939 when the Supreme Court of Canada decided that they were "Indians" under the terms of Section 91(24) of the *Constitution Acts, 1867 to 1982*.<sup>19</sup> The constitutional status of the Métis and non-Status Indians has never been resolved; it has never been settled whether or not the Métis and non-Status Indians are "Indians" under Section 91(24). The practice of "treating" with the Métis and non-Status Indians is evidence in favour of their being regarded as "Indians". If the courts were to formulate purely racial criteria for defining who is an Indian, it seems logical and reasonable that the definition would include — as the *Indian Act* does now — those with some degree of non-Indian blood. This would presumably include a large portion of the Métis and non-Status Indians. The courts would have to reject any distinctions based solely on gender.

The provisions of the *Indian Act* that enfranchise Indian women who marry non-Indians and their children have been the subject of much criticism. While the federal government has felt that the courts would resolve the problem under the *Charter of Rights and Freedoms*, it has recently proposed to eliminate these provisions by amending the *Indian Act*.<sup>20</sup> It is in the process of negotiating an acceptable solution to the problem with the Indian First Nations and Indian women.

The legal definitions discussed above were imposed on what were and are many diverse and distinct peoples. There are 11 separate language groups and numerous dialects in

Canada.<sup>21</sup> Siggner's remarks, which were directed to the Indians, apply equally to the Inuit:

*The different groups for the most part lived in quite different ecological environments and consequently pursued quite different economies and lifestyles. In turn, differences and variations appeared in their spiritual beliefs and larger cultural systems.*<sup>22</sup>

There are currently 576 Status Indian bands in Canada.<sup>23</sup>

Native societies were undermined in other ways. For many years the Christian churches, with the cooperation of the government, provided native education. In the schools the use of native languages was not allowed and native religious observances were proscribed. This was a reflection of what Mr. Justice Berger found to be the prevailing attitude of non-native people:

*Euro-Canadian society has refused to take native culture seriously. European institutions, values and use of land were seen as the basis of culture. Native institutions, values and language were rejected, ignored or misunderstood and - given the native people's use of the land - the Europeans had no difficulty in supposing that native people possessed no real culture at all. Education was perceived as the most effective instrument of cultural change; so, educational systems were introduced that were intended to provide the native people with a useful and meaningful cultural inheritance, since their own ancestors had left them none.*<sup>24</sup>

Education was not the only "instrument of cultural change". Native institutions were suppressed by law. An example is the Potlatch, a political and social institution of West Coast Indians. This system was described by the Special Committee on Indian Self-Government:

*From time to time, community or national leaders call assemblies which are widely attended. Through ceremony, song, dance and speeches, new leaders are installed in office. Wealth is redistributed through an economy based on giving rather than accumulating. Names are given and recorded. Political councils are held and decisions are made. History is recalled and instructed. Spiritual guidance is given.*<sup>25</sup>

In 1884 the *Indian Act* was amended at the behest of British Columbia officials and clergymen to outlaw the Potlatch. At the same time Indians were denied the opportunity to participate in the political life of society as a whole. Status Indians living on reserves could not vote in federal elections until 1960, except for a short period in the late 1800s.<sup>26</sup>

During the 1960s the government became more sensitive to the plight of the native people. The notion grew that the *Indian Act* and the reserves were perhaps Canada's own apartheid system. Eventually the federal government responded with its 1969 White Paper. The government proposed to reform the relationship of Canada and its native people. The rationale was as follows:

*The Government believes that its policies must lead to the full, free and non-discriminatory participation of the Indian people in Canadian society. Such a goal requires a break with the past. It requires that the Indian people's role of dependence be replaced by a role of equal status, opportunity and responsibility, a role they can share with all other Canadians.<sup>27</sup>*

The federal government wished to eliminate the "legislative and constitutional bases of discrimination".<sup>28</sup> The *Indian Act* was to be repealed and the federal government's special responsibility for Indians under the constitution eliminated. The federal and provincial governments would have jurisdiction over and be responsible for providing services to Indians in the same way as they have jurisdiction over and are responsible for services to other Canadians. The effects of the treaties were discounted:

*The significance of the treaties in meeting the economic, educational, health and welfare needs of the Indian people has always been limited and will continue to decline. The services that have been provided go far beyond what could have been foreseen by those who signed the treaties.<sup>29</sup>*

The reserve lands would be transferred to the direct ownership of the Indians.

The White Paper was rejected by the Indian people. It was perceived as the culmination of the assimilationist policies of the federal government. Indians were to lose what they considered to be their special status in Canadian society. Harold Cardinal wrote at the time:

*We will be fearful of any attempt by the federal government to turn over to provincial governments responsibility for Indian Affairs. We will be certain that the federal government is merely attempting to abandon its responsibilities. Provincial governments have no obligations to fulfill our treaties. They never signed treaties with the Indians. We would not expect them to be concerned with treaty rights. In our eyes, this new government policy merely represents a disguised move to abrogate all our treaty rights.<sup>30</sup>*

The Indians had a much more expansive interpretation of the federal government's treaty obligations. Eventually in 1971 the federal government formally withdrew the White Paper.

The White Paper was a catalyst for native political development. The response to the White Paper forced the federal government to reassess its policies. Since that time the federal government has manifested a desire to assist native people in preserving their culture. It began a process of devolution of government powers to Indian bands and organizations. For the Indian people this policy has not been adequate. They are now asking for nothing less than the recognition of Indian self-government. Their hopes have been charged by the entrenchment of aboriginal rights in the constitution,<sup>31</sup> by the far-reaching recommendations of the Special Committee on Indian Self-Government,<sup>32</sup> and by the federal government's proposal at the 1984 First Ministers' Conference on Aboriginal Rights to recognize some form of Indian self-government.<sup>33</sup>

### 3. NATIVE PEOPLE: A DEMOGRAPHIC AND SOCIO-ECONOMIC PROFILE

#### 3.1 Introduction

The statistical data on native people generally and their economic position in particular are inadequate. The quantity and quality of analysis leave much to be desired. We know that the socio-economic condition of native people is poor. We have enough data to know generally and sometimes in detail what must be done to make improvements. But we do not have the data for the type of sophisticated and comprehensive strategy that is needed to combat native socio-economic ills.

More data are needed and the data that are available must be provided in a more disaggregated form. We would have a much better idea of employment barriers if, for instance, we could take all the persons employed in a particular industry or occupation and break them down by ethnic origin, age, sex, education, experience, income, length of time in the workforce, and geographic location. While it may not be feasible to produce this type of data on a broad basis it is feasible and desirable to do so on a selective basis.

One specific need is for more data on the Métis and non-Status Indians. Data on the Inuit and Status Indians are more readily available. This is because the federal government has had to collect this data in the course of fulfilling its special responsibilities for the Inuit and Status Indians.<sup>1</sup>

What generally is needed is a program to study the socio-economic condition of the native people. Such a program could systematically collect and analyze the data needed for a native economic and employment strategy. This program could be a joint undertaking of the provincial and federal governments with the participation of the native people.

This section represents an attempt to bring together existing data on a number of topics. Some indication of the social and economic ills plaguing native people can be found here.

#### 3.2 Population

The 1981 Census shows a total native population of 491,460, or two per cent of the total population of Canada.<sup>2</sup> This is further broken down into four groups: Status Indians (292,700); Métis (98,260); non-Status Indians (75,110); and Inuit (25,390). There is some reason to think that these figures are not accurate. A number of Indian reserves refused to cooperate with Census officials.<sup>3</sup> Continuing mistrust of the government may have led some native people to refuse to identify themselves as being of native origin. The Census itself had a liberal method for the identification of native people: persons reporting any degree of native origin were designated as native persons. Despite this, data from other sources would indicate that the 1981 Census under-counted native people in Canada.

Discrepancies appear in the figures for Métis and non-Status Indians (MNSI). The 1981 Census showed a total of 173,370 Métis and non-Status Indians. Shortly before the Census two government reports put the Métis and non-Status Indian population at no less than 300,000. The two reports are: *The Development of an Employment Policy for Indian, Inuit and Métis People*<sup>4</sup> (Employment and Immigration Canada) and *The Métis and non-Status Indian Population: Numbers and Characteristics*<sup>5</sup> (Native Citizens Directorate, Department of the Secretary of State). Employment and

Immigration Canada estimated there to be a core MNSI population of 300,000. This figure was arrived at by regional Manpower directorates in consultation with Métis and non-Status Indian organizations. It apparently was based on the following considerations:

*There are more than 3½ million Canadians who could legitimately claim to be of Native ancestry. Two-thirds of them are hardly aware of it or seldom think about it. For all practical purposes Canadian society generally does not consider them to be part of the country's Native population when it talks about status Indians, Inuit, Métis or non-status Indians.*

*The remaining third of 1.2 million are divided about equally into two groups. The persons in the first group, though themselves quite conscious of their Native heritage, are not perceived by others to be Native. Hence, they are generally excluded from any statistics available on Native people. By contrast, the persons in the second group are perceived in Canadian society as being Indian, Métis or Inuit.<sup>6</sup>*

The estimate of 300,000 MNSI was apparently of persons in this last group.

The report of the Secretary of State reviewed existing studies of the MNSI population.<sup>7</sup> It found a good deal of confusion about the numbers of Métis and non-Status Indians. The problems stem in part from the difficulties in defining the Métis and non-Status Indians. It was acknowledged that between 2 million and 3.5 million Canadians may have "some native genetic heritage".<sup>8</sup> The following breakdown of this group was suggested in the report:

1. Status Indians and Inuit.
2. MNSI core population: "those people of Native ancestry who identify closely with their Native heritage, share many characteristics of status Indians, are identified by government agencies as the total MNSI group in need of programs".<sup>9</sup>
3. MNSI non-core, self-identifying population: those people who are aware of their native heritage but who are either primarily or usually part of the non-native society.
4. MNSI non-core, non-self-identifying population: those people with some native ancestry but who are unaware or marginally aware of their native heritage.

Estimates of the last three groups are, respectively, 300,000 to 435,000, 400,000 to 600,000, and 1 to 2.5 million. The report of the Secretary of State criticized the studies from which these figures were taken. Methods of estimation were either poorly explained or not explained at all. It was suggested that the process of estimation is incestuous and somewhat arbitrary:

*No more than four or five people in the federal government are actively involved in estimating the MNSI population. These people tend to take into account each other's latest revisions and, outside of ad hoc consultation with MNSI organizations, base their numbers on well-informed but subjective estimates.<sup>10</sup>*

Even if we take the most conservative estimate of Métis and non-Status Indians (300,000) it is still higher than the figure in the Census.

Another more recent study supports the view that the Census under-counted the MNSI population at least in Ontario. The Census puts the MNSI population in Ontario at 38,770. The Ontario Task Force on Native People in the Urban Setting<sup>11</sup> estimated the MNSI core population to be between 50,000 and 94,000 and the MNSI non-core, self-identifying population to be between 67,000 and 130,000. The Task Force's "conservative estimate" of urban MNSI who may need services was 117,000.

### 3.3 Population Growth and Age Groupings

The native population in Canada has been growing at a faster rate than the non-native population. Much of this growth occurred during a native "baby boom" in the late 1960s. We now have a native population that is "younger" as a whole than the non-native population.

While we know that the native population has been growing at a faster rate than the non-native population we do not know for sure how much faster it has grown. The 1971 Census showed there to be 312,760 native people in Canada.<sup>12</sup> The 1981 Census counted 491,460 native people. The problems with the 1981 Census were noted in Section 3.1. The 1971 Census only recorded native persons under the following categories: Eskimo, "Native Indian Band", and "Native Indian Non-band". Métis were not counted.<sup>13</sup> The native population figures for 1971 and 1981 are therefore not comparable. The only figures about which we can be reasonably confident are those for Status Indians. In 1971 there were approximately 231,000 Status Indians<sup>14</sup> and in 1981 there were 292,700.<sup>15</sup> Between 1971 and 1981 the Status Indian population increased by 27 per cent. During the same period the total population in Canada increased by 12 per cent from 21,568,310 to 24,083,491.<sup>16</sup>

After peaking at 44 births per 1,000 population in 1965, the Status Indian birthrate fell to 28.5 per 1,000 population in 1976.<sup>17</sup> The birthrate for the total population in 1965 was 19.4 per 1,000 population and in 1976 it was 15.7 per 1,000 population.<sup>18</sup> The Status Indian birthrate is dropping faster than the national birthrate — the former fell 32 per cent between 1966 and 1976 while the latter fell 19 per cent during the same period<sup>19</sup> — but it is still almost twice the national rate. Mortality rates have also been dropping. The death rate for Status Indian infants has declined from about 79 deaths per 1,000 live births in 1960 to 32.1 deaths per 1,000 live births in 1976.<sup>20</sup> The overall death rate for Status Indians declined from 10.9 deaths per 1,000 population in 1960 to 7.5 per 1,000 in 1976.<sup>21</sup> Siggner commented in 1979 on the potential consequences of these changes:

*If the major reductions in the mortality rate continue throughout the next decade, especially among infants and children, the Indian population may grow at a more rapid rate than has been forecast despite the expected decline in the fertility rate.<sup>22</sup>*

The native population is "younger" than the national population. In 1966, 48 per cent of Status Indians were less



than 15 years old while only 33 per cent of the total Canadian population were less than 15 years old.<sup>23</sup> In 1976 the proportion of Status Indians under the age of 15 had declined somewhat to 42 per cent but still exceeded the proportion of the total Canadian population under the age of 15, which declined to 26 per cent.<sup>24</sup> The 1971 Census found that 45 per cent of native people (excluding Métis) were under the age of 15 while only 30 per cent of the total Canadian population were under the age of 15.<sup>25</sup> The 1981 Census showed that 39 per cent of native people were less than 15 years old but only 23 per cent of the national population were in that age group.<sup>26</sup> The 1981 Census counted roughly 190,000 native people under the age of 15.<sup>27</sup>

There is potential for a sizable increase in the native labour force during the 1980s. The native population is young and it has been growing relatively quickly. The pattern of growth means that the "Indian labour force will not experience the full brunt of the Indian baby boom until the 1980s".<sup>28</sup> The Task Force on Labour Market Development was of the opinion that the native "baby boom" would increase the working age population by approximately 200,000 in the 1980s.<sup>29</sup> The Task Force did not explain how it had arrived at this figure. Considering that only about 190,000 native people were less than the working age (15 and over) at the time of the 1981 Census, the potential for growth may be less than that estimated by the Task Force. Even so, a disproportionate number of native people will be joining the working age population in the next decade or so. Two variables make it difficult to assess what impact this will have on the labour force. The labour force participation rates of native people are depressed.<sup>30</sup> These rates have been improving since 1971 and it can be assumed that they will continue to improve but at what rate we are not certain.<sup>31</sup> The second variable is the attendance of native people at educational institutions. Attendance rates have been improving.<sup>32</sup> The impact of native population growth on the native labour force may be delayed if this trend continues.

### 3.4 Geographic Distribution and Migration

The largest part of the Status Indian population is located in the western provinces, that is, Manitoba, Saskatchewan, Alberta, and British Columbia. The 1981 Census shows that 167,075 Status Indians or 57 per cent of the Status Indians in Canada live in these four provinces.<sup>33</sup> Department of Indian Affairs and Northern Development (DIAND) data, which show a higher overall Status Indian population for Canada, indicate that 195,920 Status Indians or 60.5 per cent of the Status Indians live in the western provinces.<sup>34</sup> The province with the highest number of Status Indians is Ontario, with 70,190 (which would give Ontario 22 per cent of Status Indians). Twelve per cent of Status Indians live in Quebec. The remaining, roughly seven per cent of Status Indians live in the Yukon, Northwest Territories, and the Atlantic provinces.

About 60 per cent of the Inuit people live in the Northwest Territories.<sup>35</sup> Another 19 per cent live in Quebec. Roughly seven per cent and four per cent live in Newfoundland and Ontario, respectively. The balance are spread out across Canada with a low of five Inuit people in New Brunswick.

According to the Census, 111,700 Métis and non-Status Indians, or 64 per cent of the total 173,370 MNSI population, live in the western provinces. Employment and Immigration Canada (EIC) on the other hand estimated in 1978<sup>36</sup> that

211,400 Métis and non-Status Indians, or 70 per cent of what it estimated to be a total of 300,000 MNSI population, live in the western provinces. According to the Census the largest provincial MNSI population is in Ontario (38,770, or 22 per cent of the total MNSI population). EIC data shows Ontario (50,000, or 17 per cent of the total MNSI population) standing third after Saskatchewan (64,400, or 21.4 per cent of the total MNSI population) and Manitoba (62,200, or 20.6 per cent of the total MNSI population) for MNSI population. According to the Census, approximately eight per cent of the MNSI population lives in Quebec. The comparable EIC percentage is roughly seven.

The next set of statistics discussed deal with native people as a percentage of provincial and territorial populations. The Census data indicate that native people constitute less than one per cent of the population in Quebec and in the Atlantic region. In Ontario they form slightly more than one per cent of the population. In Manitoba and Saskatchewan they represent more than six per cent of the population. Three per cent of the population in each of Alberta and British Columbia are native. In the Yukon and in the Northwest Territories they form 18 per cent and 58 per cent, respectively, of the population.

It was suggested earlier that the Métis, non-Status, and Status Indians may have been under-counted in the Census. If we combine the Census data on the Inuit people and Status Indians (see Table 3.1) and the EIC estimate of the MNSI population (see Table 3.2), we have a different picture of proportions of native people in the provinces and territories (see Table 3.3). There is not much change in the percentages for the Atlantic region, Quebec, and Ontario. In Manitoba and Saskatchewan the percentages rise to 10 and 11 per cent, respectively, from six per cent for each. The figures increase by about one-half of a percentage point for Alberta and British Columbia. In the Yukon the proportion of native people rises from 18 per cent to 23 per cent. In the Northwest Territories the native people form 71 per cent rather than 58 per cent of the population. Using this data native people would form 2.6 per cent of the national population rather than the two per cent indicated by the Census data.

**On and Off the Reserve.** As of 1981, 30 per cent of Status Indians were living off the reserve.<sup>37</sup> The highest proportions of Status Indians living off the reserve were in British Columbia (38 per cent), Saskatchewan (34 per cent), and Ontario (33 per cent). The proportions of Status Indians living off the reserve were somewhat less than average in the Atlantic region (25 per cent), Manitoba (27 per cent), Alberta (24 per cent), and the Yukon (26 per cent). An even smaller proportion live off the reserve in Quebec (19 per cent). Status Indians living off the reserve in the Northwest Territories represented only seven per cent of the total Status Indian population.

**Proximity to Urban Centres.** About 65 per cent of Status Indians lived in rural or remote locations in 1977.<sup>38</sup> By contrast, in 1976 only 24 per cent of the total population in Canada were living in rural areas.<sup>39</sup> While nationally about 26 per cent of Status Indians live in remote locations the figures vary "by region, with a low of 5% in the Maritimes and Alberta, with 55% in Manitoba, and with a high of over 80% in the Yukon".<sup>40</sup>

**TABLE 3.1**  
**Native Population by Type, Canada and Provinces/Territories, 1981**

| Area                  | Total<br>Population* | Total<br>Native<br>People | Inuit  | Status<br>Indian | Non-<br>Status<br>Indian | Métis  |
|-----------------------|----------------------|---------------------------|--------|------------------|--------------------------|--------|
| Canada                | 24,083,496           | 491,460                   | 25,390 | 292,700          | 75,110                   | 98,260 |
| Newfoundland          | 563,747              | 4,430                     | 1,850  | 1,010            | 1,185                    | 385    |
| Prince Edward Island  | 121,223              | 625                       | 30     | 400              | 140                      | 50     |
| Nova Scotia           | 839,801              | 7,795                     | 130    | 5,905            | 1,155                    | 605    |
| New Brunswick         | 689,373              | 5,515                     | 5      | 4,235            | 865                      | 415    |
| Quebec                | 6,369,068            | 52,395                    | 4,875  | 34,400           | 5,810                    | 7,310  |
| Ontario               | 8,534,263            | 110,060                   | 1,095  | 70,190           | 26,090                   | 12,680 |
| Manitoba              | 1,013,703            | 66,280                    | 230    | 39,710           | 5,855                    | 20,485 |
| Saskatchewan          | 956,441              | 59,200                    | 145    | 37,470           | 4,135                    | 17,455 |
| Alberta               | 2,213,651            | 72,050                    | 510    | 35,810           | 8,595                    | 27,135 |
| British Columbia      | 2,713,615            | 82,645                    | 515    | 54,085           | 19,085                   | 8,955  |
| Yukon                 | 23,074               | 4,045                     | 95     | 2,770            | 990                      | 190    |
| Northwest Territories | 45,537               | 26,430                    | 15,910 | 6,720            | 1,205                    | 2,595  |

\* Excludes inmates in institutions.

Source: Unpublished 1981 Census data.

**TABLE 3.2**  
**Métis and Non-Status Indian Population by  
 Provinces/Territories, 1978**

| Province/Territory    | Population |
|-----------------------|------------|
| Newfoundland          | 1,000      |
| Prince Edward Island  | 600        |
| Nova Scotia           | 2,500      |
| New Brunswick         | 2,500      |
| Quebec                | 20,000     |
| Ontario               | 50,000     |
| Manitoba              | 62,000     |
| Saskatchewan          | 64,400     |
| Alberta               | 45,000     |
| British Columbia      | 40,000     |
| Yukon                 | 2,500      |
| Northwest Territories | 9,500      |
| Canada                | 300,000    |

Source: *The Development of an Employment Policy for Indian, Inuit, Métis People, Employment and Immigration Canada, 1978.*

Data on the proximity of the Métis and non-Status Indians to urban centres are presented in the report of the Secretary of State referred to earlier.<sup>41</sup> These data assume a MNSI core

**TABLE 3.3**  
**Native Population by Region or Province**

| Region                | Population |
|-----------------------|------------|
| Atlantic              | 20,165     |
| Quebec                | 59,275     |
| Ontario               | 121,285    |
| Manitoba              | 101,940    |
| Saskatchewan          | 102,015    |
| Alberta               | 81,320     |
| British Columbia      | 94,600     |
| Yukon                 | 5,365      |
| Northwest Territories | 618,095    |

Source: Inuit and Status Indians — Table 3.1; Métis and non-Status Indians — Table 3.2.

population of about 300,000. This estimate is divided into three undefined categories: Mid-North, Developed Rural, and Urban Areas. In 1975 the percentages of Métis and non-Status Indians in these categories were, respectively, 36.6, 30.6, and 32.8 per cent.

Statistics on the proximity of the Inuit people to urban centres were not available. It would appear, though, that the majority live in remote or rural locations. The Inuit people live in the outlying areas of Labrador and northern Quebec, the shores of Hudson Bay and Ungava Bay, in the Mackenzie

Delta, and on the mainland coast of the Northwest Territories.

**Migration.** The proportion of Status Indians living on reserves has been declining steadily since the 1960s. The proportion of Status Indians on reserves declined from 84 per cent in 1966 to 77 per cent in 1971, 73 per cent in 1976, and 70 per cent in 1981.<sup>42</sup> This trend has been most pronounced in the western provinces (Manitoba, Saskatchewan, Alberta, and British Columbia).

It was suggested in *Indian Conditions: A Survey*, a recent DIAND report, that the increase in the proportion of Status Indians living off the reserve during the period from 1966 to 1976 was "largely due to migration from reserves".<sup>43</sup>

In 1974 the rate of change in the distribution of Status Indians living on and off the reserve slowed and levelled off until 1976. Siggner, writing in 1979, attributed this to a number of factors:

*...poor economic conditions in the cities throughout the 1970's have limited job opportunities and increased the competition in a limited labour market. Thus, a movement back to reserves and settlements may be contributing to the stable proportions on reserves. The same economic conditions may also be contributing to discouraging out-migration from reserves. Improvements in housing supply and economic development on reserves and Indian control of education also may be combining to discourage out-migration from reserves or to draw people back.*<sup>44</sup>

From 1976 to 1981, however, the proportion of Status Indians living on reserves dropped three percentage points. The increase in the proportion of Status Indians living off reserves has continued but at a reduced rate.

The destination for the majority of native migrants appears to be urban areas:

*The past two decades have witnessed the movement of increasing numbers of native persons from rural areas and reservations to urban centres. Although this phenomenon has occurred in all regions of Canada, it has been especially pronounced in Canada's western provinces and has led to the very rapid growth of native populations in major prairie cities.*<sup>45</sup>

This movement to urban areas involves not only young single adults but large numbers of families as well. The Ontario Task Force on Native People in the Urban Setting found that 45 per cent of the time a migrant was accompanied by his or her family.<sup>46</sup> Clatworthy found in 1980 that 82 per cent of recent Status Indian migrants (and 12 per cent of Métis and non-Status Indian migrants) to Winnipeg consisted of single- or two-parent families with children.<sup>47</sup> In another study, Clatworthy and Hull determined that 58 per cent of net Status Indian migrants (and 64 per cent of net Métis and non-Status Indian migrants) to Saskatoon during 1978 to 1982 were in the 0-14 age group.<sup>48</sup> This would suggest that the majority of migrants to Regina and Saskatoon are families. These data are consistent with the decline in the proportion of Status Indian children living on reserves. During 1966 to 1976 the proportion of Status Indians aged 0-14 years old living on

reserves declined from 87 per cent to 74 per cent — a slightly faster rate than that for all Status Indians.<sup>49</sup>

A number of studies suggest that native migrants to urban areas are predominantly young. Clatworthy found that 64 per cent of the native migrants to Winnipeg in 1980 were under 25 years of age. A further 24 per cent fell in the 25-39 age group.<sup>50</sup> Clatworthy and Hull found that during 1978 to 1982 an annual average of 80 per cent of the native migrants to Regina were under 25 years of age and that a further 15 per cent fell into the 25-44 age group.<sup>51</sup> They also determined that the comparable figures for Saskatoon were 74 per cent and 21 per cent, respectively.<sup>52</sup> It is noteworthy that these studies also determined that female native persons formed the majority of native migrants to all three cities: Winnipeg (63 per cent), Regina (55 per cent), and Saskatoon (56 per cent). These findings are consistent with overall population statistics. The 1981 Census showed that of the working age (15 years and over) off-reserve native population in Canada, 53.5 per cent are female.<sup>53</sup> Other data from the 1981 Census show that in five Census Metropolitan Areas native women form a higher percentage of the working age population than native men: Toronto (54 per cent), Halifax (56 per cent), Montreal (53 per cent), Regina (59 per cent), and Vancouver (54 per cent).<sup>54</sup>

A number of surveys have shown that the primary reasons for native migration to urban areas are the desire for better employment opportunities and the desire for better educational opportunities. The Ontario Task Force on Native People in the Urban Setting found that 49 per cent of native moves were related to employment and 13 per cent to education.<sup>55</sup> Clatworthy found that among recent migrants to Winnipeg, 33 per cent of Status Indians and 37 per cent of Métis and non-Status Indians had moved for reasons related to employment. Fifteen per cent of the Status Indians and 14 per cent of the Métis and non-Status Indians relocated to take advantage of educational opportunities.<sup>56</sup> There were, however, significant differences between sex groups. Only 13 per cent of female Status Indians versus 45 per cent of male Status Indians and 16 per cent of female Métis and non-Status Indians versus 55 per cent of male Métis and non-Status Indians cited the desire for better employment opportunities as the primary reason for moving. Female native persons were more likely to cite family ties in the city or problems at their previous home as the primary reason for moving. The percentage of female native persons citing the desire for better educational opportunities as the principal reason for moving only differed slightly from the comparable percentage of male native persons. A fairly similar pattern emerged in Clatworthy and Hull's study of Regina and Saskatoon.<sup>57</sup>

There appears to be a substantial degree of "return migration", that is, migrants returning to their place of origin. Studies have indicated that many native people return to their reserves or home communities.<sup>58</sup> Further, studies have detected a pattern of commuting between the cities and the reserves.<sup>59</sup>

### 3.5 The Family

According to *Indian Conditions*, the "average family size among Status Indians, [which is] now slightly less than five, appears to be slowly approaching the lower national levels of approximately 3.5".<sup>60</sup> This is consistent with the apparent decline in the birthrate.<sup>61</sup>



In 1961, 60 per cent of the native population were officially married as opposed to 67 per cent of the national population.<sup>62</sup> It was reported that in 1971, 57.6 per cent of native people aged 15 years or over were married as opposed to 64.3 per cent of the comparable national cohort.<sup>63</sup> Frideres maintains that in 1971 nearly 60 per cent of Status Indian births were outside a formal marriage.<sup>64</sup> Frideres gave no authority for this statistic. Siggner asserted — also without reference to any authority — that 33 per cent of "all Indian births" in 1971 were to unmarried Indian women.<sup>65</sup> He added that this percentage rose to over 50 per cent in 1976. In *Indian Conditions* it was maintained that the rate of Status Indian births outside marriage is four to five times the national average. It seems fair to assume then that Status Indians have a relatively high rate of births outside of marriage. One of the obvious reasons for this is the desire of Status Indian women to avoid the consequence of marrying a non-Indian: forfeiture of their legal status as registered Indians. The significance of this as a factor in the high rate of births outside marriage is underlined when one considers that 80 per cent of the 13,153 Status Indians who were "enfranchised" during 1955 to 1975 were women and children who lost their status following marriage to a non-Indian.<sup>66</sup> There do not appear to be any other substantiated explanations for the high rate of births outside of marriage.

While the divorce rate of Status Indians is only one-half of the national rate<sup>67</sup> this may not be indicative of the status of the Indian family unit. More revealing are studies indicating an increasing number of single-parent families headed by women. A 1981 study of native women in Winnipeg determined that, "Mother led single parent families comprise approximately 43% of Native households and more than 53% of Native family households".<sup>68</sup> A survey of native people in Regina and Saskatoon found that 48 per cent of native families with children were headed by single parents.<sup>69</sup> It seems reasonable to assume that a good part of these parents were women.

In 1973-74 the proportion of Status Indian children "in care" was 5.5 per cent.<sup>70</sup> The national rate, according to *Indian Conditions*, was about one per cent.<sup>71</sup>

### 3.6 Health

The mortality rate for Indian children<sup>72</sup> outstrips that for non-Indian infants. The average death rate for 1973-76 for Indian children aged one to four years old was 3.1 per 1,000 population (in that age group). The comparable non-Indian rate was 0.8. The Indian rate is four times the non-Indian rate.<sup>73</sup> The infant mortality rate for Indians also exceeds the rate for non-Indians. This rate is defined as the number of deaths of children in the first year of life per 1,000 live births. In 1976 the Indian rate was 32.1 and the rate for all Canadians was 16.0. The Indian rate had declined from 79.0 in 1960 (as opposed to 27.3 in 1960 for all Canadians).

Siggner's statistics show that the top four causes of infant death include respiratory diseases and infective and parasitic diseases. For each of these two causes the Indian infant death rate is six times that for non-Indian infants. According to *Indian Conditions*, this reflects "poor housing, lack of sewage disposal and potable water, as well as poorer access to medical facilities".<sup>74</sup>

The death rate for Indians exceeds the death rate for non-Indians in all age groupings. In only one category, those 65 years and over, is the death rate close to that for non-Indians. In all other age groups the Indian death rates range from about two to four times the rates for non-Indians. For Indians in the age group 5-19 years the death rate is 1.9 per 1,000 population (in that group) versus 0.7 for the non-Indian population. The rates for Indians in the age groups 20-44 and 45-64 years are 6.0 and 15.7, respectively, versus 1.5 and 9.0, respectively, for non-Indians.<sup>75</sup>

Life expectancy for Indians is lower than for non-Indians. For Indians under one year life expectancy as of 1971 was 10 years less than that for the national population. This was so even though Indian life expectancy had increased somewhat since 1961. For Indians surviving to middle age, life expectancy is closer to the national level. This has been taken as suggesting that the major reasons for lower Indian life expectancy are high infant and youth mortality.<sup>76</sup> These statistics are dramatized by Siggner's figures, which show that the average age at death for Indians in 1976 was 43 years as opposed to 67 years for the total Canadian population.<sup>77</sup>

The report *Indian Conditions* indicated that accidents (said to include suicides), violence, and poisoning account for more than one-third of Indian deaths as opposed to nine per cent of non-Indian deaths.<sup>78</sup> The suicide rate for Indians is almost three times that for the general population. Most of the suicides occur in the 15-24 and 25-34 age groups.<sup>79</sup> In 1976 the other major causes of accidental death among Indians were motor vehicle accidents and drowning. The rates for each of these were, respectively, two and six times the rates for the general population.<sup>80</sup> *Indian Conditions* indicated that the Indian death rate in the category of firearms is 40 times the national rate.<sup>81</sup> The rate of death caused by burns and fire for Indians is almost seven times the national rate. Burns and fire represent a major cause of accidental deaths among Indians aged 1 to 14.<sup>82</sup> According to *Indian Conditions*: "The unusually high rate of fires and fire deaths in Indian housing may be attributable to the lower quality of housing, use of substandard heating systems, crowded conditions and the scarcity of fire protection services, especially in rural and remote communities".<sup>83</sup> Altogether the rate of violent deaths (that is, deaths in the following categories: motor vehicle, burns and fire, firearms, poisoning and overdose, suicides, and "other") for Indians is more than three times the rate for all Canadians. In the 15-44 age group it is somewhere between four and five times the national rate.<sup>84</sup>

**Other Statistics.** The Indian hospital use rate is about 2 to 2.5 times the national rate.<sup>85</sup> Information on the incidence of alcoholism among native people is incomplete and inconclusive, and the following data should therefore be treated accordingly. It has been estimated that between 50 and 60 per cent of Indian illnesses and deaths are related to alcohol.<sup>86</sup> An unnamed Saskatchewan study referred to in *Indian Conditions* showed that "hospital admissions for alcoholic psychosis and alcoholism for on-reserve Indians in the 25-55 age group were five times the national rate".<sup>87</sup> On the other hand the Ontario Task Force on Native People in the Urban Setting found that there is insufficient evidence that alcoholism rates for urban native people are high. The Task Force did find, however, that alcohol abuse is recognized as a serious problem by urban native people.<sup>88</sup> Siggner,

writing in 1979, said that the only available information on the incidence of disease among Indians concerned tuberculosis. As of 1976 the tuberculosis rate for registered Indians was more than six times the rate for the general population.<sup>89</sup>

The report *Indian Self-Government in Canada*<sup>90</sup> commented on Indian health conditions:

*The shocking degree of ill-health among Indian people has been widely documented. Indeed the federal Indian Health Policy of 1979 referred to the "tragedy of Indian ill-health" and presented ways to remedy this intolerable situation. Although the federal medical care program for Indians and Inuit has been extensive, involving significant sums of money for health services, Indian health has not improved to any great extent.*<sup>91</sup>

The present situation has been said not to be the result of "departmental neglect" but is attributable to larger problems relating to "poverty, poor housing, lack of clean water, inadequate sewage and garbage disposal".<sup>92</sup>

### 3.7 Housing

It was noted previously that the lack of adequate housing and services has been blamed for the high rates of disease and fires and fire deaths. DIAND estimated that as of 1977 one in three Indian families lived in crowded conditions.<sup>93</sup> Siggner says, as of 1977, that 40 per cent of Indian reserve and settlement houses were in need of major repairs or replacement.<sup>94</sup> The need for new housing on reserves was estimated in *Indian Conditions* to be about 11,000 units.<sup>95</sup> The backlog was attributed to: the need for replacement housing; the need to reduce crowding; and the "recent increase in family formations following the Indian 'baby boom' of the late 1950's and early 1960's".<sup>96</sup> In addition to this backlog there is the yearly normal new housing demand of 2,000 units. DIAND estimated in 1980 that to meet this demand and eliminate the backlog the current rate of construction of 2,200 units per year would have to be doubled for five years.

About 24 per cent of on-reserve housing units need major repairs.<sup>97</sup> There are also deficiencies in services. As of 1977 only 50 per cent of Indian houses had potable water and only 45 per cent had sewage disposal and indoor plumbing.<sup>98</sup> These figures are a little more than half the national levels. On the other hand, 90 per cent of on-reserve houses have electricity. This is close to the national figure. The situation is worse in non-urban Indian communities:

*The lack of services is more pronounced on rural and remote reserves, where in 1977 fewer than 40% of houses had running water, sewage disposal and indoor plumbing facilities compared to more than 60% of all Canadian rural houses.*<sup>99</sup>

The lack of running water and sewage disposal is particularly marked in Saskatchewan, Manitoba, and the Yukon.<sup>100</sup>

### 3.8 Criminal Justice

Native people are over-represented in federal and provincial prisons. According to *Indian Conditions*: "About 9% of the prison population is Indian or native, compared to an

estimated 3 to 3.5 percent share of the national population."<sup>101</sup> In 1971 native people constituted less than 10 per cent of the population in Saskatchewan and Manitoba but upwards of 40 per cent of the provincial prison population and upwards of 20 per cent of the federal prison population.<sup>102</sup>

In 1979, 48 per cent of native inmates in federal penitentiaries had been convicted of violent crimes such as murder, manslaughter, and rape as opposed to 27 per cent of non-native inmates.<sup>103</sup>

Large proportions of native inmates are in jail for non-payment of fines and for liquor and vehicle offences. According to Frideres, "Non-payment of fines alone accounts for well over half of the Natives admitted to jails".<sup>104</sup> A study of native inmates in Ontario indicated that of 433 inmates serving sentences at the time of the survey, 96, or 22 per cent, were serving time for non-payment of fines.<sup>105</sup> According to another study of native inmates in Ontario, "In 1981-82, liquor offences represented 37 per cent of all the offences for which native people were imprisoned".<sup>106</sup> It has been said that "most Indian crime is a direct result of alcohol abuse".<sup>107</sup>

The juvenile delinquency rate for Indians is three times the national rate. Further, "A lower proportion of Native children are let off with a warning than the national rate (15% compared to 46%) and consequently more are charged or referred".<sup>108</sup>

### 3.9 Social Assistance

Native people in Canada are heavily dependent on social assistance. In its 1980 survey, *Indian Conditions*, DIAND asserted that "use of social assistance and welfare among Indians has increased from slightly more than one-third of the population to slightly more than one-half in the last 10 to 15 years".<sup>109</sup> In 1974, 55 per cent of the on-reserve Status Indian population received social assistance whereas only six per cent of the total population received assistance under the Canada Assistance Plan.<sup>110</sup> Federal social assistance to Status Indians grew from approximately \$35 million in 1970-71 to about \$104 million in 1978-79.<sup>111</sup>

A recent study of Status Indians in Ontario found that in 1977 about 18 per cent of the on-reserve Indian population received social assistance.<sup>112</sup> This led the authors of the study to conclude, based on the assumption that social assistance is directed to family heads, that more than 70 per cent of the on-reserve Indian population were benefitting from social assistance. Some 72 per cent of these recipients were said to be employable.<sup>113</sup> A similar study of the British Columbia Status Indian population found that in 1978 31 per cent of the on-reserve population were receiving social assistance.<sup>114</sup> Presumably an even higher proportion of the on-reserve population were benefitting from the social assistance.

Studies of urban native populations in the prairie provinces have also found high rates of dependence on social assistance. A 1980 study of the native population in Winnipeg showed that 77.5 per cent of Status Indian households and 71.6 per cent of Métis and non-Status Indian households were receiving government transfer payments.<sup>115</sup> In the case of Status Indians, 78.9 per cent of the payments took the form of "social assistance"<sup>116</sup> and 15.5 per cent were from the Unemployment Insurance Commission. For the Métis and

non-Status Indians the comparable figures were 68.2 per cent and 19.1 per cent, respectively.<sup>117</sup> Clatworthy and Hull's study, *Native Economic Conditions in Regina and Saskatoon*,<sup>118</sup> found similarly high rates of dependence on social assistance. In 1982, 84.6 per cent of Status Indian households and 73.2 per cent of Métis and non-Status Indian households in Regina were receiving government transfer payments made up primarily of "social allowances"<sup>119</sup> and unemployment insurance benefits.<sup>120</sup> For Saskatoon the percentages of Status Indian households and Métis and non-Status Indian households receiving government transfer payments were, respectively, 82.7 per cent and 81.9 per cent. Again, these payments consisted mainly of "social allowances" and unemployment insurance benefits.<sup>121</sup>

A survey of Métis and non-Status Indians in Ontario conducted from 1978 to 1979 found that 32 per cent of the Métis and non-Status Indian households surveyed were receiving some form of social assistance (including welfare, unemployment insurance, mothers allowance, disability pension, and old-age pension).<sup>122</sup>

### 3.10 Education

Native educational levels continue to lag behind non-native levels although the gap has been closing over the past two decades. In 1971 about 65 per cent of the native population over the age of 15 had less than a Grade 9 education while only 34 per cent of the comparable national population fell into this category.<sup>123</sup> A further 33 per cent of the native population had had education in the Grade 9 to 13 range (as opposed to 56 per cent of the national population). Of the native population, 1.6 per cent had obtained some university education and a further 0.5 per cent had obtained a university degree (compared with 6.1 per cent and 4.7 per cent, respectively, of the national population). These figures add to 100 per cent. The study from which these figures came also determined that 10 per cent of the native population as opposed to 22.6 per cent of the national population had "vocational, post-secondary non-university or partial university (short of degree) training".<sup>124</sup> By 1981 native educational levels had improved but so had non-native levels.<sup>125</sup> The following statistics are for native people 15 years of age and over. In 1981, 42.2 per cent of the male native population and 42 per cent of the female native population had less than a Grade 9 education as opposed to 20 per cent and 20.8 per cent of the national male and female populations, respectively. Of the native population, 37.2 per cent of females and 35.8 per cent of males had schooling in the Grade 9 to 13 range but had not obtained a certificate or diploma. The comparable national statistics were 21.3 per cent and 29.7 per cent, respectively. Of the native population, 7.7 per cent of males and 8.7 per cent of females had obtained a high school certificate or diploma. The comparable national statistics were 17.5 per cent and 21.3 per cent, respectively. Of the female native population, 10.9 per cent, as opposed to 20 per cent of the national female population, had trades or other non-university training or had a trades or other non-university certificate or diploma or had non-degree university training. The comparable male native statistic was 12.7 per cent as opposed to 22.9 per cent for the national male population. Finally, only 1.1 per cent of female natives and 1.6 per cent of male natives had university degrees as opposed to

6.2 per cent of all female Canadians and 9.9 per cent of all male Canadians.

If Status Indian enrolment figures are any indication, the majority of native people educated beyond the secondary level received some form of non-university training. These figures are set out below in Table 3.4 and Figures 3.1, 3.2, and 3.3. They show that during the past two decades the majority of Status Indians involved in post-secondary education were enrolled in some form of vocational training. The more recent apparent decline in vocational training as recorded by DIAND has been attributed by the department to "a new movement into community colleges as well as increased use of programs funded through the Canada Employment and Immigration Commission. Enrolment in these programs is difficult to record accurately and therefore the information is not included in these charts [i.e., Figures 3.2 and 3.3]".<sup>126</sup> Frideres has said that it is also due in part to program cut-backs.<sup>127</sup>

TABLE 3.4

#### Full-Time Post-Secondary and University Enrolment of Registered Indians, 1965, 1970, and 1975

| Year | Post-Secondary Enrolment* | University Enrolment |
|------|---------------------------|----------------------|
| 1965 | 3,103                     | 131                  |
| 1970 | 10,946                    | 432                  |
| 1975 | 11,103                    | 2,071                |

\* Post-secondary includes: university teaching, nursing, vocational, auxiliary, pre-vocational formation and special courses.

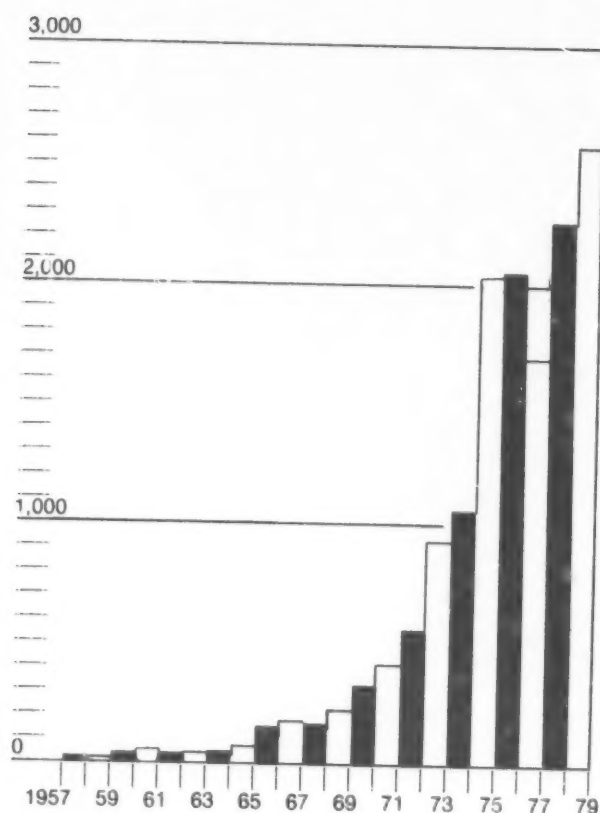
Source: A.J. Siggner, *An Overview of Demographic, Social and Economic Conditions Among Canada's Registered Indian Population*, Research Branch, Indian and Inuit Affairs Program, DIAND, Ottawa, 1979, 32.

It is noteworthy that the 1981 Census, at the disaggregated levels shown in the statistics made available, showed that male native educational levels were only slightly ahead of female native education levels.<sup>128</sup> Whether or not this apparent equality would persist on further examination remains to be seen.

The university enrolment of Status Indians improved from 0.5 per cent of Status Indians aged 18-24 in 1965 to 5.3 per cent in 1975. This was still less than half of the proportion of the total population aged 18-24 enrolled in university in 1975 (12.2 per cent).<sup>129</sup> Broken down by region, university enrolment of Status Indians in 1975 was highest in Quebec (8.9 per cent of Status Indians aged 19-29), Manitoba (11.1 per cent), and Saskatchewan (9.0 per cent). Alberta was apparently just over five per cent while British Columbia and the Atlantic region were apparently just under five per cent. Only 2.6 per cent of Status Indians (aged 19-29) in Ontario were enrolled in university.<sup>130</sup>



Figure 3.1  
University Enrolment of Status Indians, 1957-79



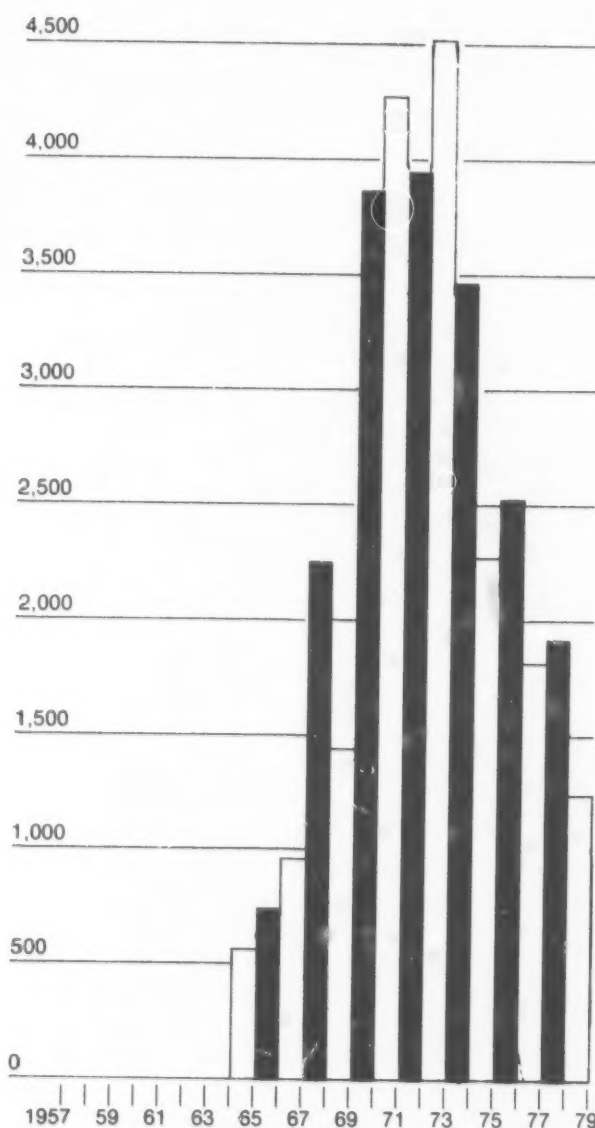
Source: *Indian Conditions: A Survey*, DIAND, Ottawa, 1980, 53.

The proportion of Status Indian children aged 4-13 enrolled in elementary school rose from 83 per cent in 1969-70 to 90 per cent in 1973-74 to 95 per cent in 1977-78.<sup>131</sup> According to DIAND this "has virtually matched national participation levels".<sup>132</sup> In 1977-78, 55,371 Status Indian children aged 4-13 were enrolled in primary school.<sup>133</sup> The proportion of Status Indian children aged 14-18 enrolled in secondary school rose from 60 per cent in 1969-70 to a peak of 76 per cent in 1972-73 but declined steadily afterwards to 60 per cent in 1977-78.<sup>134</sup> The Status Indian and national secondary school participation rates were the same in 1972-73 but, by 1978-79, the national rate was more than 10 percentage points higher than the Status Indian rate.<sup>135</sup>

The proportion of Status Indian students remaining in school from Grade 2 to Grade 12, otherwise known as the retention rate, has improved somewhat from 1965, but there is still a serious gap between the Status Indian rate and the national rate. The 1965-66 retention rate of 11.1 per cent for Status Indians rose to 19 per cent in 1973-74 but dropped somewhat to 17.9 per cent in 1975-76. The comparable national rates were: 1965-66 — 50.5 per cent; 1973-74 — 70.8 per cent; and 1975-76 — 75.4 per cent.<sup>136</sup> Broken

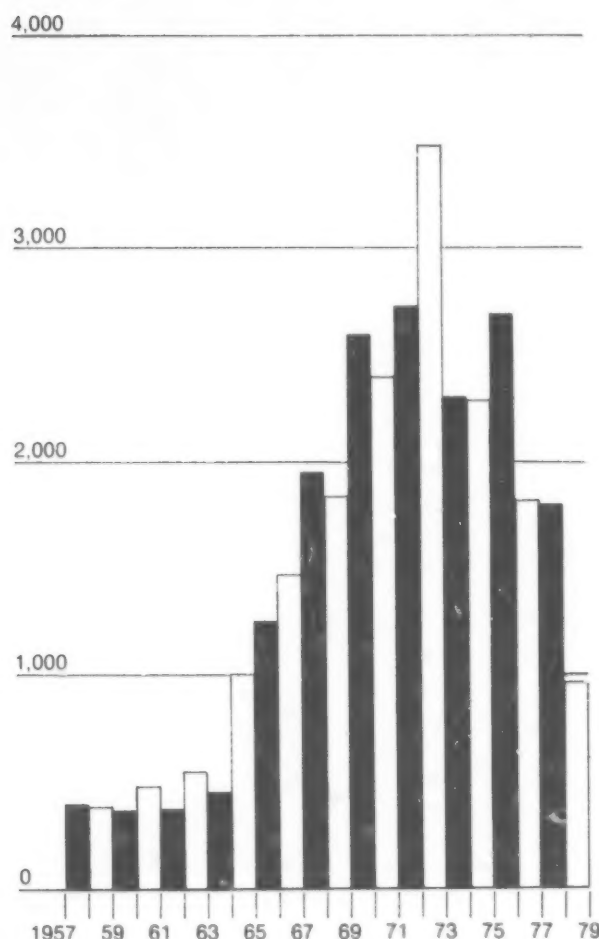
down regionally, the retention rates for Status Indians were higher than average in the Atlantic region, Quebec, Alberta, and Ontario (the highest at 29.7 per cent). The lowest retention rates were in Manitoba (10.8 per cent) and Saskatchewan (8.6 per cent).<sup>137</sup>

Figure 3.2  
Pre-Vocational Training, Enrolment in Post-Secondary Institutions of Status Indians, 1957-79



Source: *Indian Conditions: A Survey*, DIAND, Ottawa, 1980, 55.

Figure 3.3  
Vocational Training, Enrolment in Post-Secondary  
Institutions of Status Indians, 1957-79



Source: *Indian Conditions: A Survey*, DIAND, Ottawa, 1980, 55.

### 3.11 Employment and Income

#### Unemployment and Labour Force Participation

The overall unemployment rate for native people in 1981 was just over twice that for non-native people: 15.9 per cent as opposed to 7.2 per cent.<sup>138</sup> The total number of unemployed native people was 24,265.<sup>139</sup> Among native people the statistics were worst for young people in the age cohorts 15-19 and 20-24.<sup>140</sup> These groups make up 31 per cent of the native labour force but 44 per cent of the unemployed native people.<sup>141</sup> About 29 per cent of native people aged 15-19 and about 21 per cent of native people aged 20-24 were unemployed. This compares with the national rates of 14.2 per cent for males aged 15-24 and 12.3 per cent for females aged 15-24.<sup>142</sup>

The difference between the unemployment rates for native women and native men was slight: 16.5 per cent as opposed to 15.5 per cent. 14,185 native men and 10,080 native women were unemployed in 1981.<sup>143</sup>

It may be that the figures given above understate the unemployment rates of native people. This possibility is underscored by the low participation rates of native people: 299,735 native people, or just over 60 per cent of the native population in 1981, were over the age of 15. Of these, 153,045 were members of the labour force; the overall participation rate of native people was 51.1 per cent. This compares with a participation rate of 65 per cent for the non-native population.<sup>144</sup> In the 1981 Census, on which these statistics are based, the participation rate is the labour force as a percentage of the population 15 years of age and over. The labour force consists of those persons (15 years of age or over) who were employed or unemployed during the week prior to the Census enumeration. Normally, to count as one of the unemployed a person must have actively looked for work in the four weeks preceding the Census. This will exclude those who have become discouraged from looking for work. This creates a lower participation rate. It would appear that a substantial number of native people would fall into the category of the "discouraged unemployed". The *Survey of Métis and Non-Status Indians*, using a broader definition of unemployment, found that 33 per cent of the Métis and non-Status Indians surveyed were unemployed.<sup>145</sup> More than half of those had actively looked for work. The remainder had not been looking for work for reasons including the following: "no good job" — 6.5 per cent; "no work in the area" — 23.3 per cent; "lack of schooling or training" — 8.2 per cent; and "lack of skills or experience" — 3.2 per cent.<sup>146</sup> DIAND has found that the "lack of suitable jobs near and in Indian communities" has discouraged Indians from actively searching for work.<sup>147</sup> The isolated location of many of the Indian reserves restricts employment opportunities. The already high unemployment rate on reserves (18 per cent versus 15 per cent off-reserve)<sup>148</sup> may be even higher once one looks behind the 40 per cent on-reserve participation rate to the "discouraged unemployed".

Another group that may not be showing up in labour force statistics are those native people who are pursuing traditional native lifestyles. In *Indian Conditions* it was reported that in three sample communities the non-wage sector (hunting, fishing, trapping, lumbering, gathering, and farming) garnered between 41 per cent and 58 per cent of the total community income.<sup>149</sup> Seasonal "unemployment" among native people carrying on traditional activities may never be reported properly because it does not fit into standard measures.

While the difference between the unemployment rates of native women and native men was slight, the participation rate of native men (63.2 per cent) was 24 percentage points greater than the rate of native women (39.6 per cent). The spread between the participation rates of non-native men (78.4 per cent) and non-native women (52 per cent) was, however, even greater — 26 percentage points.<sup>150</sup> The particularly low participation rate of native women may reflect the double barrier faced by native women.

Education is positively correlated with labour force participation. As educational levels rise so do the participation rates of native people.<sup>151</sup> The available 1981 Census data

broke down educational levels into three categories: less than Grade 9, Grade 9 to 13, and "other". "Other" is defined to include "trades certificate or diploma", 'university' and 'non-university' ".<sup>152</sup> The participation rate of native people in the "other" category was very close to that of non-native people. In the first two categories, however, there was a significant gap between the participation rates of native people and non-native people. Education also has a positive effect on unemployment rates.<sup>153</sup> The unemployment rate for native people having less than Grade 9 was 19.3 per cent, compared to 17.5 per cent for those falling in the Grade 9 to 13 category and 11.4 per cent for those falling in the "other" category. The unemployment rate for the best-educated native people, however, was still more than two percentage points behind that for the least educated non-native people (less than Grade 9 (9.1 per cent)). The unemployment rate for non-native people in the Grade 9 to 13 category was 8.2 per cent and that for those in the "other" category was 6 per cent.

It appears that native unemployment may be higher than that recorded by the Census and the Labour Force Survey. Their standard measures do not take account of the discouraged unemployed and the seasonally unemployed. The true level of unemployment has not been adequately documented. In *Indian Conditions*, DIAND stated that "Indian unemployment remains at about 35 per cent of the working-age population".<sup>154</sup> If the level of social assistance is any indication, the real unemployment level may very well be as high as DIAND estimates it to be.<sup>155</sup> As was noted earlier, one study of Status Indians in Ontario estimated that 70 per cent of the on-reserve Indian population in Ontario were receiving social assistance. Of these, 72 per cent were said to be employable.<sup>156</sup>

### Income

An Indian and Inuit Affairs Program survey of 35 Indian bands in 1964 found the average per capita Indian income to be \$300, as opposed to \$1,400 for the total Canadian population.<sup>157</sup> Native incomes continue to lag behind non-native incomes. In 1970 the 66.3 per cent of native people aged 15 and over who had some income had an average total income of \$2,976. That same year, the 76.2 per cent of non-native people aged 15 and over who had some income had an average total income of \$5,033.<sup>158</sup> More recently the Ontario Task Force on Native People in the Urban Setting found that of the native people (over the age of 15) surveyed, 57.2 per cent earned less than \$7,000, 21.5 per cent earned \$7,000-\$11,000, 14.8 per cent earned \$11,001-\$17,000, and 6.5 per cent earned more than \$17,000.<sup>159</sup> The comparable percentages for the total Ontario population — based on those persons filing a tax return in 1978 — were, respectively, 7.3 per cent, 23.9 per cent, 32.2 per cent, and 36.6 per cent.<sup>160</sup>

Clatworthy's study *Patterns of Native Employment in the Winnipeg Labour Market*<sup>161</sup> and Clatworthy and Hull's paper *Native Economic Conditions in Regina and Saskatoon*<sup>162</sup> provide information on household incomes for native people in Winnipeg, Regina, and Saskatoon. Clatworthy found that in 1980 the average household income of native people was about one-half the average household income of the general population in Winnipeg.<sup>163</sup> He also found that the per capita income of native people in Winnipeg was less than 40 per cent of that of the general population.<sup>164</sup> Clatworthy and Hull

found that in 1981 the average household income of Status Indian households was \$13,078 in Regina and \$14,869 in Saskatoon, and that the average household income of Métis and non-Status Indian households was \$15,237 in Regina and \$14,364 in Saskatoon.<sup>165</sup> Household income data for the two cities were not available but the authors did note that the estimated average household income for metropolitan centres in Canada was \$31,642 in 1981.<sup>166</sup>

The 1964 Indian and Inuit Affairs Program survey found that an average Indian worker earned \$1,361 annually compared to almost \$4,000 for all Canadians.<sup>167</sup> *Indian Conditions* reported that in 1970, 27 per cent of employed Indian men as opposed to 51 per cent of employed men nationally earned more than \$6,000.<sup>168</sup> Siggner wrote in 1980 that,

*the 1971 Census showed that almost two-thirds (62 percent) of the Native labour force working full-time for at least forty weeks earned less than \$6,000 per year. This proportion is twice as high as the thirty-three percent of the total Canadian labour force which fell into the same category.*<sup>169</sup>

The Survey of Métis and Non-Status Indians found that the average weekly earned income for employed Métis and non-Status Indians in 1976 was \$186. The average weekly earned income for "the industrial composite of all Canadian workers" for a three-month period in 1976 was \$221 or 19 per cent more.<sup>170</sup> Data from the 1981 Census show that these discrepancies still exist.<sup>171</sup> The income figures that follow are for persons 15 years of age and over who worked in 1980 and reported employment income for 1980. The average employment income for native people in 1980 was \$9,414. This was 69 per cent of the average employment income in 1980 for non-native people, which was \$13,692. The average employment income for native males was \$11,363, as opposed to \$17,066 for non-native males (the native figure is about 67 per cent of the non-native figure). The average employment income of female natives was \$6,562, as opposed to \$8,894 for non-native females (the native figure is about 74 per cent of the non-native figure). While non-native females earned 52 per cent of what non-native males earned, native females earned about 58 per cent of what native males earned. Native females earned only 38 per cent of what non-native males earned.

### Occupational and Industrial Distribution

The 1981 Census indicates that native people were under-represented in the following occupational categories when compared to the rest of the population: managerial, administrative, and related (4.6 per cent of natives as opposed to 8.5 per cent of non-natives worked in this category); natural science, engineering and maths (1.5 per cent/3.2 per cent); health and medicine (2.6 per cent/4.4 per cent); clerical and related (13.1 per cent/19.2 per cent); and sales (4.7 per cent/9.1 per cent). Native people were over-represented in the following categories: service (18.3 per cent/12.8 per cent); construction (11.5 per cent/6.4 per cent); hunting, fishing, and trapping (2.1 per cent/0.4 per cent); forestry (4 per cent/0.7 per cent); and mining and quarrying (1.4 per cent/0.6 per cent).<sup>172</sup>

These figures are reflected in those breaking down the native and non-native labour forces by industry.<sup>173</sup> For that



reason the only statistic from the latter figures to which I wish to draw attention and which does not show up in the occupational figures is that for the category of public administration and defence. Fifteen per cent of the male native labour force and 13.9 per cent of the female native labour force fell into that category. The comparable non-native figures were 7.8 per cent and 6.8 per cent, respectively.<sup>174</sup> The explanation for this is suggested by the on- and off-reserve breakdown of the native figures. On the reserve, 24 per cent of the male native labour force were in the public administration and defence category, as opposed to 11.1 per cent of the off-reserve labour force. The comparable figures for the female native labour force were 27.2 per cent and 10.1 per cent, respectively. These high on-reserve figures are consistent with the devolution policy of DIAND<sup>175</sup> and the department's effort to employ more native people in the administration of the reserves.

The *Survey of Métis and Non-Status Indians*<sup>176</sup> produced data on the occupational distribution of native people quite similar to the 1981 Census. It found that Métis and non-Status Indians were most heavily represented in the following categories: service (16 per cent); construction trades (13 per cent); clerical and related (10 per cent); forestry and logging (6 per cent); product fabricating, assembly, and related (6 per cent); and transport equipment operating (5 per cent). All other occupations represented 44 per cent.<sup>177</sup> The *Survey* also made the following findings:

*When the data on occupational experiences are broken down further by 4-digit level CCDO, it emerges that among the service occupations, most work has been performed in restaurants as chefs, cooks, waiters, hostesses, stewards, bartenders; in private homes as domestics; and in the food, beverage and laundering service industries.*

*It also emerges that much of the activity in the construction trades occupation is in structural work, excavating, grading and related work. Clerical and related occupations are general bookkeeping, accounting clerks in stores and secretarial work in offices.*

*The data also reveal that timber cutting was predominant in the forestry and logging occupations, while motor vehicle mechanics and other repair work was predominant in the product fabricating, assembly and related occupations. In the transport equipment operating occupations, most employed individuals are either truck drivers or taxi drivers.*<sup>178</sup>

On the basis of this data the authors of the *Survey* concluded that most Métis and non-Status Indians worked in jobs requiring only entry level skills and that "few have risen above the unskilled or semi-skilled occupational levels".<sup>179</sup>

In studies of the native populations in Winnipeg, Regina, and Saskatoon, Clatworthy has found that native "workers tend to be concentrated in lower skill/lower wage employment sectors".<sup>180</sup> Male native workers were concentrated in construction, manufacturing and processing, and service occupations. In Regina and Saskatoon about 65 per cent of female native workers were in sales, service, and clerical

occupations.<sup>181</sup> In Winnipeg, 50 per cent of female native workers were in these occupations. A further 25.7 per cent were in the occupational category of manufacturing and processing.<sup>182</sup>

When the native labour force is broken down by broad occupational categories, significant differences in occupational distribution are found to exist for females and males (see Table 3.5). The most prominent differences existed in the following categories: clerical (4.8 per cent of native males were in this category, as opposed to 27.2 per cent of native females); service (9.8 per cent/27.1 per cent); fishing and hunting (2.7 per cent/0.2 per cent); forestry and logging (5.7 per cent/0.6 per cent); and construction (18.5 per cent/0.9 per cent).

**TABLE 3.5**  
**Native Labour Force by Broad Occupation**  
**and Sex, 1981**

|     |                                                  | Males<br>(%) | Females<br>(%) |
|-----|--------------------------------------------------|--------------|----------------|
| 1.  | Managerial, Technical,<br>Professional, Teaching | 14.5         | 23.1           |
| 2.  | Clerical                                         | 4.8          | 27.2           |
| 3.  | Sales                                            | 3.7          | 6.3            |
| 4.  | Service                                          | 9.8          | 27.1           |
| 5.  | Fishing and Hunting                              | 2.7          | .2             |
| 6.  | Forestry and Logging                             | 5.7          | .6             |
| 7.  | Other Primary                                    | 6.6          | 1.7            |
| 8.  | Processing                                       | 6.1          | 3.2            |
| 9.  | Machinery and Fabricating                        | 11.2         | 5.1            |
| 10. | Construction                                     | 18.5         | .9             |
| 11. | Transportation                                   | 6.9          | 1.4            |
| 12. | Other                                            | 9.5          | 3.2            |
|     |                                                  | 100.0        | 100.0          |

Source: Unpublished 1981 Census data.

#### 4. EDUCATION AND TRAINING

##### 4.1 Introduction

One of the most significant barriers to improving native employment opportunities is the lack of education and training. The gap between native and non-native educational levels was noted in section 3. The training and education of native people has improved considerably during the past two decades — particularly in recent years — but there remain many unmet needs and unsolved problems. Among these are a number of recurring themes and sub-themes including: native control of native education and training; the preservation of native culture and language; the relevance of curricula to native people; the access of native communities to education and training; the existence of cultural barriers; the concentration of native people in certain industries, occupations, and skills; the continuing financial obstacles to training and education; the low educational retention rates; the access of

native people to information about education and training; and the need for appropriately trained and educated native people to serve native communities. These will be considered in greater depth in the rest of this section.

As we will see, the special needs of native people span the whole range of levels and types of education and training. Dealing with the employment problems of native people through education and training requires not one but many solutions.

#### 4.2 Primary and Secondary Education

Native education in Canada has gone through a number of overlapping phases. In the first phase the education of Indians was set apart from the education of other Canadians and controlled by Christian religious institutions. Indian children were inculcated with Christian precepts and values while "the religious observances of the native people were banned and the use of their languages forbidden".<sup>1</sup> The schools in which this took place (known as "residential schools") were often removed from the Indian communities. In 1945 Indian students were allowed to leave the reserve and the residential schools to obtain an education.<sup>2</sup> Nevertheless, it was not until the late 1960s that the Christian churches finally severed, for the most part, their connections with Indian education.

In 1950 federal day schools were established for elementary education. These schools were operated by DIAND on the reserves. Later, Indian children began to attend integrated, off-reserve, provincial schools. While run by provincial school authorities, these schools were financed to a certain extent with federal funds. Through agreements with school boards or provincial governments the federal government paid and continues to pay per capita grants for each Indian student. In addition, the federal government has contributed toward the capital costs of the provincial schools. According to *Indian Conditions*, "from about 1960 to 1970 emphasis was placed on developing arrangements with schools in provincial systems".<sup>3</sup> The enrolment of Indian students in federal schools dropped from 61 per cent in 1965 to 39 per cent in 1972.<sup>4</sup> According to Siggner, "By 1976, 623 agreements had been signed with off-reserve non-Indian school boards, and almost all federal secondary schools had been closed".<sup>5</sup>

In the late 1960s the integration of Indian children into provincial schools had been reinforced by the Hawthorn report,<sup>6</sup> which had endorsed integrated education. This era culminated with the 1969 White Paper presented by the Minister of Indian Affairs and Northern Development, Jean Chretien, to Parliament. In it the federal government proposed to repeal the *Indian Act* and have the provinces assume responsibility for Indians (and consequently their education). The White Paper was rejected by most of the Indian people. Eventually in 1971 the White Paper was retracted by the federal government.

In 1972 the National Indian Brotherhood (now the Assembly of First Nations) proposed in a paper titled "Indian Control of Indian Education"<sup>7</sup> that control of Indian education be transferred to Indian bands and that the federal government continue to fund Indian education. In 1973 the federal government publicly endorsed in principle the policy of the National Indian Brotherhood. Since that time, according to *Indian Conditions*, the "emphasis has been on developing

schools in Indian communities, ideally operated by Indian bands".<sup>8</sup> In its recent publication *Indian Education Paper-Phase 1*,<sup>9</sup> DIAND cited the following "indicators of progress":

*In 1970, about 200 Indian school committees had some, generally minor, responsibility for education programming. However, by 1980:*

- *three Indian or Inuit school boards have been created under provincial law: the Nishgas of B.C. and the Cree and Kativik School Boards of Northern Quebec;*
- *450 of the 573 bands are administering all or parts of their programs;*
- *there are 137 band-operated on-reserve schools;*
- *band-administered O & M operation and maintenance education budgets (including post-secondary and student residences) have grown to almost \$110 million (from \$7 million in 1973-74);*
- *the percentage of Indian administrators and teachers in federal schools has grown to 30 per cent.*<sup>10</sup>

According to the same document, 24 per cent of Indian elementary and secondary school students attend "Indian-administered" schools<sup>11</sup> although only 15 per cent attend band-operated schools.<sup>12</sup> Further, 80 on-reserve schools now offer one or more high school grades to about 2,500 students, or about 18 per cent of the total Indian high school population.<sup>13</sup> Native languages and native cultural content are increasingly being incorporated as part of the curriculum in native education.

The Indian people believe that while progress has been made toward Indian control of Indian education, there is still much to be done. They believe that DIAND, through its budgetary control in conjunction with the continuing promulgation of policy and operational guidelines, has retained control of Indian education. They believe further that DIAND has not provided adequate resources for the realization of the goals expressed in the National Indian Brotherhood's paper "Indian Control of Indian Education". DIAND, on the other hand, believes that it has always been committed to local control of Indian education but that this commitment is subject to the Minister's responsibilities under the *Indian Act*. Under the Act the Minister is, according to DIAND, accountable to Parliament for Indian education and the funds used in support of it. DIAND believes, therefore, that it must monitor and maintain the standards and quality of Indian education.<sup>14</sup>

DIAND has acknowledged that Indian control over Indian education has developed "in a somewhat uncoordinated manner across the country".<sup>15</sup> Control has been transferred according to DIAND's perception of the capacity of the particular band (or bands).

DIAND has admitted that a number of other problems face Indian education including:

*The education management framework both in the Indian and the federal school systems is inadequate when assessed against generally accepted management principles and is significantly inferior to provincial structures.*

*Funding of Indian and federal schools is inferior to provincial funding levels, and this, despite the relatively greater costs of meeting the special demographic, social and economic circumstances of most Indian communities.<sup>16</sup>*

*...It is generally accepted that federal and band school facilities and maintenance programs are inferior to provincial school facilities.<sup>17</sup>*

The federal government must commit more resources to Indian education if the special needs of Indians are to be met and educational levels raised.

Fifty-four per cent of Indian children attended schools under provincial jurisdiction in 1980-81.<sup>18</sup> The federal government continues to financially support provincial schools where Indian children attend. According to DIAND the federal government has assumed the cost of elementary and secondary education — both provincial and federal — "as a matter of practice, but not of legal obligation".<sup>19</sup> The federal government supports the provincial schools through tuition agreements and capital contribution agreements with provincial school boards or provincial governments. Indians participate in varying degrees in the negotiation of these agreements.

The significance of native control of and participation in education rests not just in the realization of the cultural and political aspirations of the native people. The "bottom line" is improving the educational levels of the native people and thereby improving their opportunities for employment. The evidence is not all in on the effect of native control, but what is in indicates that the effect is positive. The Union of Ontario Indians maintains that since Indian bands in Ontario have taken over certain schools there has been a significant improvement in the number of children graduating from these schools.<sup>21</sup> According to Frideres, "Indian Affairs has found that, when natives control the education of their children, the secondary participation of the community rises and the retention rate for students increases".<sup>22</sup> The benefits of establishing schools in native communities and expanding the grades available in existing community schools are manifold. In the past, native people have often had to leave their communities for schooling, particularly in the secondary grades. This situation persists in many native communities. The Special Committee on Education of the Legislative Assembly of the Northwest Territories found this to be the case for the Northwest Territories in 1982:

*At present, most students who wish to continue their education beyond Grade 9 must, at a young age, leave their homes in small communities to live in a crowded residence in some distant settlement while attending a large, composite high school. Not surprisingly, most of them are unhappy, and the drop-out rate for students in Grades 9 and 10 is very high indeed. We have heard abundant testimony to suggest that, if these students could live at home, most of them would remain in school through Grade 10.<sup>23</sup>*

Separation from family, community, and culture has not been conducive to success in the school system.<sup>24</sup> Language

problems,<sup>25</sup> cultural conflict,<sup>26</sup> and culturally irrelevant curricula<sup>27</sup> in the provincial schools have also been obstacles. The incidence of cultural conflict is reduced in native community schools. The impetus and commitment to providing education in native languages and culturally relevant courses are greater when schools are locally accountable and community resources are available. While some of the native people are reluctant to, in effect, segregate their children from non-native children, they are also desirous of ensuring that their children successfully complete school and retain their cultural identity. Mindful of this, the Parliamentary Task Force on Employment Opportunities for the '80s recommended that:

*Where requested, the Federal Government should work with Indian Bands, Regional and Tribal Councils and Indian Associations to place more schools on Indian Reserves. Then Indian people of all ages can be taught in their own language, as well as in English or French, by Indian teachers of their own choosing. This is extremely important in order to reduce the high drop-out rate among Indian people and to encourage their continuing education for skilled trades and professions.<sup>28</sup>*

It may be that it will not always be possible or desirable to create native-operated schools. This will be the case outside of native communities and reserves. DIAND suggests that it will also be the case where the federal government has committed resources to provincial schools (in respect of Status Indians) and the government's investment is "still undepreciated".<sup>29</sup> DIAND has estimated that replacing provincial schools with on-reserve schools would cost \$491 million.<sup>30</sup> Where the establishment of native-operated schools is not feasible, the federal and provincial or territorial governments must strive to increase native participation and native educational programming.

There are a number of things that can be done to improve education for native people. Improved English as a Second Language (ESL) training is needed.<sup>31</sup> According to the Inuit Tapirisat Council, native students drop out of school because of the language barrier.<sup>32</sup> The Special Committee on Education of the Legislative Assembly of the Northwest Territories recommended, in its final report on education in the North, that ESL training be improved and ESL teacher training be developed.<sup>33</sup> At the same time the Special Committee endorsed the use of native languages in the schools.<sup>34</sup> Bilingual programs will enable residents to serve their communities in their working languages. The Métis and Non-Status Indian Constitutional Review Commission found that there has been some progress in this area:

*In some cases school boards are responding to this demand for Native language instruction. In Sault Ste. Marie ... Ojibway is now taught in the high schools and adult courses are offered by the Sault Ste. Marie board. However, this response has been the exception rather than the rule.<sup>35</sup>*

Another area that could do with some improvement is career counselling. The Union of Ontario Indians, in its submission to the Commission on Equality,<sup>36</sup> and the Inuit Tapirisat



Council<sup>37</sup> criticized the school system for not providing adequate counselling. The Inuit Tapirisat Council has recommended that "more care should be taken to ensure that Inuit students are ... aware of their academic and occupational options".<sup>38</sup>

For many years the school system has not been sensitive to native culture and values. Part of the problem has been the lack of native teachers. In 1979 about 73 per cent of the teachers in federal schools were not native.<sup>39</sup> According to the National Indian Brotherhood, non-native teachers have "in most cases ... not [been] prepared to understand or cope with cultural differences".<sup>40</sup> The Special Committee on Education of the Legislative Assembly of the Northwest Territories found that teachers were not adequately prepared to teach in the North. It found in particular that southern teachers had little or no knowledge of native culture and little or no training in cross-cultural education.<sup>41</sup> According to the Special Committee there are too few native teachers in the North.<sup>42</sup> They are needed in the North and elsewhere to provide role models and support for native students. It is therefore to be welcomed that there are sizable numbers of native people being trained as teachers. In 1979, according to DIAND, there were about 600 Status Indians being trained as teachers.<sup>43</sup> DIAND reported that in 1982-83 there were 1,426 Status Indians being trained in teaching and related occupations.<sup>44</sup>

The native people want the system to accommodate their culture and their traditional lifestyles. They point out that "it is not unusual for students to quit school as soon as they reach the legal age to pursue a lifestyle which is familiar and enjoyable to them (hunting/trapping/fishing)".<sup>45</sup> If education is to be compulsory for such native persons then it should at least be relevant to their desired lifestyle. Further, native people wish to give their children the option of a traditional or non-traditional lifestyle. In one submission to the Royal Commission on the Northern Environment it was made clear that it is possible to prepare for both:

*Our system in [Moose Factory, Ontario] teaches oral Cree from kindergarten to grade eight, teaches trapping, goose hunting and outdoor camping skills, as well as all the basic skills found in regular elementary programs. Our students at the end of grade eight are easily as skilled as any in the area despite our cultural content and emphasis. If our objectives are accurate and our schools don't fall down, we will be training pupils who have the skills and knowledge to either live in a traditional manner or follow a career related to the professions. Regardless of the choice, we want both opportunities to exist here in the traditional home of our students.*<sup>46</sup>

The Royal Commission on the Northern Environment recognized, however, that such programs are the exception. To adapt the educational system to the special needs of Canada's northern population, the Special Committee on Education of the Legislative Assembly of the Northwest Territories, has proposed to end regular schooling at Grade 10. Education after that point would be offered by a new institution to be known as the Arctic College. Grade 10 would be treated as the "termination of an education that should prepare a

person for life, business, or further academic work".<sup>47</sup> Innovative approaches like these are needed to accommodate native culture and the realities of life in the North.

The most recent phase of native education was marked by a transition from a policy of assimilation to a policy of accommodation of native culture and values and of native control. The elements of this policy should have a beneficial effect on native educational levels. They should therefore be part of an overall strategy to improve native employment opportunities.

### 4.3 Post-Secondary, Vocational, and Technical Education and Training

#### 4.3.1 Introduction

Native labour force growth, low native labour force participation rates, high native unemployment, and low native educational levels all point to an increased need for education and training. Education and training are also necessary to break the pattern of low-wage and low-skill employment among native people and the concentration of native women in a limited number of occupations.<sup>48</sup>

Many of the native persons and organizations making submissions to the Commission on Equality concurred that more training is needed for native people if they are to compete in the job market on an equal level with other Canadians. The persistent and serious employment problems of native people suggest that special measures are needed to put native people on an equal footing.

In at least one respect native people do not wish simply to be put on an equal footing. They have special needs that must be addressed. The native people desire to be trained and educated to serve their communities. The trend to self-government means that native people will be needed to manage bands and to provide services. More native teachers, social workers, and health care workers are needed. The Gabriel Dumont Institute in Saskatchewan found recently that there is an under-supply of native human service workers.<sup>49</sup> The need for native people to serve native communities is one of the motivations behind the proposal to establish an Ontario Indian Training College<sup>50</sup> and the establishment of the Saskatchewan Indian Training Institute Plan by the Federation of Saskatchewan Indian Nations.<sup>51</sup>

Labour market shortages in the highly skilled trades<sup>52</sup> coincide with the need to bring native people into a broader and more diverse set of occupations. According to the Task Force on Labour Market Development the greatest employment growth in the 1980s will occur in the medium-skilled occupations.<sup>53</sup> Native people should be enabled to take advantage of these opportunities.

The statistics on occupational distribution presented in Section 3 showed that native women were concentrated in a limited range of occupations. Fifty-four per cent were in the clerical and service categories.<sup>54</sup> Like other women, native women have been excluded from certain traditionally male occupations. In its submission to the Commission on Equality, the Ontario Native Women's Association cited the need for more funds and seats for training native women in non-traditional skills.<sup>55</sup> The Pas Friendship Centre in Manitoba complained that no women were being trained currently under the Canada Manpower Industrial Training Program (CMITP — now the National Industrial Training Program) in

non-traditional occupations.<sup>56</sup> A study sponsored by the Canada Employment and Immigration Commission (CEIC) and the Ontario Native Women's Association found that 60 per cent of the native women surveyed — significant proportions of which were homemakers or workers in traditional female occupations — wanted to be trained in non-traditional skills.<sup>57</sup> The CEIC/Native Women's Association of Canada Working Group on Native Women's Employment also "found evidence of a considerable interest among native women in undertaking training for non-traditional occupations".<sup>58</sup>

Providing appropriate training and educational opportunities for native people will require closer cooperation between government, educational institutions, employers, and native people. Native people told the Commission on Equality that many native workers were being trained for non-existent jobs or for occupations in which there is an excess supply of workers.<sup>59</sup> Native people want to participate in planning training and education.

Native people also want to take part in the management and delivery of education and training. In Saskatchewan a number of native educational institutions have been created: the Gabriel Dumont Institute of Native Studies and Applied Research, the Saskatchewan Federated Indian College, the Saskatchewan Indian Cultural College, and the Saskatchewan Indian Community College. These institutions offer a full complement of training and educational programs ranging from adult basic education to skills and trades training, to technical and vocational courses, and to university-level courses. For native people the advantage of such institutions is that they are more accountable to native people and more responsive to their problems. They create a supportive atmosphere for native people. They facilitate training and education for native people by concentrating the resources available and by allowing for a more coordinated approach.

Where it is not possible to create native educational and training institutions, native people want to have courses and programs geared for native people.

A common theme in native training and education is improved access. Many native people live in rural and remote areas.<sup>60</sup> As a result, they face obstacles in obtaining training and education. Those who leave their communities to train usually in southern and/or urban centres experience difficulties in adjusting to an unaccustomed lifestyle and an alien culture. Many have had to leave their families. Often native people are overwhelmed and withdraw from their studies or training.<sup>61</sup>

One answer to this problem is to promote improved access to training and education. The Parliamentary Task Force on Employment Opportunities for the '80s recommended that innovative, mobile, and regionally-based training centres be established in northern and remote areas.<sup>62</sup> The Special Committee on Education of the Legislative Assembly of the Northwest Territories proposed the creation of the Arctic College, which would consist of several campuses spread out through the Territories.<sup>63</sup> The Federation of Saskatchewan Indian Nations' Saskatchewan Indian Training Institute Plan involves the creation of several satellite colleges throughout the province under the auspices of the Saskatchewan Indian Community College. The satellite colleges may in turn offer courses at reserves. The rationale is as follows:

*Training opportunities should be further decentralized outside of the major centres so that Indian accessibility can be expanded and participation encouraged. That is, students should not have to move away from their communities and regions. Training should be taken to the students rather than the reverse.*<sup>64</sup>

Some types of training and education will lend themselves to decentralization. Short-term courses in lifeskills, occupation orientation, job readiness training, pre-trades training, and other pre-employment training can more readily be offered on a flexible basis by mobile instructors.

According to a CEIC official, the lack of training seats has meant long waiting lists for native people.<sup>65</sup> The joint CEIC/Native Women's Association of Canada Working Group on Native Women's Employment cited long waiting lists as a problem.<sup>66</sup> Often native people embarking on training programs must wait a considerable period of time after finishing one phase of their program and before beginning the next phase. It was submitted to the Commission on Equality that when the desired training is not available native persons may accept any training program in order to obtain an income. After that training program the trainee was said to be back to where she or he started.<sup>67</sup>

The next section considers other ways of improving native access to education and training through financial aid and other forms of support for native students and trainees. After that we will look more closely at the kinds of training and education available to native people.

#### **4.3.2 Financial and Other Support for Native Students and Trainees**

There are two principal national sources of financial support for native students and trainees. One is the Department of Indian Affairs and Northern Development (DIAND), the other is the Canada Employment and Immigration Commission (CEIC). Each provides support for both institutional and industrial training.

DIAND provides financial aid through its Post-Secondary Education Assistance Program (PSEAP), Occupational Skills Training (OST) program, and Training On-the-Job (TOJ) program. These programs are only available to Status Indians and Inuit. It does not matter if they live on or off a reserve. PSEAP provides assistance for post-secondary studies at universities, community colleges, technical institutes, schools of nursing, teachers' colleges, and other institutions offering programs that have secondary school graduation as a normal prerequisite. PSEAP will also assist students who are over 20 years old and who have a Grade 11 education to obtain Grade 12 in order to qualify for post-secondary education. Assistance is available up to a maximum of 96 months for students in post-secondary programs. The assistance provided includes training, shelter, tuition, clothing, books and supplies, and childcare and travel allowances. The training allowance is currently \$120 per week for a single person, \$151 per week for a person with one dependant, and so on up to \$184 per week for a person with four dependants. There apparently is no prescribed rate for childcare but it averages between \$100 and \$200 per week.<sup>68</sup>

The OST program is comparable to the National Institutional Training Program offered by CEIC. Assistance is provided for courses in trades training, academic upgrading, life skills training, basic job readiness training, and so on. Unlike the National Institutional Training Program, OST may involve up to 104 weeks of training and there is no waiting period after the school-leaving age. In 1981 the allowances available for trainees under the OST program were decreased to the CEIC level.<sup>69</sup> DIAND recently decided not to offer this program except for trainees from the far North and Inuit.<sup>70</sup> Status Indians from other areas are being sent to CEIC for funding.

The TOJ program, which is almost identical to CEIC's National Industrial Training Program, subsidizes the wages of trainees in on-the-job training for up to 52 weeks. Trainees must be unemployed. They must also have been unable to obtain training or a job placement through CEIC. DIAND will subsidize their wages up to \$250 per week or 100 per cent of their wages if they work for any level of government or a non-profit or political native organization or up to 85 per cent of wages if they work for a private employer.

CEIC's National Industrial Training Program, which will be more fully described later, provides essentially the same financial assistance in respect of all native trainees with two exceptions. The limit on the wage subsidy is apparently 85 per cent of the trainee's wage (in the case of a native person — otherwise it is usually only 50 per cent). The second exception is that CEIC will extend the subsidy to up to 104 weeks for persons being trained in "critical trade skills" (skills in which there are shortages of workers as identified by CEIC).

The National Institutional Training Program administered by CEIC is also available to all native people. It offers assistance to trainees taking the following courses: basic training for skill development, occupational skill training, job readiness training, work adjustment training, apprenticeship training, and language training. Support is offered for up to 64 weeks. Usually a person is not eligible for this training unless she or he has been out of school for one year. CEIC will also give financial assistance to persons who wish to upgrade in order to take occupational skill training or apprenticeship training. In this case the trainee can get assistance for up to about two years. If someone required two years of upgrading in order to take occupational skill or apprenticeship training, that person would have to obtain some alternative form of financial assistance for the additional year of upgrading.<sup>71</sup>

The training allowance available for a single person is only \$70 per week, \$50 per week less than the allowance available from DIAND under PSEAP. The allowance rises to \$100 per week for a trainee with one dependant and up to \$160 per week for a trainee with five dependants. There are increments for additional dependants with no upper limits on the number of dependants. A childcare allowance is available starting at \$50 per week for one dependant and rising to \$130 per week for five dependants and higher for more dependants. Where a trainee commutes more than 10 miles for training, an allowance of \$45 per week is available. A trainee who has to move to attend a course will receive the cost of one return trip.

It should be noted that unemployment insurance benefits may also be paid to eligible unemployed workers while they

retrain. Depending on the worker's previous earnings the benefits may be higher than the training allowances paid by DIAND and CEIC.

A number of gaps and inadequacies can be detected in these programs. Persons who need more than one year of upgrading are not eligible for financial assistance. One CEIC official indicated that a number of native people have suffered as a result.<sup>72</sup> Another problem is the distinction between Status Indians and Inuit on the one hand, and non-Status Indians and Métis on the other. PSEAP is not available to the latter. They must rely upon student loan programs.<sup>73</sup> One must also wonder why the PSEAP single person's allowance is \$120 per week while all the other institutional training programs pay only \$70 per week (although the type of training in each case is not strictly comparable). If anything, this would tend to suggest that the latter allowance is inadequate. Another inadequacy is the cutoff of training allowance increments at four dependants under PSEAP. The joint CEIC/Native Women's Association of Canada Working Group on Native Women's Employment said this is not "adequate for native female sole support parents who often have larger families".<sup>74</sup> The Working Group also recommended, as did a number of native persons and organizations, an increase in CEIC's basic training allowances, particularly for women with dependants,<sup>75</sup> to reflect the cost of living. The Working Group was also concerned about the disincentive to undertaking institutional training for women who are on welfare and have dependent children. When training allowances exceed welfare allowances the recipients lose their eligibility for benefits, including health insurance, drugs, and daycare.<sup>76</sup>

Another problem with the CEIC institutional training program is that it only provides for one return trip to the site of the training course. Native people submitted to the Commission on Equality that CEIC should provide for visits home during the training.<sup>77</sup>

A major criticism of CEIC has been that its limits on financial aid have resulted in training programs that are too short. Three-year community college courses are not covered by CEIC. Indeed, if the course involves institutional training, no support is available beyond a 64-week period. Some apprenticeships require up to five years of training, but even if it is in a "critical trades skill" only two years of wage subsidies are available. Of course this may be a reflection of a policy to force employers to absorb part of the cost of training employees.

The last area of support for trainees and students that should be commented on is childcare for the children of trainees and students. This issue was mentioned by some of the native people appearing at hearings before the Commission on Equality.<sup>78</sup> A study of native women in Thunder Bay, Ontario, found that more than 50 per cent of those surveyed "would require babysitting services or daycare if they were to pursue a further education or employment and training programs".<sup>79</sup> Statistics like this are not surprising when one considers the high number of single-parent families headed by native women.<sup>80</sup> To a certain extent this need is taken care of by childcare allowances for trainees and students. The real issue, however, is the availability of childcare services and



facilities. According to the CEIC/Native Women's Association of Canada Working Group on Native Women's Employment, childcare facilities are particularly limited on reserves.<sup>81</sup> The Working Group recommended that the provincial government be lobbied to provide childcare services because of its jurisdiction in this area. It may be, however, that the federal government has jurisdiction to provide childcare services on Indian reserves.<sup>82</sup>

#### 4.3.3 Pre-Employment Training

Under pre-employment training<sup>83</sup> can be classed courses in life skills, occupational orientation, basic literacy, language training, Basic Job Readiness Training, and Work Adjustment Training. These courses may also be preliminary to on-the-job training and institutional training in occupational skills and trades.

Native people are particularly in need of pre-employment training.<sup>84</sup> The authors of the Saskatchewan Indian Training Institute Plan identified areas in which native people could be assisted by life skills courses.<sup>85</sup> Native women in particular with their low participation rate (40 per cent)<sup>86</sup> may require preparation for entry into the labour force. A survey of native women conducted by the Ontario Native Women's Association found that many native women would desire Basic Job Readiness Training before entering the job market.<sup>87</sup> Seventy-one per cent of the native women surveyed indicated that either they or other native people needed training in "basic skills, homemaking and life skills".<sup>88</sup>

The need for pre-employment training was recognized by the Parliamentary Task Force on Employment Opportunities for the '80s. It recommended that:

*In order to develop effective affirmative-action programs and contract compliance policies, there must be an immense effort made to provide women, Natives, minorities and the handicapped with basic training in literacy, job readiness and job orientation so that they can qualify for the various training and retraining programs directed at skill shortages and employment opportunities in the '80s.*<sup>89</sup>

The Task Force also commented on the problems of migrants from remote areas. Its recommendation on that topic applies especially to native people:

*Canadians who come from isolated and disadvantaged areas face a wide range of problems when they move to more densely populated urban areas seeking employment or training. A broad range of support services and training programs, including life skills training, must be developed in order to permit these people to find employment in their new communities.*<sup>90</sup>

Many native people are migrating from reserves in rural and remote areas where there are high unemployment rates and low participation rates.<sup>91</sup>

A variety of courses in pre-employment training are available. CEIC sponsors a number of these courses, including Basic Job Readiness Training, which "teaches participants basic work skills, job search techniques, how to set career goals and skills required to handle situations on the job", and Work Adjustment Training, which "places the participant in a

work situation [at CEIC's expense], provides counselling, and is intended to enable the participant to develop good work habits and attitudes".<sup>92</sup> CEIC also sponsors occupational orientation courses that "provide practical experience in a variety of trades to assist participants to select a trade"<sup>93</sup> and language training in either French or English for, among others, native persons who need it in order to obtain employment.

DIAND also sponsors life skills training and Basic Job Readiness Training through its Occupational Skills Training program. CEIC also sponsors pre-employment training by funding pre-employment training projects through its Local Employment Assistance Program (Preparation) (LEAP), which is now known as Job Corps. An example would be the Pre-Employment-Pre-Employer Trades Training Program run by the Native Women's Association of the Northwest Territories.<sup>94</sup>

Some indication of the demand for pre-employment training may be discerned from the disproportionate enrolment of native people in CEIC courses: 19.3 per cent of the participants in Basic Job Readiness Training, 5.7 per cent of those in Work Adjustment Training, and 10.7 per cent of those in occupational orientation courses in 1982-83 were native.<sup>95</sup>

The CEIC/Native Women's Association of Canada Working Group on Native Women's Employment was of the opinion that more life skills training should be available and recommended:

*That a more concerted effort be made, where appropriate, to incorporate a life skills component, based on available models, in CEIC training and employment development programs. It is further recommended that the Commission [CEIC] strive to increase the number of life skills coach training courses available to Native women.*<sup>96</sup>

The Working Group also recommended the creation of Native Women's Centres as pilot projects to offer services comparable to those provided by Canada Employment Centres (CECs), including training in life skills.

Lin Buckland has suggested that CEIC is reducing its emphasis on adult basic education and pre-employment training.<sup>97</sup> The Task Force on Labour Market Development noted this trend in 1981:

*Academic upgrading courses under BTSD [Basic Training for Skill Development] (including BJRT and WAT) amounted to some \$84 million (or 19.4 percent) for full-time purchases and allowances, and 37,459 trainees, representing 21.2 percent of full-time institutional trainees. This represents about a 5 percent decrease since 1975-76.*<sup>98</sup>

It would appear that there has been no reduction, however, in the native demand for pre-employment training. The resources for the pre-employment training of native people must be safeguarded.

#### 4.3.4 Adult Education and Upgrading

Native educational levels are significantly lower than non-native educational levels. It was noted earlier in Section 3

that in 1981 a large portion (37 per cent) of the native population over the age of 15 had less than a Grade 9 education.<sup>99</sup> Only 20 per cent of the non-native population had less than Grade 9. Of particular importance is the fact that 30 per cent of the native unemployed (or 7,380 native people) had less than a Grade 9 education. If the overall labour force statistics are any indication, another large portion of the native unemployed may not have their high school graduation diploma. Thirty-six per cent of the native labour force have attended school beyond Grade 8 but do not have a high school diploma.<sup>100</sup> Lacking basic education, many native people are barred from advanced training and education. The authors of the Saskatchewan Indian Training Institute Plan agree:

*[The] majority [of Indian people] find it difficult, if not impossible, to access advanced skill training and occupational opportunities.*<sup>101</sup>

While more native people are acquiring a basic education, a large proportion of young native people continue to leave school before completing their secondary education.<sup>102</sup> There is therefore a large group of potential students for adult education and upgrading programs.

The evidence suggests that there is a demand for upgrading and adult education: 16.4 per cent of 3,318 of the participants in CEIC's Basic Training for Skill Development (BTSD) program — an educational upgrading program covering Grades 7 to 12 — in 1982-83 were native people.<sup>103</sup> A 1982 survey of students enrolled in universities, technical, and private trade schools under the Saskatchewan non-Status Indian and Métis (NSIM) program found that 20 per cent had upgraded their education prior to entering the program.<sup>104</sup> The demand for upgrading and adult education has not, however, been properly assessed. The number of Status Indians enrolled in adult education dropped from more than 25,000 in 1972 to well under 3,000 in 1978.<sup>105</sup>

DIAND suggests that this reflects a new movement into community colleges and CEIC programs but was unable to give figures on enrolment in the latter because they are "difficult to record accurately".<sup>106</sup> There were only 3,318 native people, however, enrolled in BTSD in 1982-83. It would seem that the number of native people enrolled in adult education has dropped considerably over the past decade. Certainly, the overall level of enrolment in BTSD has dropped. In 1979-80, 36,000 trainees were enrolled whereas in 1982-83 there were only 20,233.<sup>107</sup> While it is difficult to assess the demand for BTSD it seems that declining enrolment may be attributable more to the federal government's reduced emphasis on upgrading. This certainly was the opinion of the Special Committee on Education of the Legislative Assembly of the Northwest Territories:

*In the past, the Canada Employment and Immigration Commission (CEIC) has provided most of the financial support for the improvement of an individual's academic qualifications and for training for new employment. However, CEIC now states it is less willing to continue this support, and it has withdrawn a good deal of funding, thereby denying many residents with low levels of academic achievement an opportunity to participate in the work force.*<sup>108</sup>

The reduction in federal support can be traced to changes in policy. In 1977 the Department of Employment and Immigration and the Treasury Board Secretariat in their evaluation of training programs recommended that BTSD courses be more closely linked to skill training and job opportunities.<sup>109</sup> As a result the federal government cut down on BTSD courses below Grade 9 and curtailed courses for trainees under the age of 21. The Task Force on Labour Market Development, which reported in 1981, found that only 25 per cent of BTSD trainees had moved on to skill training.<sup>110</sup> The Task Force was of the view that academic upgrading should be done in conjunction with on-the-job skill training. It recommended that "resources devoted to Basic Training for Skill Development (BTSD) under institutional training should be reduced and remaining resources targeted to training required by those receiving subsidized on-the-job training".<sup>111</sup>

The federal government's response to the report of the Task Force on Labour Market Development was summarized by Sharon Katz in her paper "CEIC and Target Group Members":

*In a paper delivered to a federal-provincial conference in January 1982, the Minister of Employment and Immigration reported that the program of Basic Training for Skill Development had had relatively limited success, in terms of the number of participants who had gone on either to training in occupational skills or jobs.*

*It was proposed in that paper that, in the future, CEIC would increase funding for Basic Training and Skill Development which would be provided in close conjunction with skill training and jobs, and would decrease funding for such training if it was provided in an isolated manner.*<sup>112</sup>

This policy, concerned as it is with improving the effectiveness of BTSD, is to be commended so long as it does not impair the access of native people to academic upgrading. It must also give us pause if it tends to stream native people into vocational programs. Inuit Tapirisat of Canada has suggested that native people are being streamed into vocational programs because of their lack of education.<sup>113</sup> The effect of the federal government's BTSD policy would be to do just that if a university education were not to be recognized as a valid objective for academic upgrading. The problem may be the view of the federal government that "education", as opposed to "training", is the responsibility of the provincial governments. It may be that the federal government believes that preparation for university, including academic upgrading, should be, as "education", handled by the provinces. Even so, the Parliamentary Task Force on Employment Opportunities for the '80s, while acknowledging that education is a provincial responsibility, recommended that CEIC "should increase, not reduce, its participation in the Basic Training Skills Development program".<sup>114</sup>

In Section 4.3.2 concern was expressed that native people who need more than one year of upgrading may be slipping through the system for lack of financial support. More effort must be made to accommodate those persons who, despite serious deficiencies in their education, are committed to obtaining occupational skills or a post-secondary education.

In its 1978 policy document, "The Development of an Employment Policy for Indian, Inuit and Métis People", CEIC acknowledged that "Native adults require more academic upgrading than do Canadians in general".<sup>115</sup>

#### 4.3.5 Vocational and Industrial Training

The needs of native people coincide to a great extent with Canada's labour market needs. Native people are concentrated in a limited number of low-paying and low-skilled occupations.<sup>116</sup> Canada is experiencing shortages in the highly-skilled trades and an increased demand in the medium-skilled occupations.<sup>117</sup> This is the sort of situation the Task Force on Labour Market Development had in mind when it suggested that there are cases in which the government's labour market policy goals of equity and efficiency are mutually supportive.<sup>118</sup> Integrating women and native people into the labour force helps to achieve both goals:

*To the extent that these groups acquire a greater diversity of skills and experience, equity will be increased, labour market adjustment processes will occur more smoothly and the economy will be able to adapt more easily to changes in the industrial and geographic structure of economic activity.*<sup>119</sup>

Canada should be preparing native people for medium- and high-skilled occupations. Particular effort must be made to better integrate native women into the labour force. Native women are concentrated in an even more limited number of occupations than native men.<sup>120</sup> Their experience in this respect is not so different from that of the rest of Canadian women.

In general, native people are over-represented in service and construction occupations, and in occupations in primary industries.<sup>121</sup> They are under-represented in managerial and administrative occupations, health occupations, clerical occupations, and sales occupations. It appears further that native people tend to work in the lower-skilled jobs in any given occupation. Fifty-four per cent of native women as opposed to 15 per cent of native men work in clerical or service occupations.<sup>122</sup> This is comparable to the overall Canadian statistics which are, respectively, 51 per cent for women and 16 per cent for men.<sup>123</sup> The proportion of native men in the following occupational categories is more than four times as great as the proportion of native women (58 per cent as opposed to 13 per cent): processing, machinery and fabricating, construction, transportation, and the primary occupations.<sup>124</sup>

Canada's major government-supported vocational and industrial training programs are carried out under the relatively new *National Training Act*.<sup>125</sup> The overall federal program is known as the National Training Program. Its two principal parts are the National Institutional Training Program and the National Industrial Training Program (which I will refer to as NITP (Institutional) and NITP (Industrial), respectively). The former succeeded the Canada Manpower Training Program (CMTP), and the latter the Canada Manpower Industrial Training Program (CMITP). These programs are administered by CEIC. NITP (Institutional) purchases training courses from the provinces or territories and provides allowances for trainees. NITP (Industrial) arranges for on-the-job training

with private or public employers. It will pay for up to 100 per cent of the training costs and up to 85 per cent of a native trainee's wages. NITP (Institutional) courses may be up to 64 weeks long and NITP (Industrial) courses are usually 52 weeks long, although 104 weeks may be allowed for courses in "critical trade skills". NITP (Industrial) is divided into two parts: General Industrial Training (GIT) and Critical Trade Skills Training (CTST). CTST involves skilled occupations (such as tool and die makers or industrial maintenance mechanics) in which there are shortages of workers. In 1982-83 CEIC spent \$797 million on institutional training, which was considerably more than the \$110 million it spent on the National Industrial Training Program.<sup>126</sup>

The participation of native people in CEIC's training programs varies considerably. Of the 174,424 persons who started institutional training (including BTSD, WAT, occupational orientation and language training, as well as skill training and the classroom part of apprenticeship training) 5.4 per cent or 9,433 were native.<sup>127</sup> Altogether there were 63,646 persons enrolled in skill training, of which 5.6 per cent, or 3,564, of these were native. Using the 1981 Census as the measure of the proportion of Canadians who are native, this figure indicates that CEIC is giving special attention to the needs of native people. Native people constitute 1.6 per cent of the population over the age of 15, 1.3 per cent of the labour force, and 2.7 per cent of the unemployed.<sup>128</sup> The 1982-83 figures for the classroom portion of the apprenticeship program are not so favourable. Less than 1 per cent of the 65,942 participants were native.

As for industrial training, 7.1 per cent, or 2,175 of the 30,631 trainees who started General Industrial Training in 1982-83, were native. Only 0.4 per cent, or 23 of the 6,197 trainees who started Critical Trades Skills Training in 1982-83, were native. There were a number of native women being trained in non-traditional occupations under the industrial training program. About 19 per cent, or 7,103 of the 36,828 participants in the industrial training program were women, and about 19 per cent, or 1,354, of those were training in non-traditional occupations. Six per cent, or 81 of those, were native.

In sum, native people are under-represented in the institutional portion of apprenticeship training and in Critical Trades Skills Training. Native women do not appear to be making much of an inroad into non-traditional industrial training, although they are fairly represented among all women in such training.

An interesting set of statistics are those showing the breakdown of NITP expenditures by native group. Of NITP (Institutional) expenditures, 72 per cent were on Status Indians, 20 per cent were on Métis and non-Status Indians, 4 per cent were on Inuit, and the balance were on unidentified native persons. Of NITP (Industrial) expenditures, 65 per cent were on Status Indians, 16 per cent were on Métis and non-Status Indians, and 20 per cent were on Inuit.<sup>129</sup> If the 1981 Census count of Métis and non-Status Indians is accurate, these figures would roughly reflect the proportion of non-Status Indians and Métis in the total native population. Status Indians outnumber Métis and non-Status Indians by about four to one, according to the 1981 Census.<sup>130</sup>

Even if the 1981 Census under-counted Métis and non-Status Indians, the increased spending on Status Indians



could be a reflection of the apparently better economic position of Métis and non-Status Indians. Clatworthy's studies of Winnipeg,<sup>131</sup> Regina, and Saskatoon<sup>132</sup> found that the Status Indians consistently had a worse unemployment rate than Métis and non-Status Indians.<sup>133</sup> The 1981 Census found that Métis and non-Status Indians reporting a single origin<sup>134</sup> earned on average more than \$1,000 more than Status Indians reporting a single origin.<sup>135</sup> Similarly, Métis and non-Status Indians reporting multiple origins<sup>136</sup> earned on average almost \$1,000 more than Status Indians reporting multiple origins.

DIAND also offers training programs, but only for Status Indians and Inuit.<sup>137</sup> As noted in Section 4.3.2., DIAND has been cutting back on its Occupational Skills Training Program, although it will spend \$6.3 million in 1983-84 to provide 540 person-years of training.<sup>138</sup> DIAND's Training On-the-Job program will receive \$1.5 million in 1983-84 to provide 120 person-years of training.<sup>139</sup> DIAND spends considerably more on its Post-Secondary Education Assistance Program — for 1983-84 the budget will be \$38.3 million.<sup>140</sup> At least 1,960 of the 5,100 students supported by PSEAP during 1982-83 attended community colleges.<sup>141</sup>

It seems then that considerably more federal resources are devoted to the vocational and industrial training of Status Indians. When CEIC expenditures on Status Indians are added to DIAND's, then it would appear, based on the 1981 Census count of Métis and non-Status Indians, that Status Indians are receiving a disproportionate amount of federal training funds relative to the Métis and non-Status Indians. The spending becomes even more disproportionate if the Métis and non-Status Indian population is estimated to be more than that counted in the 1981 Census.

If longer-term community college programs (the only programs DIAND funds under PSEAP) are viewed as a provincial responsibility, however, the discrepancy is not as great as it first appears. The provinces would be expected to make up for this shortcoming in federal financing. The remaining discrepancy would not be very great and might be explained by the apparently better economic position of the Métis and non-Status Indians.

It is not clear if Status Indians would be better off if DIAND transferred its occupational skill training and on-the-job training programs to CEIC. CEIC considered this idea in 1978 and rejected it:

*When the [Task Force on Manpower Services to Native people] was established, one of its assignments was to study the advisability of transferring DIAND's employment-related programs to Manpower. Considerable data were gathered for this exercise. In the process, it was discovered that DIAND's budget for Manpower-like services was small and diminishing. Furthermore, status Indians would object in principle to any transfer of DIAND responsibilities. It was concluded that any notion that Indian Affairs is giving up any part of its responsibilities for Indians, or that Manpower is assuming new responsibilities, should be rejected.<sup>142</sup>*

One advantage of maintaining DIAND's programs would be in DIAND's ability to draw upon years of experience with Status Indians' problems. CEIC and DIAND must be careful, however, to coordinate the availability of their services. At least one native person complained to the Commission on Equality that native people were receiving "the runaround" from CEIC and DIAND with respect to training programs.<sup>143</sup>

The Task Force on Labour Market Development recommended that the federal government continue its differential wage subsidies for special needs groups, including native people. NITP (Industrial) will subsidize up to 85 per cent of a trainee's wages where the trainee belongs to a special needs group. A number of the native people and organizations making submissions to the Commission on Equality thought that training programs should be longer<sup>144</sup> (i.e., the federal government should provide longer periods of financial support and subsidies). Some vocational training courses take longer than the 64 weeks allowed by NITP (Institutional). Many apprenticeships take up to four years and some take even longer. NITP (Industrial) will usually subsidize wages for only 52 weeks although it will allow 104 weeks for training in the critical skills. It may be advisable to extend these programs in order to meet the special needs of native people. Extending wage subsidies would be an added inducement to employers to hire native apprentices. This sort of initiative would also go some way to meeting the demand of native people for more on-the-job training programs.<sup>145</sup>

Flexible training programs are needed to accommodate those native people who wish to carry on traditional activities and native women with family responsibilities. A semestering system would be one way of doing this. A semestering system provides for a series of phases of training to be completed over some maximum period of time. This maximum period of time would allow the trainee periods of time during which she or he would not have to participate in the training program. The Task Force on Labour Market Development noted the early success of such programs in Manitoba.<sup>146</sup> The joint CEIC/Native Women's Association of Canada Working Group on Native Women's Employment recommended that CEIC establish pilot semestering projects.<sup>147</sup>

Native people want to improve native control of, and access to, education and training. The development of Indian "self-government" offers in at least one area some scope for accomplishing these goals. The devolution of responsibility by the federal government to Indian bands and councils means that Indians must be trained to deliver various public services and in particular to manage a variety of local activities. This training can and should be delivered as much as possible at the community level with the involvement of the Indian people. This was one of the recommendations of the Task Force on Labour Market Development:

*The Task Force concludes that training directed at under-developed areas and people should be designed as outgrowths of community economic development approaches, with the people participating in its planning and implementation. These people may be unwilling or unable to fit into traditional educational institutions and thus may require more flexible, less formal and more locally based instruments. Recent experience is largely positive where people have*

*hired their own instructors, outlined their own course needs and where such undertakings have connected into upcoming or existing job opportunities. The concept of a resource package for the provision of economic development, training and other support measures should be developed. The development of the capacity for managing local enterprise, local government and infrastructure will be particularly important in Native communities.*<sup>148</sup>

The federal Special Committee on the Disabled and the Handicapped recommended in its Follow-Up Report on the native population that DIAND be directed to improve management training programs.<sup>149</sup> DIAND responded with the Indian Management Development Program, the objective of which is to improve the capacity of Indian local governments to manage and administer their affairs. This program will also train social para-professionals. In 1983-84 DIAND will spend \$6.6 million on this program and in 1984-85, \$10.2 million.<sup>150</sup>

The Indian Management Development Program will distribute funds directly to Indian bands for the purchase, development, and delivery of management programs and courses. It will also offer assistance to post-secondary institutions "for the development of management programs and courses for Indian people working for band councils" and to Indian management training institutes.<sup>151</sup> Native groups in Saskatchewan are making strides in establishing such programs and institutions. The Saskatchewan Indian Community College (SICC) has recently purchased a business college to provide training in business management. SICC has also established the Saskatchewan Indian Technical Institute Plan (SITIP), which will offer a business management program. DIAND has also provided seed funding to SICC for the establishment of the Saskatchewan Indian Management Training Institute. The development of such programs should be encouraged.

SITIP is being funded through the Skills Growth Fund set up recently under the *National Training Act*. The fund is directed to training in occupations of "national importance" and to training for groups with special training needs such as native people. Funding is provided to establish, expand, or modernize training facilities. For 1982-83 to 1984-85, CEIC has approved funding of \$10,527,519 for native organizations through the Skills Growth Fund.<sup>152</sup> The establishment of this fund is a positive step in the development of native control of education and training.

Another step that could be taken in the direction of native control of training would be to provide native organizations with the authority to purchase training. One of the native persons appearing before the Commission on Equality suggested that the Native Employment Centre in Regina, which currently only provides counselling for potential trainees, should have the authority to purchase training seats on behalf of such potential trainees.<sup>153</sup> This idea would be worth looking into.

#### 4.3.6 University

In Section 3 it was noted that while the enrolment of Status Indians in university has grown it remains proportionately less than that of the rest of the population.<sup>154</sup> In addition, only 2.5 per cent of all native people in the labour force as opposed

to 10.7 per cent of the total Canadian labour force had university degrees.<sup>155</sup>

There is some concern that native people are being steered into vocational training programs because of their low educational levels. In addition, native people, because of their poor economic situation, may lack the resources to embark on a university education. While Status Indians and Inuit receive allowances from DIAND under the Post-Secondary Education Assistance Program to attend university and longer-term community college programs, non-Status Indians and Métis must rely upon loan programs and bursaries. Clearly there is room for the development of a special program of assistance for non-Status Indians and Métis.

If the federal government were to assume responsibility for Métis and non-Status Indians, PSEAP could be accordingly expanded. Even if the federal government is not prepared to assume responsibility for Métis and non-Status Indians under Section 91(24) of the *Constitution Act, 1867* to 1982, this does not mean that it could not assume a more limited responsibility for assisting — through grants and allowances — non-Status Indians and Métis to attend university. The federal government is already involved in assisting university students through its Canada Student Loans Program.

Consideration should be given to the development of parallel Indian institutions at existing universities. One such institution, the Saskatchewan Indian Federated College, has been operating in conjunction with the University of Regina with some success.<sup>156</sup> In 1983 it had about 600 native students. The college provides university classes on reserves.

#### 4.4 Counselling and Information

Native people lack information about training and education and apparently have not been well-served by the counselling services provided in the primary and secondary schools<sup>157</sup> and by CEIC. Both the Task Force on Labour Market Development and the Parliamentary Task Force on Employment Opportunities for the '80s suggested that there is concern that Canada Employment Centres are not providing adequate counselling and guidance for native people.<sup>158</sup> The information problem is the result of the physical and cultural isolation of native people. The deficiencies in counselling at Canada Employment Centres have been blamed on inadequate resources.<sup>159</sup> Overcoming these problems requires the use of innovative information channels and community-based programs.

The special information and counselling needs of native people have been the motivations behind the establishment of CEIC's Outreach Program. To its credit, CEIC spent 31.4 per cent of its total \$15 million Outreach Program budget on about 100 native projects in 1982-83.<sup>160</sup> The Parliamentary Task Force on Employment Opportunities for the '80s made the following assessment of the Outreach Program:

*Government Outreach programs have been particularly effective for women, natives, minorities and the handicapped, especially in job counselling, job placement and facilitating training programs. Consequently, Outreach programs should be continued and expanded. They should be given grants under contracts lasting three years instead of one, so that they will be able to carry on even better planning*

*and to hire and keep competent staff. There should be an advance notice of one year for major changes or termination, and three months' notice for minor changes.*<sup>161</sup>

Indeed the Task Force on Labour Market Development recommended that CEIC should restrict intensive counselling services to "the hardest-to-employ and to special needs groups" and that these services be provided by special units or satellites that would presumably include Outreach projects.<sup>162</sup>

Special projects may be advisable for native women who face extra barriers. Many native women head single-parent families and will require added support before and during training. Native women are also concentrated in a limited number of occupations. Native women already in the labour force and those entering the labour force will require information and counselling on non-traditional employment and training opportunities. For these reasons the joint CEIC/Native Women's Association of Canada Working Group on Native Women's Employment has recommended the establishment of Native Women's Centres as pilot projects to provide CEC services including pre-employment counselling and career planning.<sup>163</sup>

To improve CEIC's services to, among other groups, native people, the Parliamentary Task Force on Employment Opportunities for the '80s recommended that,

*Canada Employment Centres must develop an aggressive policy of hiring and training counsellors who understand the problems of the disadvantaged and other special needs groups. This would mean hiring more women, natives, minorities and handicapped people.*<sup>164</sup>

The federal government now has 105 Native Employment Counsellors working in Canada Employment Centres. These counsellors also carry out regular counsellor duties at CECs. There is some concern that these counsellors are being diverted from their special duties.<sup>165</sup>

## 5. FEDERAL GOVERNMENT EMPLOYMENT PROGRAMS AND SERVICES

### 5.1 Counselling and Other Support Services

Most of the federal government's employment programs and services are delivered by CEIC. CEIC's direct services to native people are provided primarily through Canada Employment Centres and Outreach projects. CEIC also funds, as was noted in Section 4, a variety of pre-employment training projects that provide some of the same services as CECs and Outreach projects. DIAND's role in providing employment services is relatively minor.

Canada Employment Centres provide employment information, counselling, and placement services for job seekers. They have come in for a good deal of criticism. Their public image has been poor, not the least among native people.<sup>1</sup> The Task Force on Labour Market Development noted that concern had been expressed that the counselling process in particular "has not adequately served the needs of the disadvantaged, particularly of women and native people".<sup>2</sup> Two major criticisms have been levelled at CEIC's counselling service. The first is that there is simply not enough counselling

for native people. The Parliamentary Task Force on Employment Opportunities for the '80s found that native people suffered because of CECs' emphasis on processing as many people as possible.<sup>3</sup> The response of the Task Force on Labour Market Development to this problem was to recommend, first, that intensive counselling services be restricted to the "hardest-to-employ" and, secondly, that CEIC make use of alternative modes of delivering counselling services.<sup>4</sup>

The second criticism is that counsellors have not been sensitive to native people. There are three remedies for this problem. The first, most obvious one, is to provide sensitivity and awareness training for CEC staff. The Task Force on Employment Opportunities for the '80s recommended a second approach:

*Canada Employment Centres must develop an aggressive policy of hiring and training counsellors who understand the problems of the disadvantaged and other special needs groups. This would mean hiring more women, natives, minorities and handicapped people.*<sup>5</sup> (emphasis added)

Finally, CEIC should use alternative community-based agencies to deliver services.

CEIC now employs more than 100 Native Employment Counsellors in its Canada Employment Centres.<sup>6</sup> It has also continued to expand its Native Outreach projects, which now number over 100 and which absorbed 31.4 per cent of the total Outreach budget in 1982-83.<sup>7</sup> The use of native staff in CECs and Outreach projects is more effective in meeting the needs of native clients and overcoming cultural barriers. Certainly, in the perception of native people, their relationship with service organizations is enhanced by the existence of native staff.<sup>8</sup>

Native women need additional counselling and support services. Their participation rates are very low, their income levels lag behind native men and non-native women, and their occupational distribution is limited.<sup>9</sup> Many native women are constrained by their responsibilities as heads of single-parent families. Many women have had no or little exposure to employment. Even more have had no exposure to traditional male work. Special measures and programs are indicated for native women to help them obtain and maintain employment. A survey conducted by the Ontario Native Women's Association in 1983 found that the majority of female native respondents thought that CEIC should have native counsellors to deal specifically with native women.<sup>10</sup>

The joint CEIC/Native Women's Association of Canada Working Group on Native Women's Employment recommended a number of programs to assist native women in seeking employment in a "community-based, non-threatening and culturally compatible environment".<sup>11</sup> It recommended, firstly, the creation of Native Women's Centres as pilot projects to provide full CEC services especially in communities where there are many native female single parents. It recommended, secondly, that CEIC support Outreach-like projects for women sponsored by native women's organizations. Finally, it recommended that CEIC fund a rural program "to provide community employment facilitators whose role would be to determine the local labour force's employment needs and provide counselling, long-term community



planning and employment related information, and generally to improve the labour market information flow to and within the community".<sup>12</sup>

Native women, like other women, need more childcare facilities. The CEIC/Native Women's Association of Canada Working Group found that childcare facilities are particularly limited on reserves.<sup>13</sup> It also found that native women would prefer to have daycare provided by members of the native community.<sup>14</sup>

A special need of all native people is post-employment counselling. Lack of job experience and cultural barriers create pressures on native workers. Continuing counselling is needed to help them adjust to the workplace. The CEIC/Native Women's Association of Canada Working Group recommended that CEIC provide more post-placement counselling.<sup>15</sup>

Urban adjustment problems underlie some of the employment problems of native people. Cities present an alien environment for many native people migrating from reserves and rural and remote areas. They are culturally isolated and unfamiliar with the urban lifestyle. Most have come because their opportunities are limited in their home communities. Ordinary service agencies have been able to address their needs in only a fragmentary way. The gap has been filled to some extent by the Native Friendship Centres sponsored by the federal government. Friendship Centres are gathering places and provide cultural services, counselling, and referral services. The Special Committee on the Disabled and the Handicapped found that the staff of Friendship Centres are "badly overworked and underpaid".<sup>16</sup> The situation is not so unlike that for other native organizations and agencies. Consideration should be given to expanding funding for the Friendship Centres.

Both CEIC and DIAND operate mobility programs. CEIC will help workers to seek work in other places or relocate temporarily or permanently for employment through its Canada Manpower Mobility Program. DIAND operates a similar program for Status Indians and Inuit. DIAND has allocated \$135,400 for this program for 1983-84. Mobility assistance is particularly important for those native people wishing to migrate to urban areas or to work on resource projects in northern areas.

## 5.2 Job Creation

In 1978 Employment and Immigration Canada indicated in its native employment policy statement its policy on job creation for native people:

*The major approaches will be used for enhancing the impact of job creation programs upon the Native labour force. The first is to increase the proportion of the job creation grant budget which goes to Native people either by allocating a special amount or by issuing directives that indicate the high priority that is to be given to Native applications.*<sup>17</sup>

Since 1978, the native share of the job creation budget has exceeded the proportion of native people in the population.

In 1982-83, CEIC's Local Employment Assistance Program spent \$23.4 million of its total \$57 million budget on native people.<sup>18</sup> LEAP (Preparation), which has now been

consolidated into the Job Corps program, funds projects that train "disadvantaged" persons in life and job skills. LEAP (Retention), which is now part of the Local Employment Assistance and Development (LEAD) program, funds the establishment of small businesses to employ "disadvantaged" workers. LEAP projects are longer-term than some of the other job creation projects. Another CEIC program, the Canada Community Development Projects (CCDP), the Canada Community Development Projects (CCDP), spent at least \$18.22 million,<sup>19</sup> or 7.4 per cent of its 1982-83 budget of \$246.8 million,<sup>20</sup> on native projects. CCDP, which began in 1980, subsidizes wages and some of the costs of projects sponsored by community organizations and municipalities. These projects may be subsidized for up to 18 months. CCDP has now been split into two parts — one under Canada Works and the other under the LEAD program. The Canada Community Services Projects (CCSP) program was established by CEIC in 1980. It provides funding to non-profit organizations to hire unemployed people. About \$1.6 million,<sup>21</sup> or 16 per cent of its \$10 million budget,<sup>22</sup> was spent on native projects. Funding is provided for up to three years but the contribution declines to 33 per cent of the first-year level in the third year.

CEIC's Program for the Employment-Disadvantaged (PED) spent \$1,116,512<sup>23</sup> of its \$34.9 million budget<sup>24</sup> to subsidize the wages of native persons working for private employers. The subsidy for native workers is provided for 39 weeks, beginning at 85 per cent and declining to 25 per cent. The overall purpose of PED is to encourage "private sector employers to hire and maintain, in continuing employment, disabled persons and other unemployed people experiencing serious difficulties in securing and keeping employment because of a social, cultural or similar barrier".<sup>25</sup> PED, which was created in 1981, is now incorporated in the Career Access program. Another CEIC program is the Local Economic Development Assistance (LEDA) program, which started in 1980. It is also aimed at the private sector:

*LEDA encourages local enterprise development in slow-growth communities. It funds the planning and operation of community-based corporations. These provide technical support and limited financial assistance to proposed or existing local businesses that will create continuing jobs in the community.*<sup>26</sup>

Up to \$50,000 may be provided for the initial planning of LEDA corporation projects, and up to \$250,000 per year may be given to the corporation for its operations. In 1982-83 LEDA spent \$720,000<sup>27</sup> or 28.9 per cent of its \$2.4 million budget<sup>28</sup> on projects of benefit to native people. LEDA is now part of the LEAD program. CEIC's New Employment Expansion and Development (NEED) program, which started in 1982, creates jobs in the private and public sectors for unemployed persons who have exhausted their unemployment insurance benefits or who are receiving social assistance. NEED pays for wages and some capital costs for projects lasting up to 12 months. The program was provided with \$500 million to be distributed for the period of January, 1983, to June, 1984.<sup>29</sup> In 1982-83, 8.85 per cent of all jobs created in NEED were considered to be native jobs.<sup>30</sup>

CEIC also supports summer programs for students. Its Native Internship Program employed 335 native students at CEIC in 1982-83 at a cost of \$1.84 million.<sup>31</sup> The Summer

Canada Student Employment Program supports projects sponsored by local non-profit organizations, local governments, and federal departments and agencies. In 1982-83 the program received \$96.6 million in federal funding.<sup>32</sup> In 1984, 4,196 or 7.8 per cent of the participants in Summer Canada were native.<sup>33</sup>

The federal government has stated three broad objectives for its job creation programs. The first is to provide "short-term counter-cyclical measures to deal with unemployment due to temporary economic downturns like our recent recession".<sup>34</sup> The second is to "support long-term community-based planning and employment development in slow growth regions and in communities where chronic high unemployment persists regardless of economic cycles".<sup>35</sup> The final objective is to promote human resource development.

It is the last two objectives that are most important for native people. Indian reserves and isolated native communities are currently facing high levels of unemployment. Programs aimed at stimulating local employment growth such as CCDP, LEAP (Retention), and LEDA are of benefit to these communities. Particularly important are programs designed to develop human resources such as the summer student internship program, PED, CCSP, and LEAP (Preparation). While LEAP (Preparation) now makes initial funding commitments of three years, after that projects are subject to extension on a year-to-year basis. This has created some uncertainty for project sponsors and staff. LEAP (Preparation) projects provide valuable pre-employment training to native people. CEIC should consider putting these sorts of programs on a more stable funding basis.

The program for the Employment-Disadvantaged could be improved, in the view of the Task Force on Labour Market Development, by expanding wage subsidies to two years, instead of the present 39 weeks, and by linking such subsidies to training.<sup>36</sup>

## 6. AFFIRMATIVE ACTION IN THE FEDERAL PUBLIC SECTOR AND THE PRIVATE SECTOR

### 6.1 The Federal Public Sector

Leaving aside DIAND, the federal government has operated programs to increase native participation in the federal public service since at least 1971. In 1971 the Public Service Commission of Canada established within its staffing branch the Native Employment Program (with a staff of three) in order to attract native persons to work for the public service and to assist government departments in improving native participation in the civil service. In 1972 the program was further formalized with the creation of the Office of Native Employment (ONE) within the PSC's Staffing Programs Branch.

In 1977 the Treasury Board announced that the federal government would work together with native organizations to formulate a policy to increase the participation of native people in the public service. In 1978 the Treasury Board and the Public Service Commission issued the "Policy on Increased Participation of Indian, Métis, Non-Status Indian and Inuit people in the Federal Public Service", the three main objectives of which are to ensure that:

- *Indian, Métis, Non-Status Indian and Inuit people participate fully in the Public Service, with particular*

*emphasis on middle and senior management and advisory roles;*

- *the Public Service is sensitive and responsive to the training and developmental needs of indigenous employees; and*
- *indigenous people are effectively involved in the conceptualization, design, development and implementation of socio-economic and cultural programs where Indian, Métis, Non-Status Indian and Inuit people comprise a significant proportion of the client population.'*

This policy requires government departments and agencies to submit plans for accomplishing these objectives and report annually on their progress to the Treasury Board Secretariat. Both the Treasury Board and Public Service Commission were given roles in the further development of the policy and its implementation. Prior to the policy being issued, the Treasury Board, Public Service Commission, and three native organizations formed a Senior Policy Committee. This committee was transformed into a Joint Council consisting of the Public Service Commission, the Treasury Board Secretariat, the National Indian Brotherhood (now the Assembly of First Nations), the Native Council of Canada, Inuit Tapirisat of Canada, the National Association of Friendship Centres, and the Native Women's Association of Canada. It was created along with a supporting "Work Group" to guarantee the participation of native people in the implementation and evaluation of the policy.

The Public Service Commission also has charge of two programs for the recruitment and training of native persons for the federal public service: the Northern Careers Program and the National Indigenous Development Program. The Northern Careers Program has been operating since 1974 under the sponsorship of DIAND and the administration of the Public Service Commission. In April, 1982, the Public Service Commission assumed full responsibility for the program. Its goals are to recruit native people from the North for federal departments and agencies carrying on activities north of the 60th parallel. Along similar lines is the National Indigenous Development Program. The Joint Council recommended the creation of such a program in 1980.<sup>2</sup> It was approved by Cabinet in 1981. The program has only recently gotten under way. Unlike the Northern Careers Program it applies nationwide. Its objective is to bring native people into middle and senior management positions in the federal government. The Public Service Commission refers to its native programs as the "Indigenous Participation Programs".

The most recent initiative of the federal government was the creation of a comprehensive affirmative action program for the public service in 1983. The Treasury Board Secretariat oversees this program with the assistance of the Public Service Commission.

All of these programs have responded to the perceived poor representation of native people in the federal public service. The Joint Council reported that in 1976 60 per cent of the total population in the North were native but only 14 per cent of the members of the northern public service were native.<sup>3</sup> The Council must have been referring to the Northwest Territories, where as of 1981 native people made up almost 60 per cent of the population. In the Yukon they constitute only 18 per cent of the population.<sup>4</sup> The Joint Council

reported that in the whole federal public service in 1976 there were only 2,500 native persons.<sup>5</sup> Most of them were in administrative support and operational occupational categories. Only 0.4 per cent of the 72,000 federal government employees in the officer level occupational categories of senior executive, administrative and scientific, professional and related technical were native.<sup>6</sup>

The Northern Careers Program is limited to native people who were born in the Yukon or the Northwest Territories and who have always lived there and native people born elsewhere if they have lived in the North for five years. NCP provides on-the-job management training in the federal public service for up to 30 months.<sup>7</sup> During that time the trainee is paid a salary. Since the inception of the program 322 persons have participated: 180 men and 142 women. Fifty-two are currently in the program.<sup>8</sup> According to the Public Service Commission, 65 per cent of the participants gained positions in the federal and territorial governments and in native organizations.<sup>9</sup>

Increased native participation aside, one of the goals of the program has been to reduce the staffing problems such as "high relocation costs, staff retraining, disruption of services and high staff turnover" that have accompanied the recruitment of southerners for work in the North.<sup>10</sup> In both the Northern Careers Program and the National Indigenous Development Program permanent employment is not guaranteed. After the training has been completed the participant must apply for a position in the public service. There is some indication, though, that the normal competition process may be waived in appropriate circumstances pursuant to the *Public Service Employment Act*.

The Office of Native Employment (ONE) carries on a number of activities in its role of advising and assisting government departments and agencies. It runs educational, training, and awareness programs in support of the native participation policy. These programs are directed to the native community as well as the public service. ONE also maintains an inventory of native persons seeking employment in the public service. There are 2,500 names listed in the inventory but the actual number of persons registered may be somewhat less because candidates may be listed in more than one category. Seydegart and Spears report that this inventory has had limited success. In 1983, from 800 applications over a six-month period, only seven placements were made.<sup>11</sup>

ONE also identifies and reviews positions in the public service with native "content", that is, positions requiring knowledge related to native people. In addition, ONE has taken part in reviewing the native participation plans of other departments that are prepared to meet those departments' obligations under the "Increased Indigenous Participation" policy issued in 1978. ONE also counsels perspective native employees. To perform all these functions ONE employs 11 persons in its head office along with eight full-time and three part-time regional coordinators.

The "Increased Indigenous Participation" policy is having mixed success. The Joint Council reported that in 1976 there were 2,500 native persons in the federal public service. There is doubt about the reliability of pre-1978 figures but this is the only estimate available.<sup>12</sup> In 1981 only 1.3 per cent or 2,525 of the full-time permanent employees in the public service were native.<sup>13</sup>

The policy has apparently met with more success in raising the proportions of native people in the higher occupational categories of the public service. In 1976 only 0.4 per cent of the employees in the officer level occupational categories (senior executive, administrative and scientific, professional and related technical) were native.<sup>14</sup> As of December, 1981, 1.12 per cent of the positions in the occupational categories of executive, scientific and professional, administrative and foreign service, and technical were filled by native persons.<sup>15</sup> Unfortunately, most of these persons were concentrated in two categories. They made up 1.3 per cent of the scientific and professional category and 1.3 per cent of the administrative and foreign service category but only 0.3 per cent of the executive category and 0.7 per cent of the technical category. In the lower level administrative support and operational occupational categories, native people represented 0.9 per cent and 1.7 per cent, respectively, of federal civil servants.

The federal government has been assessing its programs on the basis that native people represent about four per cent of the Canadian population. This percentage was assumed in the Joint Council report<sup>16</sup> and in the June 27, 1983, news release in which the Treasury Board announced the new affirmative action program.<sup>17</sup> This assumption can no longer safely be made. The 1981 Census found that native people constituted only 2 per cent of the population and an even smaller percentage (1.6 per cent) of the population 15 years of age and over.<sup>18</sup> There is some feeling that the Census may have under-counted the number of Métis and non-Status Indians. Even if we assume that there are 300,000 Métis and non-Status Indians<sup>19</sup> rather than the 173,370 counted by the census, native people would only represent 2.6 per cent of the total population. While the participation of native people in the federal public service is not cause for rejoicing, it seems that native people are not as badly off as we might have thought.

While native participation in the federal public service has increased somewhat, native people are concentrated in certain departments. Fifty-eight per cent of the native people in the public service in 1979 were employed by DIAND.<sup>20</sup> A further 36 per cent were employed by Health and Welfare Canada, Environment Canada, and the Canada Employment and Immigration Commission. The balance were working for a variety of government departments and agencies. Some degree of concentration is to be expected as a result of the federal government's policy of identifying and appropriately staffing positions with native "content". Another contributing factor is the geographic distribution of the native people. Many are located in rural and remote areas and on reserves.

The "Increased Indigenous Participation" policy apparently got off to a slow start. Departments were late with action plans and reports.<sup>21</sup> Many were unable initially to set targets or identify internal barriers.<sup>22</sup> By 1981 the departments' response had improved.<sup>23</sup> The departments also identified such barriers within the public service as poor referral systems, inadequate Canada Manpower Centre (now Canada Employment Centre) information systems and procedures, and closed competitions for public service jobs.<sup>24</sup>

A 1976 study, *Native People and Employment in the Public Service of Canada*, determined there to be a number of barriers to native participation in the public service.<sup>25</sup> In particular it was found that: native people had poor perceptions of the



federal government; native people were not being made aware of public service employment opportunities; native people participating in the public service job competition process were not conversant with the procedures; public service job advertisements were seldom in native languages; and public service selection criteria over-emphasized academic achievements.

The public service is still experiencing difficulties in recruiting native people. Seydegart and Spears suggested that one reason "is the lack of effective marketing strategies to recruit native people and to make them known to those in the departments who might hire them".<sup>26</sup> The need for more education and training has already been shown. This need is no less pressing for those who would be employed in the public service. The Joint Council found in 1981 that there is a need to train and develop people for careers in the public service.<sup>27</sup> In its 1981-82 and 1982-83 Annual Reports to the Treasury Board on the implementation of the "Increased Indigenous Participation" policy, DIAND cited a lack of education and training as a barrier to increased native participation.<sup>28</sup>

The federal government cannot simply hope to find qualified native persons for the public service. Increasing native participation means committing resources to the training and education of native people. On-the-job training is the primary means. To get at the root of the problem resources must be devoted to encouraging young native people to enter the public service. The Office of Native Employment has been doing exactly this by going out into the native communities to inform native school children of opportunities in the public service. In 1980 the Public Service Commission also adopted a policy of setting aside 10 per cent of the places in its Career Oriented Summer-Employment Program (COSEP) for native students. COSEP allows university and college students to work for the summer in the public service. Among other things this program is designed to encourage people to join the federal public service after graduation.

## 6.2 The Private Sector

The information available on native employment in the private sector is sketchy at best. The data on employment income, unemployment, labour force participation, educational levels, and occupational distribution are very general. The information suggests, not unexpectedly, that native people, relative to the proportion that they form of the population, are under-represented in private-sector employment.

How do we know that native people are under-represented in private-sector employment? High unemployment rates and low participation rates make for a reasonable inference of general under-representation. But we also know that native people are under-represented in a more refined sense. They tend to be found in low-level, low-paid occupations. The few studies that exist support this proposition. In addition, the average native employment income is 69 per cent of the average non-native employment income.<sup>30</sup>

The information on specific industries or employers is both fragmentary and discouraging. Surveys conducted by the Canadian Civil Liberties Association in Northern Ontario in 1978 showed that native people were under-represented in retail businesses and banks.<sup>31</sup> The survey was conducted in three towns — Kenora, Fort Frances and Sault Ste. Marie —

with sizable native populations. In Kenora there were only two native people among 349 employees in 14 retail businesses. Out of 67 bank employees there were no native persons. In Sault Ste. Marie there was only one native person among 388 bank employees. It was estimated that there were 3,500 native people in Sault Ste. Marie and its environs. There was estimated to be 4,000 native people in or near Fort Frances yet only one of 75 bank employees was native.

Native people have not been well-represented in the resource industries operating in the northern parts of Canada. Mr. Justice Berger examined, in the Report of the Mackenzie Valley Pipeline Inquiry, the communities of Fort Resolution and Pine Point in the southern part of the Northwest Territories.<sup>32</sup> The former is an old community populated mostly by Indians. The latter is a new, predominantly white community. In Mr. Justice Berger's opinion, "The development of each of these two communities is, to a considerable extent representative of economic development in the North".<sup>33</sup> Pine Point began with the construction of a mine by Cominco which opened in 1964. It was not until 1972 that an all-weather road was built between Fort Resolution and Pine Point which are about 40 miles apart. The inability to commute contributed to the low level of native employment at Pine Point.

Even in 1976 Mr. Justice Berger found that there was a negligible number of native workers in Pine Point's workforce of about 500. Another example of economic development in the North given by Mr. Justice Berger was the Pointed Mountain gas pipeline and gas dehydration plant. These were constructed in the early 1970s. Mr. Justice Berger found that generally "Native employment was intermittent and of relatively short duration"<sup>34</sup> during the construction phase. Native employment was limited both during and after construction:

*Over 90 percent of the jobs held by Native people were in the unskilled category, with their main employment being clearing and grading. Now that the gas plant is in operation, there are only eight permanent positions available, of which half are categorized as skilled and half as unskilled. All eight positions are held by personnel from the South.*<sup>35</sup>

The Royal Commission on the Northern Environment which investigated conditions in northern Ontario heard from one Indian band that, "The majority of jobs created are filled by skilled labourers from the south".<sup>36</sup> The Nishnawbe-Aski Nation, which represents a large number of native communities in northern Ontario, submitted to the Commission on Equality that its efforts to procure a native employment program at the UMEX mine at Pickle Lake met with only limited success.<sup>37</sup> A native representative appearing at a hearing before the Commission on Equality said that while oil companies operating in the Beaufort area in the Northwest Territories have between 200 and 300 native people working on the oil rights, very few have been promoted to the supervisory level.

There are examples of resource companies that have made a special effort to increase native participation in their workforces. Syncrude Canada Ltd. established a program in 1976 to hire and train native workers in Alberta. It did so in response to pressures from native organizations and the federal government.<sup>38</sup> A company publication reported that its

objective of having about 200 native employees by 1979 was met and the turnover in native employees had been substantially reduced.<sup>39</sup>

AMOK Ltd. signed a surface lease agreement with the government of Saskatchewan in 1978 and established a program to hire and train northern Saskatchewan residents. Most of the population in northern Saskatchewan are native so the program is in effect an affirmative action program for native people. AMOK agreed that not less than 50 per cent of the workforce at its mine and mill would be made up of

northern residents. Submissions made at hearings before the Commission on Equality indicated that the preferential hiring program has been successful and that the native turnover rate is no greater than average. A number of other resource companies have also established native employment programs: Eldorado Nuclear Ltd., Anvil Mining Corp. Ltd., and Columbia Gas Development of Canada Ltd.<sup>40</sup> In Saskatchewan a few resource and other companies have instituted affirmative action programs for native people in response to that province's affirmative action legislation.<sup>41</sup>

## NOTES

## SECTION 1

1. Quoted in Cumming and Mickenberg, app.VI, 331.
2. Cardinal, 1977.

## SECTION 2

1. Special Committee on Indian Self-Government, 12.
2. Section 91(24).
3. S.C. 1876, c. 18.
4. Jamieson, 25; Department of Indian Affairs and Northern Development (hereinafter referred to as "DIAND"), 1978, 23-6.
5. Jamieson, 26.
6. Jamieson, 29-30. In addition, the children of the marriage would not be recognized under the *Indian Act* as Indians.
7. S.C. 1876, c. 18.
8. Jamieson, 61.
9. DIAND, 1978, 27.
10. R.S.C. 1970, c. I-6, s. 109.
11. Jamieson, 65, Table III.
12. Frideres, 1983, 136, Table 6.3.
13. Sanders, 419-20.
14. Daniels, 1979, 18-9.
15. Daniels, 1979, 19.
16. Podoluk, Table 18.
17. Frideres, 1983, 12; Cumming and Mickenberg, 202-3.
18. Cumming and Mickenberg, 202-3.
19. *Reference Re Eskimos* [1939] S.C.R. 104.
20. "Women to regain Indian status", *The Globe and Mail*, 9 March 1984, 5.
21. Sanders, 418.
22. Ponting and Gibbins, 36-7.
23. DIAND, 1982f, xix.
24. Berger, 85.
25. Special Committee on Indian Self-Government, 13.
26. Ponting and Gibbins, 13.
27. DIAND, 1969, 5.
28. *Ibid.*, 6.
29. *Ibid.*, 11.
30. Cardinal, 1969, 30-1.
31. See Section 35 of the *Constitution Act*, 1982.
32. See their *Indian Self-Government in Canada, Report*.
33. "PM's plan on self-rule for natives is stalled," *The Globe and Mail*, 9 March 1984, 1-2; "Share responsibility for natives, PM urges premier," *The Globe and Mail*, 9 March 1984, 5.
34. The federal government has special responsibilities for the Inuit and Status Indians arising out of Section 91(24) of the *Constitution Acts, 1867 to 1982* which gives the federal government exclusive authority over "Indians, and Lands reserved for the Indians". It has never been resolved whether Section 91(24) includes the Métis and Non-Status Indians and federal government programs premised on Section 91(24) have not been extended to the Métis and Non-Status Indians. Whether or not there are other sources for imposing special responsibilities on the federal government in respect of native people cannot be discussed here.
35. Podoluk, Table 18.
36. Unpublished 1981 Census material.
37. Canada Employment and Immigration Commission (hereinafter referred to as CEIC), 1978.
38. See under Taylor in the bibliography.
39. CEIC, 1978, Table 1.
40. See the list at pp. 4-5 of the report.
41. Taylor, 2.
42. This definition is taken from Maidman, 27, n. 1. It fairly represents the meaning of the term as it is employed in the report of the Secretary of State.
43. Taylor, 5.
44. See under Maidman in the bibliography.
45. Department of Labour, Appendix A, Table 1.
46. Some were recorded as "Native Indians" if their mother tongue fell into a native grouping. Otherwise, they would have been classified as English or French and so on.
47. Department of Labour, 1.
48. Podoluk, Table 18.
49. For the 1971 figure, see Department of Labour, Appendix A, Table 1. For the 1981 figure, see Podoluk, Table 18.
50. Siggner, 1980, 37-8.
51. Siggner, 1979, 5, Table 2.
52. *Ibid.*, 6.
53. *Ibid.*
54. Frideres, 1983, 135, Table 6.2.
55. Siggner, 1979, 8.
56. Siggner, 1980, 43, Figure 2.2.
57. *Ibid.*
58. Department of Labour, Appendix A, Table 4.
59. Unpublished 1981 Census data.
60. Unpublished 1981 Census data.
61. Siggner, 1980, 44.
62. Task Force on Labour Market Development, 95.
63. See Section 3.11, *infra*.
64. The 1971 Census showed that of 172,000 native people of working age, 60,095 or 35 per cent were in the labour force: Department of Labour, Appendix A, Tables 4 and 18. The 1981 census showed that of 299,735 native people of working age, 153,045 or 51 per cent were members of the labour force: unpublished 1981 Census data.
65. See Section 3.10, *infra*.
66. See Table 3.1 for all census data set out in this and the next four paragraphs.
67. DIAND, 1982f, xix. DIAND figures represent all Status Indians registered with the Department. Some of these persons are living outside of Canada. These figures are therefore not an accurate count of Status Indians living in Canada.
68. All data in this paragraph and relating to the Inuit are taken from the 1981 Census — see Table 3.1.
69. CEIC, 1978. All data in this paragraph from Employment and Immigration Canada are from this document and are set out in Table 3.2.
70. DIAND, 1982f, 83. The other 70 per cent live on reserves or Crown land. The percentages in the text below are based on data contained in this document.
71. Siggner, 1979, 19.
72. Siggner, 1979, 19. This figure is based on census data. Siggner found the difference in urban/rural distribution for Status Indians and the national population significant while noting that the census definitions of "rural" and "urban" are not strictly comparable to those used for Status Indians.
73. Frideres, 1983, 45.
74. Taylor. Data in the text below are taken from p. 10 of the report.
75. The statistics for 1966-1976 are from Siggner, 1979, 14-6, and Siggner et al., 18. The statistic for 1981 is from DIAND, 1982f, 83.
76. DIAND, 1980, 134.
77. Siggner, 1979, 14 and 17.



45. Clatworthy, 1981c, 1.
46. Maidman, 31.
47. Clatworthy, 1981c, 21, Table 6.
48. Clatworthy and Hull, 38, Table 9, and 39, Table 10.
49. Siggner, 1979, 15, Table 7.
50. Clatworthy, 1981c, 19, Table 5.
51. Clatworthy and Hull, 38, Table 9.
52. *Ibid.*, 39, Table 10.
53. Podoluk, Table 22.
54. Unpublished 1981 Census data.
55. Maidman, 30.
56. Clatworthy, 1981c, 26, Table 9.
57. Clatworthy and Hull, 41, Table 11.
58. See: Siggner, 1980, 44-7; Clatworthy, 1981c, 25 and 28; Clatworthy and Hull, 47; Maidman, 31.
59. See Frideres, 1983, 198; Maidman, 32.
60. DIAND, 1980, 9.
61. On declining birthrates see: Siggner, 1979, 5, and Frideres, 1983, 131.
62. Frideres, 1983, 147-8.
63. Department of Labour, 2.
64. Frideres, 1983, 132.
65. Siggner, 1980, 40.
66. Frideres, 1983, 136.
67. DIAND, 1980, 24.
68. Clatworthy, 1981b, 4.
69. Clatworthy and Hull, 55.
70. Siggner, 1979, 36, Table 20. "Children in care" is defined as: "The number of children being cared for outside their home under the supervision of children care agencies and the Department of Indian Affairs and Northern Development": Siggner, 1979, 36.
71. DIAND, 1980, 24.
72. Data was not available for Metis and non-Status Indians.
73. Siggner, 1979, 9, Table 4.
74. DIAND, 1980, 16.
75. Siggner, 1979, 9, Table 4.
76. DIAND, 1980, 15.
77. Siggner, 1979, 41, Table 2.4.
78. DIAND, 1980, 17.
79. DIAND, 1980, 19, and Siggner, 1979, 22.
80. Siggner, 1979, 22.
81. DIAND, 1980, 18.
82. *Ibid.*
83. *Ibid.*, 33.
84. *Ibid.*, 18.
85. *Ibid.*, 20.
86. Frideres, 1983, 182.
87. DIAND, 1980, 21.
88. Maidman, 23.
89. Siggner, 1979, 26.
90. Special Committee on Indian Self-Government.
91. *Ibid.*, 33.
92. *Ibid.*
93. DIAND, 1980, 30.
94. Siggner, 1979, 39.
95. DIAND, 1980, 30.
96. *Ibid.*
97. *Ibid.*, 31.
98. Siggner, 1979, 39.
99. DIAND, 1980, 31.
100. *Ibid.*, 32.
101. *Ibid.*, 37.
102. *Ibid.*
103. Siggner, 1979, 41.
104. Frideres, 1983, 183.
105. Birkenmayer and Jolly, 5-6.
106. Jolly, 12.
107. Ponting and Gibbins, 60. Frideres also says that "alcohol use is highly related to Native crimes": Frideres, 1983, 185.
108. DIAND, 1980, 38.
109. DIAND, 1980, 9.
110. Siggner, 1979, 38.
111. *Ibid.*, 27.
112. This study is referred to in DIAND, 1979, 34-35.
113. DIAND, 1979, 34 and 36.
114. Siggner and Locatelli, 1981, 39, Table 23.
115. Clatworthy, 1981c, 59-60, Tables 30 and 31.
116. "Social assistance" was apparently used in Clatworthy's study to refer to the narrower category of welfare-type payments.
117. Clatworthy, 1981c, 59-60, Tables 30 and 31.
118. See the bibliography.
119. "Social allowances" was apparently used by Clatworthy and Hull to refer to welfare-type payments.
120. Clatworthy and Hull, 95-6, Tables 45 and 46.
121. Clatworthy and Hull, 95-6, Tables 47 and 48.
122. Ministry of Culture and Recreation (Ontario), 11.
123. The 1971 statistics in this paragraph are taken from Department of Labour, Table 13.
124. *Ibid.*
125. The 1981 statistics in this paragraph are from unpublished 1981 Census data.
126. DIAND, 1980, 56.
127. Frideres, 1983, 169-70.
128. Unpublished 1981 Census data.
129. Siggner, 1979, 32, Table 19.
130. Siggner et al., 35-6.
131. Siggner, 1979, 31, Table 18.
132. DIAND, 1980, 49.
133. Siggner, 1979, 31, Table 18.
134. *Ibid.*
135. DIAND, 1980, 49.
136. The preceding statistics are from Siggner, 1979, 30, Table 17.
137. These regional statistics are from Siggner et al., 33.
138. Unpublished 1981 Census data.
139. Unpublished 1981 Census data.
140. The data available for these age groups were based on a smaller population than that on which the overall rates are based. The overall rates include all persons over the age of 15 reporting a native origin only (Metis, Status, non-Status, or Inuit) and those reporting a native origin and some other origin. The larger population numbered 299,735 of which 153,045 were in the labour force. The smaller population consisted of those persons who reported a native origin only. This latter group

numbered 255,200 of which 123,300 were in the labour force. I have assumed that the rates for the 15-19 and 20-24 age cohorts would be comparable whether these rates are based on the smaller population or on the larger population. The data on the smaller population is from Podoluk, Table 20.

141. Again, this data was computed on the basis of the smaller population described in n. 140.
142. Podoluk, Table 12.
143. Unpublished 1981 Census data.
144. Unpublished 1981 Census data.
145. CEIC, 1977, 18.
146. *Ibid.*, 19-20, Table 12.
147. DIAND, 1980, 58.
148. Podoluk, Table 22.
149. *Ibid.*, 59.
150. All statistics on participation rates in this paragraph are from unpublished 1981 Census data.
151. Unpublished 1981 Census data.
152. Unpublished 1981 Census data.
153. All statistics on unemployment rates in this paragraph came from unpublished 1981 Census data.
154. DIAND, 1980, 47.
155. See Section 3.10, *supra*.
156. See the text, *supra*, at n. 113.
157. Hawthorn, Vol. 1, 45.
158. Department of Labour, Table 19.
159. Maidman, 20, Table 6. These figures are for 1980.
160. *Ibid.*
161. Clatworthy, 1981c.
162. Clatworthy and Hull.
163. Clatworthy, 1981c, 58. The average household income of Status Indians was \$8,743 and the average household income of Metis and non-Status Indians was \$9,875.
164. *Ibid.*
165. Clatworthy and Hull, 89-90, Tables 42 and 43.
166. *Ibid.*, 88, n. 1.
167. Hawthorn, Vol. 1, 45.
168. DIAND, 1980, 62.
169. Siggner, 1980, 50-2.
170. CEIC, 1977, 22.
171. The statistics in the rest of the paragraph are from unpublished 1981 Census data.
172. The preceding statistics are from unpublished 1981 Census data.
173. See Podoluk, Tables 7 and 22.
174. The preceding statistics are from Podoluk, Tables 7 and 22.
175. In recent years, DIAND has been devolving responsibility for the administration of native reserves to the residents.
176. CEIC, 1977.
177. *Ibid.*, 21, Table 13.
178. *Ibid.*, 21.
179. *Ibid.*, 22.
180. Clatworthy and Hull, 77. See Clatworthy, 1981c, 46-55, and Clatworthy and Hull, 77-81.
181. Clatworthy and Hull, 78-9, Tables 34 and 35.
182. Clatworthy, 1981c, 50, Table 24.
2. Frideres, 1983, 159.
3. DIAND, 1980, 50.
4. Siggner, 1980, 55.
5. *Ibid.*
6. Hawthorn.
7. National Indian Brotherhood, 1972.
8. DIAND, 1980, 50.
9. DIAND, 1982b.
10. *Ibid.*, 14.
11. *Ibid.*, Annex C, 8.
12. *Ibid.*, 10.
13. *Ibid.*, 15.
14. See DIAND, 1982b.
15. DIAND, 1982b, Annex C, 8.
16. *Ibid.*, 3.
17. *Ibid.*, 22.
18. *Ibid.*, 11.
19. DIAND, 1980, 104. The provinces have for the most part taken the view that the federal government is responsible for Status Indians both on and off the reserves. The Indians believe that the federal government is responsible for bearing the costs of Indian education.
20. Special Committee on Indian Self-Government, 29. See also the submission of the Union of Ontario Indians to the Commission on Equality in Employment listed in Appendix B of Vol. 1 of its Report under the heading of Native People.
21. See the submission of the Union of Ontario Indians to the Commission on Equality in Employment listed in Appendix B of Vol. 1 of its Report under the heading of Native People.
22. Frideres, 1983, 162.
23. Special Committee on Education, Northwest Territories Legislative Assembly, 1982, 78.
24. Inuit Tapirisat of Canada, 1980b, 8, 10 and 11; Special Committee on Education, Northwest Territories Legislative Assembly, 1982, 30.
25. Inuit Tapirisat of Canada, 1980b, 10. Also, Frideres, 1983, 162.
26. Frideres, 1983, 162-3.
27. Inuit Tapirisat of Canada, 1980b, 10.
28. Task Force on Employment Opportunities for the '80s, 101.
29. DIAND, 1982b, 38.
30. *Ibid.*, 39.
31. See the submission of the Nishnawbe-Aski Nation to the Commission on Equality in Employment listed in Appendix B of Vol. 1 of its Report under the heading of Native People.
32. Inuit Tapirisat of Canada, 1980b, 10.
33. Special Committee on Education, Northwest Territories Legislative Assembly, 1982, 95-7.
34. *Ibid.*, 87.
35. Daniels, 1981, 46.
36. See the submission of the Union of Ontario Indians to the Commission on Equality in Employment listed in Appendix B of Vol. 1 of its Report under the heading of Native People.
37. Inuit Tapirisat of Canada, 1980b, 17.
38. *Ibid.*, 15.
39. Frideres, 1983, 167.
40. National Indian Brotherhood, 1972, 19.
41. Special Committee on Education, Northwest Territories Legislative Assembly, 1982, 31.
42. *Ibid.*
43. DIAND, 1980, 54.
44. Unpublished data.

#### SECTION 4

1. Berger, 90.

45. Inuit Tapirisat of Canada, 1980b, 10.
46. Royal Commission on the Northern Environment, 1978, 208.
47. Special Committee on Education, Northwest Territories Legislative Assembly, 1982, 139.
48. See Section 3.11, *supra*.
49. Gabriel Dumont Institute of Native Studies and Applied Research, 39.
50. See listing under Ontario Indian Education Council in the bibliography.
51. See listing in the bibliography under Federation of Saskatchewan Indian Nations.
52. See Task Force on Labour Market Development, Chapters 4 and 9.
53. Task Force on Labour Market Development, 53.
54. See Table 3.6, *supra*.
55. See the submissions of the Ontario Native Women's Association to the Commission on Equality in Employment listed in Appendix B of Vol. 1 of its Report under the heading of Native People.
56. See the submission of the Pas Friendship Centre Inc. to the Commission on Equality in Employment listed in Appendix B of Vol. 1 of its Report under the heading of Native People.
57. Bannon, 27.
58. Canada Employment and Immigration Commission, 1981, 18.
59. See the submissions of the Nishnawbe-Aski Nation and NorSask Native Outreach to the Commission on Equality in Employment listed in Appendix B of Vol. 1 of its Report under the heading of Native People.
60. See Section 3.4, *supra*.
61. See the submissions of the Ontario Native Women's Association and the Union of Ontario Indians to the Commission on Equality in Employment listed in Appendix B of Vol. 1 of its Report under the heading of Native People.
62. Task Force on Employment Opportunities for the '80s, 102, Recommendation 126.
63. Special Committee on Education, Northwest Territories Legislative Assembly, 1982, 138.
64. Federation of Saskatchewan Indian Nations, 25.
65. This information was supplied to the Commission on Equality in Employment on a confidential basis.
66. Canada Employment and Immigration Commission, 1981, 19.
67. This matter was raised at a hearing before the Commission on Equality in Employment. The hearings of the Commission on Equality in Employment were held on a confidential basis. For that reason it is not possible to identify the participant or the place where the hearing was held.
68. This information was supplied to the Commission on Equality in Employment on a confidential basis.
69. Seydegart and Spears, 96.
70. This information was supplied to the Commission on Equality in Employment on a confidential basis.
71. This information was supplied to the Commission on Equality in Employment on a confidential basis.
72. This information was supplied to the Commission on Equality in Employment on a confidential basis.
73. This matter was raised at hearings before the Commission on Equality in Employment.
74. Canada Employment and Immigration Commission, 1981, 18.
75. *Ibid.*, 20. See also Bannon, 42, and the submission of the Native Women Pre-Employment Training Association to the Commission on Equality in Employment listed in Appendix B of Vol. 1 of its Report under the heading of Native People.
76. Canada Employment and Immigration Commission, 1981, Appendix III, 1.
77. See the submissions of the Ontario Native Women's Association to the Commission on Equality in Employment listed in Appendix B of Vol. 1 of its Report under the heading of Native People. This matter was raised at hearings before the Commission.
78. Native People of Thunder Bay Development Corporation, 43.
79. Native People of Thunder Bay Development Corporation, 43.
80. See Section 3.5, *supra*.
81. Canada Employment and Immigration Commission, 1981, 22.
82. The jurisdiction to do so might derive from Section 91(24) of the *Constitution Acts, 1867 to 1982* which gives the federal government authority over "Indians".
83. The term "pre-employment" is sometimes applied to training other than on-the-job training or institutional training in occupational skills. For convenience I have used the term in this sense.
84. See the submissions of the Saskatoon Native Outreach Services and the Ontario Native Women's Association to the Commission on Equality in Employment listed in Appendix B of Vol. 1 of its Report under the heading of Native People. See also Gabriel Dumont Institute of Native Studies and Applied Research, 34.
85. Federation of Saskatchewan Indian Nations, 15.
86. See Section 3.11, *supra*.
87. Bannon, 23 and 28.
88. *Ibid.*, 28.
89. Task Force on Employment Opportunities for the '80s, 99, Recommendation 107.
90. *Ibid.*, 12, Recommendation 127.
91. See Sections 3.4 and 3.11, *supra*.
92. Katz, 8-9.
93. *Ibid.*, 9.
94. See the submission of the Native Women's Association of the N.W.T. to the Commission on Equality in Employment listed in Appendix B of Vol. 1 of its Report under the heading of Native People.
95. Katz, 9.
96. Canada Employment and Immigration Commission, 1981, 16-7.
97. Buckland, 23.
98. Task Force on Labour Market Development, Appendix C, 229.
99. See Section 3.10, *supra*.
100. Unpublished 1981 Census data.
101. Federation of Saskatchewan Indian Nations, 17.
102. See Section 3.10, *supra*.
103. The percentage is from Katz, 8. The figure of 3,318 was calculated in the following way. The *Annual Report 1982-83* of the Canada Employment and Immigration Department and Commission indicated (at p.63, Figure 1) that 11.6 per cent or 20,233 of 174,424 trainees in full-time institutional training were in BTSD courses. 16.4 per cent of 20,233 is 3,318.
104. Turnbull and Cruikshank, 10.
105. DIAND, 1980, 55.
106. *Ibid.*, 56.
107. 1979-80: Task Force on Labour Market Development, 171. 1982-83: Canada Employment and Immigration Department and Commission, 63, Figure 1.
108. Special Committee on Education, Northwest Territories Legislative Assembly, 1982, 145.
109. Task Force on Labour Market Development, 171.
110. *Ibid.*
111. *Ibid.*, 177.
112. Katz, 8.
113. Inuit Tapirisat of Canada, 1980b, 6. See also the submission of the Union of Ontario Indians to the Commission on Equality in Employment listed in Appendix B of Vol. 1 of its Report under the heading of Native People.
114. Task Force on Employment Opportunities for the '80s, 73, Recommendation 15.
115. Canada Employment and Immigration Commission, 1978, 20.
116. See Section 3.11, *supra*.
117. See the text, *supra*, at notes 52 and 53.



- 118 Task Force on Labour Market Development, 16
- 119 *Ibid.*
- 120 See Section 3 11, *supra*.
- 121 See Section 3 11, *supra*.
- 122 See Section 3, *supra*, Table 3 5
- 123 Podoluk, Tables 5 and 6
- 124 See Section 3, *supra*, Table 3 5
- 125 S.C. 1980-81-82-83, c 109. It was proclaimed in force in August of 1982.
- 126 Canada Employment and Immigration Department and Commission, 24
- 127 Except as otherwise indicated all the statistics in this paragraph are from Katz, 5-11.
- 128 Unpublished 1981 Census data
- 129 These statistics are from unpublished DIAND data
- 130 See Section 3 2, *supra*
- 131 Clatworthy, 1981c
- 132 Clatworthy and Hull
- 133 Clatworthy, 1981c, 42, Table 18; Clatworthy and Hull, 76, Table 33. But see the discussion in Section 3 11, *supra*, of the findings of CEIC's Survey of Métis and Non-Status Indians
- 134 Persons reporting only a "single origin" listed only one cultural background.
- 135 Unpublished 1981 Census data. Income as reported by individuals 15 years old and over who reported an employment income for the year.
- 136 Persons reporting "multiple origins" listed more than one cultural background.
- 137 Seydegar and Spears, 95-8
- 138 *Ibid.*, 95
- 139 *Ibid.*, 96
- 140 *Ibid.*, 100-1
- 141 *Ibid.*, 101
- 142 Canada Employment and Immigration Commission, 1978, 16.
- 143 This view was expressed at a hearing before the Commission on Equality in Employment.
- 144 See the submissions of the Dene Nation and NorSask Native Outreach to the Commission on Equality in Employment listed in Appendix B of Vol. 1 of its Report under the heading of Native People. This matter was also raised at hearings before the Commission.
- 145 See the submissions of the Council for Yukon Indians, the Nishnawbe-Aski Nation, and the Quesnel Tillicum Society to the Commission on Equality in Employment listed in Appendix B of Vol. 1 of its Report under the heading of Native People.
- 146 Task Force on Labour Market Development, 105
- 147 Canada Employment and Immigration Commission, 1981, 19-20
- 148 Task Force on Labour Market Development, 105
- 149 Special Committee on the Disabled and Handicapped, 1981b, 56-7
- 150 Unpublished DIAND material.
- 151 *Ibid.*
- 152 Unpublished CEIC material.
- 153 This view was expressed at a hearing before the Commission on Equality in Employment.
- 154 See Section 3 10, *supra*.
- 155 Unpublished 1981 Census data.
- 156 Native persons testified as to the success of the college at hearings before the Commission on Equality in Employment.
- 157 See the text at notes 36-38, *supra*.
- 158 Task Force on Labour Market Development, 81; Task Force on Employment Opportunities for the '80s, 55 and 57
- 159 Task Force on Labour Market Development, 81-82.

- 160 Canada Employment and Immigration Department and Commission, 13 and 16, and unpublished CEIC data
- 161 Task Force on Employment Opportunities for the '80s, 99
- 162 *Ibid.*, 82
- 163 Canada Employment and Immigration Commission, 1981, 15-6
- 164 Task Force on Employment Opportunities for the '80s, 99
- 165 This concern was expressed at hearings held before the Commission on Equality in Employment.

## SECTION 5

- 1 See Maidman, 56. The Ontario Task Force on Native People in the Urban Setting found that of the most frequently used service organizations in their sample, CEIC employment offices received the lowest ratings of usefulness by native people. See also Task Force on Labour Market Development, 81
- 2 Task Force on Labour Market Development, 81
- 3 Task Force on Employment Opportunities for the '80s, 57
- 4 Task Force on Labour Market Development, 82
- 5 Task Force on Employment Opportunities for the '80s, 19, Recommendation 110
- 6 Canada Employment and Immigration Department and Commission, 19
- 7 Canada Employment and Immigration Department and Commission, 16, and unpublished CEIC data
- 8 Maidman, 63-4
- 9 See Section 3 11, *supra*
- 10 Bannon, 33
- 11 Canada Employment and Immigration Commission, 1981, 15
- 12 *Ibid.*, 16
- 13 *Ibid.*, 22
- 14 *Ibid.*
- 15 *Ibid.*, 27
- 16 Special Committee on the Disabled and the Handicapped, 1981b, 21
- 17 Canada Employment and Immigration Commission, 1978, 21
- 18 Canada Employment and Immigration Department and Commission, 30
- 19 Unpublished CEIC material
- 20 Unpublished CEIC material
- 21 Unpublished CEIC material
- 22 Canada Employment and Immigration Department and Commission, 31
- 23 Unpublished CEIC material
- 24 Canada Employment and Immigration Department and Commission, 34
- 25 *Ibid.*, 33-4
- 26 *Ibid.*, 32
- 27 Unpublished CEIC material
- 28 Unpublished CEIC material
- 29 Canada Employment and Immigration Commission, 34
- 30 Unpublished CEIC material
- 31 Canada Employment and Immigration Department and Commission, 19
- 32 *Ibid.*, 32
- 33 Unpublished CEIC material
- 34 *Panorama*, August 1983, 1
- 35 *Ibid.*
- 36 Task Force on Labour Market Development, 107

## SECTION 6

- 1 Public Service Commission of Canada and Treasury Board, 1978.
- 2 Public Service Commission of Canada, 1980a, 19.
- 3 *Ibid.*, 1.
- 4 See Section 3.4, *supra*.
- 5 Public Service Commission of Canada, 1980a, 1 and 10.
- 6 *Ibid.*, 1.
- 7 As of 1980 the average training period was 15½ months long. Public Service Commission of Canada, 1980a, 7.
- 8 Seydegart and Spears, 78.
- 9 Public Service Commission of Canada, 1983b.
- 10 *Ibid.*
- 11 Seydegart and Spears, 77.
- 12 Public Service Commission of Canada, 1980a, 10-1.
- 13 Treasury Board of Canada, 1983b.
- 14 Public Service Commission of Canada, 1980a, 1.
- 15 *Ibid.* The percentages published in the *Affirmative Action Press Kit* do not correspond in all cases to the figures supplied therein. The percentages appearing in the text were derived from those figures. These percentages represent full-time permanent employees only. While these 1981 statistics are not strictly comparable to the 1976 statistics because of the use of different categories, they do indicate that some progress has been made.
- 16 Public Service Commission of Canada, 1980a, 1.
- 17 Treasury Board of Canada, Annex E, 1.
- 18 Podoluk, Table 18, and unpublished 1981 Census data.
- 19 As estimated in Canada Employment and Immigration Commission, 1978.
- 20 Public Service Commission of Canada, 1980a, 11.
- 21 *Ibid.*, 13-15.
- 22 *Ibid.*, 17.
- 23 Unpublished Public Service Commission of Canada material.
- 24 Unpublished Public Service Commission of Canada material.
- 25 See under: Impact Research in the bibliography.
- 26 Seydegart and Spears, 75.
- 27 Public Service Commission of Canada, 1980a, 20.
- 28 DIAND, 1982d, 12, and 1983b, 9.
- 29 See the text in Section 3, *supra*, at n. 176ff.
- 30 See the text in Section 3, *supra*, at n. 171ff.
- 31 See the listing under Borovoy in the bibliography.
- 32 Berger, 123. See also Bankes, 127.
- 33 Berger, 123.
- 34 Berger, 124.
- 35 *Ibid.*
- 36 Royal Commission on the Northern Environment, 184.
- 37 See the submission of the Nishnawbe-Aski Nation to the Commission on Equality in Employment listed in Appendix B of Vol. 1 of its Report under the heading of Native People.
- 38 The federal government contributed 15 per cent of the equity in the Syncrude project. Bankes, 121.
- 39 Syncrude Canada Ltd. *Syncrude's Native Development Program: A Stake in the Future*.
- 40 See J. Slavik and Associates, and Bankes, 127.
- 41 Saskatchewan Human Rights Commission.

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## NATIVE PEOPLE AND EMPLOYMENT: A NATIONAL TRAGEDY

Richard C. Powless

### Sommaire

Le titre résume bien le problème, qui est à la fois tragique et une source d'opprobre pour le Canada.

Les «autochtones» comprennent les Indiens, les Inuit et les Métis dont j'ai décrit brièvement les différences du point de vue historique et donné le nombre et la répartition géographique actuelle. Je m'en suis tenu aux Indiens par manque de données sur les Inuit et les Métis. D'ailleurs, ils sont tous confrontés à des problèmes semblables, quoique dans bien des cas, les problèmes soient plus aigus pour les Métis, tandis que pour les Inuit on commence seulement à identifier leurs problèmes.

J'ai essayé de décrire quelques-unes des conséquences socio-économiques du taux élevé de chômage parmi ces groupes. La pauvreté, le manque de logements adéquats et d'installations sanitaires, le taux élevé de décès par suite d'incendies, l'entassement des familles, la faible espérance de vie, le taux élevé de mortalité infantile, les taux élevés d'alcoolisme, de maladie et de décès associés à l'alcoolisme, la proportion élevée de détenus autochtones, le faible taux de scolarité, la proportion élevée d'enfants confiés à des institutions et le taux élevé de suicide témoignent du cercle vicieux directement ou indirectement lié au faible taux d'activité des autochtones.

Les répercussions de l'inaction seront graves. Elles se mesurent à la perte de revenu et de productivité et à ce qu'il en coûtera pour traiter les symptômes précités (assistance sociale, hôpitaux, prisons, etc.). Sur le plan humain, les conséquences sont inestimables.

Le taux élevé de chômage des autochtones tient principalement au fait qu'ils sont, ainsi que leur culture, méconnus par la société canadienne dominante. Cette constatation renferme aussi la solution du problème.

Nombreux sont les autochtones en chômage parce qu'ils n'ont pas la scolarité demandée et, par ricochet, les compétences nécessaires. Les collectivités autochtones ne peuvent se développer économiquement et créer des emplois, car souvent les qualités sur lesquelles reposent la concurrence et la réussite vont à l'encontre de leurs valeurs culturelles. Pour la plupart, c'est le fait de vivre dans des régions éloignées qui constitue l'obstacle principal; les employeurs concurrentiels se situent près des centres urbains et des systèmes de transport. Le système d'éducation n'a aucun rapport avec la culture autochtone et avec les emplois qui existent dans leur collectivité, d'où la proportion élevée d'autochtones qui ne terminent pas leurs études.

J'ai essayé de montrer que les autochtones ne peuvent pas réussir dans la société canadienne car ce

### Summary

The title is an apt summary statement of the problem, which truly is a national tragedy and a national disgrace.

"Native people" include the Indian, Inuit, and Metis people, and I have provided a short summary of their historical differences and their numbers and geographical distribution today. I have concentrated on the Indian people because of the lack of data available on the Inuit and Metis and because the problems facing all native people are similar. It should be stated, however, that in many cases those problems are greater for the Metis, while for the Inuit the problems are only beginning to be realized.

I have tried to explain some of the socio-economic implications of high unemployment. Poverty, poor housing, lack of sanitation systems, high fire-related death rates, crowded homes, low life expectancy, high infant mortality, high alcoholism rates and alcohol-related illnesses and deaths, high representation in Canada's prisons, low education levels, children in care of institutions, and high suicide rates are all part of the debilitating cycle that is directly related to the lack of employment among native people.

The costs of allowing this situation to continue are indeed high. They are measured in loss of potential income and productivity, and in the exorbitant costs to treat the symptoms (welfare, hospitals, prisons, etc.). The human cost is immeasurable.

The key cause of high unemployment is the lack of understanding by the dominant Canadian society of the Indian and native peoples and their cultures. This is also the key to the solution to the problem.

Many native people aren't employed because they have low education levels and thus lack marketable skills. Native communities cannot generate economic development, and thus employment, because in many cases the values needed to compete and be successful are contrary to native cultural values. For the majority the locational disadvantages are far greater. The competitive employers are located near major urban and transportation systems. The education system is irrelevant to native people and unrelated to the jobs available in native communities, thus accounting for the high incompleteness rate for native students.

What I have tried to show is that native people will not do well in Canadian society because it is not their society; they don't understand it and have no desire to. Most native people have never seen themselves as part of Canadian society but as separate and distinct and having a right to continue that distinction. It was only in the early history of relations between native people (nations) and Canada that both peoples dealt with



n'est pas la leur; ils ne la comprennent pas et n'y tiennent pas. Les autochtones ne se sont jamais sentis solidaires de la société canadienne, mais se sont toujours perçus comme une entité distincte jouissant du droit de maintenir cette distinction. Ce n'est qu'au début que le Canada et les autochtones (nations) ont eu des rapports d'égal à égal. Depuis, les autochtones en sont dépendants économiquement.

Quand les Canadiens ont pris en mains les régimes économiques du Canada, les autochtones se sont retrouvés avec des régimes qui, en définitive, ne pouvaient pas faire vivre leurs collectivités. Aussi, ils n'étaient plus en mesure de nourrir, de loger et d'habiller les leurs et sont devenus de plus en plus dépendants des biens fabriqués au Canada. Les autochtones ont été forcés de s'adapter au système économique fondé sur l'offre et la demande, où pour survivre, il fallait troquer ses compétences contre de l'argent. Dans une société industrielle, les autochtones n'avaient aucune chance. Les terres sur lesquelles ils vivaient de chasse et de pêche étant exploitées, ils pouvaient difficilement continuer de subvenir à leurs besoins. C'est cette destruction d'une économie autochtone traditionnelle et viable qui a créé les problèmes socio-économiques et de chômage que connaissent aujourd'hui les autochtones.

Le gouvernement a essayé de régler le problème en traitant les autochtones comme des Canadiens défavorisés. Le ministère des Affaires indiennes et du Nord a tenté d'inculquer aux collectivités indiennes le sens des affaires et de la concurrence. Peine perdue: les Indiens n'ont jamais chéri les valeurs associées à la soif du gain et des profits.

D'autres programmes gouvernementaux ont également échoué, car les auteurs de la politique ne comprenaient pas à quel point les Indiens sont différents du point de vue culturel, historique, politique et spirituel. On a une fois de plus tenté de régler le problème en traitant les intéressés comme un groupe minoritaire défavorisé. Ces solutions ne pouvaient quand même pas réussir faute de coordination des programmes gouvernementaux. Les divers ministères n'ont jamais envisagé le problème sous le même angle, si bien qu'ils n'ont jamais pu adopter des mesures unifiées et générales pour en venir à bout.

La vraie solution doit découler d'une initiative politique, c'est-à-dire la reconnaissance de la «légitimité» des nations et des peuples indiens et du fait qu'ils constituent un *nouveau* ou un *troisième* ordre de gouvernement et de culture au Canada. Les peuples indiens doivent être autonomes et le Canada doit modifier ses régimes de gouvernement, d'éducation, économiques, de communication, de transport, de développement et de partage des ressources, et d'emploi afin de favoriser cette autonomie.

each other as equals. It was also the last time when native people were economically self-sufficient.

When Canadians assumed dominance over the economic systems in Canada, native people were left with economic systems that through time could not sustain their communities. They could no longer feed, house, and clothe everyone in their societies because they became increasingly reliant on Canadian-made goods and tools. Thus native people were pulled into the market-wage economic system. To survive in this system one needed skills that others were willing to trade (currency) for. In an industrial society this left little chance for native people. For with their traditional hunting and fishing areas being exploited, there was little hope for traditional economic sustenance. This destruction of a viable native economic base is responsible for the socio-economic and employment problems faced by most native people today.

The government has tried to deal with these problems by treating native people as disadvantaged Canadians. The Department of Indian Affairs and Northern Development (DIAND) has tried to make Indian communities become business-like and competitive. Since greed, competitiveness, and personal profit were never closely held Indian values, DIAND failed.

Other government programs failed to address the problem because policymakers did not understand that they were and are dealing with a radically different people—culturally, historically, politically, and spiritually. They too tried to deal with the problem as a disadvantaged minority problem. Their solutions were doomed to failure anyway because of the lack of coordination among government programs. Never have the various government departments shared a common perspective on the problem, so it goes without saying that they could not come up with an integrated, comprehensive approach to a solution.

The real solution starts with a political initiative: recognizing Indian nations and people as "legitimate" and as a *new* or *third* order of government and culture in Canada. Indian peoples must be allowed to be freely self-determining, and Canada must adjust its systems of government, education, economics, communications, transportation, resource development and sharing, and employment to accommodate that self-determination.

## NATIVE PEOPLE AND EMPLOYMENT: A NATIONAL TRAGEDY

Richard C. Powless\*

### I. PREFACE

This study of native people and employment is intended to provide the Commission on Equality in Employment with a background paper on issues affecting employment as they relate to the native people in Canada.

It is not intended that this paper will serve in any way as a definitive and comprehensive study of the topic. Instead emphasis has been placed on giving the Commissioner a sense of the unique and serious position that native people face in employment.

The problems relating to employment and native people cannot begin to be fully understood unless one has some understanding of who native people are, what their present situation is, and how this came about. It will also be necessary to look at what has been and is being done to deal with the problem, whether these measures are effective, and, finally, what the possible solutions are.

### II. NATIVE PEOPLE—WHO ARE THEY?

Native people are comprised of the indigenous peoples known as Indians, Inuit, and Metis. Indian peoples are the first indigenous peoples with whom Europeans made contact and established relations when they arrived in North America. The Inuit, because they were not in contact with large numbers of Europeans until after Confederation, were not considered Indians, although a later Canadian court decision ruled that they were to be included in the 1867 British North America Act definition of Indian.<sup>1</sup> The Indian and Inuit peoples are in fact many distinct peoples, historically, culturally, and politically. They are composed of 11 linguistic groupings and approximately 60 distinct nations, as that term is known by international definitions.<sup>2</sup> It was, and is, a misnomer to class the Indian nations racially as one grouping, just as it would be to classify all Europeans as one people. The Indian and Inuit peoples are as distinct as any peoples in the United Nations.

It should be noted that originally the Canadian government recognized as Indian anyone who was "half-Indian blood; reputed to belong to a tribe; intermarried with such Indians or residing among them and their descendants and anyone adopted by the Indians".<sup>3</sup> The need arose to determine who was not an Indian for the purposes of establishing who could live on Indian land. The government policy of the day, segregation and civilization, demanded that the non-Indian "destructive element" be removed from reserves. In 1851 we find the first provision to differentiate status and non-status.<sup>4</sup> The Indian Act of 1876 was the first to have a provision of enfranchisement of Indians, thus creating Indians who would no longer be considered Indians — "non-status Indians".<sup>5</sup>

The distinction between the 1851 and 1876 Acts was that the 1851 Act merely created the first definition of legal Indian status, while the 1876 Indian Act actually took away the Indian status of Indians by birth.

The Metis people came about as a result of contact between French and Indian people (principally Algonkian) during the eighteenth century. At that time there was fierce competition between the French and British in the fur trade. Initially, Indian people would bring their furs to the trading posts of the British and French, usually located on large waterways. As the fur-bearing animals became depleted in areas near the trading posts and forts, the Indian suppliers ventured further inland. To undercut the British, the French began to send voyageurs into the woods to meet the Indians with their furs in order to save time and to intercept furs that may have been destined for British trading posts. As the French travelled further inland it became necessary to "winter" among their Indian allies. During this time the French men often took Indian wives and had children with them. These were the first Metis.<sup>6</sup>

Later in the fur trade, a food source was derived from buffalo meat that could be stored for long periods of time and was easily transported. It was called pemmican. The Metis people were largely responsible for supplying the pemmican and they established camps on the prairies to hunt the buffalo. Eventually these camps became permanent settlements through land grants from the Hudson's Bay Company.<sup>7</sup> When in 1869 the Hudson's Bay Company sold its land to the newly formed Canada, the Metis feared their land rights would be affected and set up a provisional government under Louis Riel. They drew up a list of rights they wanted the government to guarantee. These included a right to government; a representative in Parliament; French and English to be offered in their own government, courts, and schools; and all "existing customs, privileges and usages". They also wanted to join Confederation of their own free will. Between 1870 and 1875 the Canadian government gave land to many Metis families (240 acres per family), and many were offered medical and educational subsidies. They could also choose to "take treaty" and become registered Indians or take scrip (paper with cash value). Crown lands were given to the provinces to set up colonies for the Metis. In 1940 the Canadian government changed its policies and refused to acknowledge the existence of the Metis as a legal entity.<sup>8</sup>

The 1981 Census of Canada reported that 491,460 people recorded themselves as being native people. Of these, 292,700 are status Indians, 75,100 are non-status Indians, 98,260 are Metis, and 25,390 are Inuit. There is, however, a variance between the figures given by Statistics Canada (1981) and the Department of Indian Affairs and Northern Development (DIAND, 1982) on the total number of status Indians. DIAND lists 31,082 more, thus bringing the total

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native population in Canada to 522,542, or slightly more than two per cent of the Canadian population. This variance can probably be explained by those Indians who would not or did not answer the questionnaire.<sup>9</sup>

There are 2,252 parcels of land reserved for Indian use. This land occupies approximately 6,049,986 acres. There are 576 Indian bands, with an average size of 550 people (DIAND, 1982). Thirty per cent of status Indians live off reserve, and 71 per cent of reserves are located in rural and remote areas.

The Inuit are located along the Mackenzie delta (NWT), on the shores of Hudson and Ungava bays, the mainland coast of the Northwest Territories, in Labrador, and throughout the Arctic islands in 49 Inuit settlements (DIAND, 1982). Two-thirds of the Inuit live in the Northwest Territories. Native people make up 58 per cent of the population in the Northwest Territories, 17.5 per cent of the population in the Yukon, and 6.5 per cent of the population of Manitoba (DIAND, 1982).<sup>10</sup>

### III. SCOPE OF THE PROBLEM

*Just imagine, if you will, the state that Canadian society would be in if its unemployment rate was at 80%; if the only ones working were those whose funding came from government programs. What type of social structure do you suppose you would find? Would there be a high success rate in education? What type of alcoholism rate would you have? What about suicides and other social indicators? These are the problems that face Indian communities right now as I speak and it is because we are experiencing unemployment rates that have never gone below 80%.... It is without a doubt a national tragedy, a national disgrace, and one which Indian people cannot and will not tolerate any longer.*

This statement was made by Charles Paul on April 26, 1983, to the Special Parliamentary Committee on Indian Self-Government. It is a lament that is often heard in Canada when Indian people talk about employment. It imparts a sense of the frustration and anger that many native people feel when they discuss this all-pervasive problem.

The Department of Indian Affairs and Northern Development published a report in 1980 on Indian conditions in Canada.<sup>11</sup> According to its statistics for Canada from a 1978/79 study, 56 per cent of the Indian population is of working age. This compares with 66 per cent of the Canadian population being of working age. Of the Indian labour force population, 46 per cent were non-participants, compared with 40 per cent of Canadians. Fifteen per cent of the Indian labour force population were pursuing traditional lifestyles; there is no estimate of this for the national population. Eighty-two per cent of the Indian labour force population were employed, compared with 92 per cent of the national force.

The unemployment rate of the Indian labour force was 18 per cent compared to 8 per cent for the national population. Indian Affairs estimates that the working age population of the Indian people will increase by 50,000 to 60,000 over the next 10 to 15 years. By the mid-1980s the Indian working age population was expected to expand to 66 per cent. A large portion (65 per cent) of these people will be seeking work on reserves, although the employment market there is

unable to satisfy current requirements. *Indian Conditions* also reports that 35 per cent of Indians are employed less than half a year. In 1970, only 24 per cent of Indian males made more than \$6,000 per year, compared with 52 per cent of Canadian males. Of the female Indians employed, only 5 per cent made more than \$6,000 per year, compared with 14 per cent of Canadian females.

These statistics deal with the Indian population only. It is difficult at best to obtain reliable figures that would include the Inuit, Metis, and non-status Indian populations, and thereby give a "native" employment picture. The government of the Northwest Territories gave evidence to the Mackenzie Valley Pipeline Inquiry that there were 5,000 unemployed, and Justice Berger concluded that a vast majority of this 5,000 were native people (Berger, 1977:I:134). Since Statistics Canada gives the native population of the Northwest Territories as 26,430, the native employment rate in the NWT could be estimated at 18 per cent. We begin to see why the statistics are unreliable. Justice Berger did admit that he did not know and doubted whether anyone knew what the employment rates were for the North (Vol.I:135).

When dealing with Metis, non-status Indian, and Inuit employment figures we must rely more on the Canada Employment and Immigration Commission. The fault in these statistics lies in the fact that Metis, non-status Indian, and Inuit people must "self identify" when registering at Canada Employment Centres. There is no way of determining what percentage of Metis, Inuit, and non-status people even register and then identify themselves as native persons. The assumption that the Ontario region of CEIC Native Services office makes is that there are at least as many Metis and non-status people in Ontario as status Indian people (1983). Frideres (1974) states that the urban Indian population is made up of 40 per cent status Indians. The remainder is made up of Metis, non-status, and Inuit.

McCaskill, in "The Urbanization of Indians in Winnipeg, Toronto, Edmonton and Vancouver: A Comparative Analysis", states that less than half of the respondents (from his survey of urban native people) were employed in the four large Canadian cities that he studied. He also states that unemployment and heavy reliance on social assistance characterized nearly half of the respondents in Toronto (48 per cent), Edmonton (46 per cent), and Vancouver (45 per cent), as compared to 32 per cent in Winnipeg. Males were employed at nearly twice the rate of females. For example, 51 per cent of males compared to 27 per cent of females in Toronto were working full time.

In relation to full-time, full-year workers, a 1978 Canadian Human Rights Commission study states that based on the three indicators of economic opportunity (employment earnings, occupational distribution, and rate of employment), native Indians are shown to be at a disadvantage compared to the average Canadian. For example, the earnings of the average Canadian man are 29 per cent higher than those of the native Indian man. The earnings of the average Canadian woman are 17 per cent greater than those of the native Indian woman. The proportion of men having the high prestige managerial, administrative, professional, and technical occupations among all Canadian men in the labour force (18 per cent) is more than twice as high as the proportion of native Indian men in the labour force with such occupations (8.6 per



cent). The percentage of Canadian women with such jobs is 23.7 per cent, compared to 19.1 per cent for native Indian women.

Where education factors are the same for the age group 35 to 44, the data indicate that the average Canadian man earns 35 per cent more than the average native man in the same occupation (management and administration); in service occupations, the earnings of the average Canadian woman are 11 per cent higher than those of the average native woman.

In production, fabrication, assembling, and repairing, the average Canadian male earnings are 18 per cent higher than those of native men. In the construction trades, the average Canadian man earns 19 per cent more than the average native man.

The rate of unemployment of native men with a Grade 9 to 13 level of education and aged 35 to 44 is 9.9 per cent, nearly three times the rate for the Canadian male (3.4 per cent).

The rate of unemployment for native women with the same level of education and in the same age group is 13.1 per cent, one-and-a-half times the rate of the Canadian female (5.2 per cent).

The study also states that for male full-time, full-year hunters, fishermen, and trappers aged 45 to 54 who have an education of less than Grade 9, the average Canadian earnings (\$5,487) still exceed those of status Indians in this occupation (\$3,979) by 38 per cent.

In a study done by Labour Canada (1976) based on the 1971 Census, the following data are reported:

- Of working male native Indians, 1.6 per cent are in managerial or administrative occupations, compared with 5.5 per cent of the total Canadian male working population
- Of working male native Indians, 12.0 per cent are in fishing, hunting, trapping, forestry, and logging occupations, compared with 1.7 per cent of the total Canadian male working population.
- Of working female native Indians, 24.3 per cent are in service occupations, compared with 15.1 per cent of the total Canadian female working population.
- Of working male native Indians, 5.2 per cent are in trade industries, compared with 14.2 per cent of the Canadian male working population.
- Of working female native Indians, 7.2 per cent work in trade industries, compared with 15.7 per cent of the Canadian female working population.

Between 1961 and 1971 the native Indian labour force increased by 81.4 per cent, while the total Canadian labour force increased by 33.3 per cent. The male native labour force increased by 58.4 per cent over the same period, compared to an increase of 20.4 per cent in the total Canadian male labour force. During the same period the female native labour force increased by 182.6 per cent, while the total female Canadian labour force increased by 67.6 per cent.

The average total income from all sources of persons aged 15 years or over who had some income in 1970 was \$2,976 among native people and \$5,033 among the total population. The average Canadian income exceeded the average native income by 69.1 per cent.

Other relevant data include the fact that because the Indian labour force is increasing at a much higher rate than that of other Canadians, there is a much greater need to find employment opportunities for native people. Also, since the average family size among native Indians is larger, the income needed to support the average family is greater.

There is also one aspect of life among native women that affects their employment. That is their rate of fertility. The average Indian woman will have given birth to an average of six children over her lifetime, and this may have hampered any ambitions she may have had to take on paid employment.

The next employment statistics to which I would like to refer are found in a study done by the Research and Special Studies Branch of the Canadian Human Rights Commission in September of 1980. It is a study of the economic situation of visible minority groups in Canada compared with other Canadians. This study also relies on the 1971 Census. The study deals with average employment income, rate of unemployment, and occupational distribution of native status Indians, native non-status Indians (referred to in the study as band and non-band respectively), blacks, Chinese-Japanese, and Indo-Pakistanis. The study is unique in that it does not give actual hard data but rather deals with the number of times the actual average income, rate of unemployment, or occupational distribution differed from that of other Canadians given identical circumstances such as sex, age level, and occupational category. These groupings of variables are called "cells".<sup>12</sup> For example, in the average employment income area the age, sex, education, and occupation of the full-time, full-year workers studied are the same for the visible minority groups and the "other Canadians". This cell grouping is done to remove the influence of these factors on the average employment income.

The first example deals with the number and percentage of cells in which employment income of native men was less than that of other Canadian men in the labour force of Canada in 1971.

There was a possibility of 525 combinations or cells and the native non-status Indians were able to match other Canadians in 154 cells. Of these 154 cells, 119 or 77.3 per cent were cells in which non-status Indians earned less than other Canadians, and in 79 or 51.3 per cent of the cells non-status Indians earned at least 10 per cent less than other Canadians.

The native status Indians were able to match 210 of the possible 525 cells with other Canadians. Of these 210 cells, 171 or 81.4 per cent were cells in which status Indians earned less than other Canadians. In 115 or 54.8 per cent of the cells, status Indians earned at least 10 per cent less than other Canadians. Only the blacks had a higher percentage of cells in which income was lower.

There were 63 cells matched for non-status native women and 101 cells matched for status Indian women. In 66.7 per cent of the relevant cells non-status native women earned less than other Canadian women, and in 42.9 per cent of the cells they earned at least 10 per cent less. In 67.3 per cent of the relevant cells the status Indian women earned less than other Canadian women and in 44.6 per cent of the cells they earned at least 10 per cent less than other Canadian women. Only black women were worse off in this category.

The next category deals with the number and percentage of cells in which the unemployment rate of native Indian men was greater than that of other Canadian men. In this category there were a possible 25 combinations or cells and the control was on sex, age, and education (hence the lower number of cells). For non-status Indian men there were 14 cells matched; in all 14 or 100 per cent of the cells the unemployment rate of non-status Indian men was greater than that of other Canadian men. In 11 of those cells (or 78.6 per cent) the rate of unemployment was 1.5 times greater than that experienced by other Canadian men. These are full-time, full-year workers. In the male status Indian category there were 15 cells matched; in all 15 of the cells the unemployment rate of status Indian men was greater than that of other Canadian men, and in 80 per cent of the cells the unemployment rate was at least 1.5 times greater than that of the other Canadian men. Indian males, both status and non-status Indians, fared the worst of all visible minority groups studied with respect to the unemployment rate.

For the unemployment rate cells for native Indian women there were nine cells matched for non-status Indian women. In all nine of these cells the unemployment rate of non-status Indian women was greater than that of other Canadian women, and in seven or 77.8 per cent of the cells the unemployment rate was at least 1.5 times greater than that of other Canadian women.

For status Indian women there were 16 cells matched, in 12 of which the unemployment rate of status Indian women was greater than that of other Canadian women. In eight cells the rate was at least 1.5 times greater. In this category the non-status Indian women experienced the second highest unemployment rate among the female visible minority groups studied.

Therefore, in three important economic characteristics—average employment income, rate of unemployment, and proportion in managerial and administrative occupations, it has been shown that native people and other visible minorities are disadvantaged in relation to other working Canadians even when situations are similar in relation to age, sex, and level of education.

The study concludes that among the causes for this situation are "overt discrimination, some discrimination because of unfair social and economic processes and some self selection into disadvantaged categories because of cultural differences".<sup>13</sup> The relevance of these data in today's terms is dealt with by the authors of this study, who state:

*While the absolute values of average employment incomes, rates of unemployment and occupational distribution may well have changed since 1971 (or 1970, for the income data), it is presumed that the relationships between these data for each of the visible minority groups and those for other Canadians would still be very much the same. And, therefore data are offered as a reliable picture of the relative economic advantage [or disadvantage\*] of the visible minority groups in Canada. (\*Brackets and addition of words "or disadvantage" are mine.)*

What becomes painfully obvious in looking at all of these statistics is the disastrous situation of native people with respect to employment in Canada. Vast numbers of native

people are unemployed, and with their populations increasing faster than the Canadian rate, the situation will get worse before it gets better. Even when we look at those native people who are working, we see that they earn less, have higher unemployment rates, and are underrepresented in professional, managerial, and technical jobs compared to the national average.

#### IV. SOCIO-ECONOMIC IMPLICATIONS

The situation for the large numbers who are unemployed leads to serious consequences. A great majority of those native people unemployed are dependent on assistance from government, and many are near the poverty line in their standard of living. In 1969, 80 per cent of Indian families were below the poverty line (Frideres, 1974:24). Low income has a dramatic effect on the quality of life that a family can have. Just meeting the basic needs of food, clothing, and shelter is in many cases a great struggle.

In 1977, there was a backlog housing need of 11,000 units, 24 per cent of existing houses needed major repairs, and 3 per cent needed to be replaced.<sup>14</sup> The quality of housing was also inferior, lasting only 15 years on average compared to a national average of 35 years. Indian homes were also overcrowded (18.8 per cent of on-reserve homes had two or more families, affecting 40 per cent of Indian families).<sup>15</sup> Indian homes also lack services: in 1977 an average of 10 per cent of homes lacked electricity, 55 per cent lacked sewage systems, and 50 per cent lacked running water. The Canadian averages were around three per cent for these categories. (The situation for Indians is much worse in rural and remote locations, where 71 per cent of all reserves are located.)

An unusually high rate of fires and fire deaths can be attributed to lower-quality housing. Factors such as sub-standard heating systems, crowded conditions, and scarcity of fire protection services on reserves<sup>16</sup> also contribute to the high rate of fire deaths (28/100,000 for Indians compared to 4/100,000 for non-Indians). The poor quality of housing, crowding, and lack of services also contribute to high respiratory, digestive, and infective diseases among Indians.<sup>17</sup>

The low economic situation of native people in Canada also affects many other aspects of their day-to-day lives, one of the most significant being health.<sup>18</sup>

Life expectancy is generally considered a broad measure of the health of a people. The death rate for Indian people is six times the national average (Siggner, 1982) and the infant mortality rates are more than twice the national average (DIAND, 1980). The life expectancy at one year of age is 63.4 years for Indians and 72.8 for the national population. *Indian Conditions* states that the lower life expectancy rate for Indians may be due to the high infant and youth mortality rates. It also states that a large portion of post-neonatal (one month to one year) deaths in the Indian population is attributed to "respiratory ailments, infections, and parasitic diseases reflecting poor housing, lack of sewage disposal, potable water as well as poorer access to medical facilities" (probably due to the remote location of a majority of reserves). Among youth (ages 5-14), violent deaths (by accidents, poisoning, and drowning) account for more than one-third of deaths, compared to nine per cent for Canada.

Among the 15-44 age group, violent deaths are four to five times the national average. The suicide rate among Indians is three times the national average; suicides account for 35 per cent of the accidental deaths in the 15-24 age group and 21 per cent in the 25-34 age group.

Indians use hospital facilities 2 to 2.5 times more than the average Canadian. *Indian Conditions* also states that 50 to 60 per cent of all Indian illnesses and deaths are alcohol related. In 1975 the alcoholism rate for on-reserve Indians in Saskatchewan was five times the national rate. The rate for on-reserve Indians was two to three times that of off-reserve Indians (based on hospital admissions for alcoholic psychosis). Since 2.3 per cent or \$5,539,000 of DIAND social support expenditures went toward dealing with alcoholism (*Indian Conditions*, 117) the problem is clearly evident across Canada.

One result of the high alcoholism rate among Indians and other native people (as reflected in a 1981 Ontario study), has been that Indians have come into conflict with Canadian laws. A 1977 paper on socio-economic development by the National Indian Brotherhood states that it is believed that almost all Indian criminality involves alcohol. The paper states that a majority of arrests in the western provinces are for liquor and vehicle law infractions, and that in Saskatchewan (1970-71) 75 per cent of the liquor infractions were committed by Indians.

In fact the native population is highly overrepresented in prison compared to the national average. In 1979 native people represented 9.3 per cent of the penitentiary populations and 6.7 per cent of the federal inmate population, even though they only represented 1.3 per cent of the Canadian population.<sup>20</sup> The Canadian average was 3.5 per cent in prison. Native people are also overrepresented in violent crimes as compared to the non-native population. They are significantly overrepresented in manslaughter compared to the non-native population. There is also a much higher rate of juvenile delinquency among Indian people (three times the national average), and fewer native people are likely to be let off with a warning (only 15 per cent, compared to 46 per cent of non-native juvenile delinquents). Lastly, the other important crime among native people is the inability to pay fines. The NIB paper stated that one-third of all Indians in jail in British Columbia and Saskatchewan in 1970/71 were there because of non-payment of fines.<sup>21</sup>

What these figures point to is a high incidence of conflict in the values of the native and non-native societies. The juvenile delinquency points to a breakdown in the family, and natives in jail for non-payment of fines indicates that many native people are in jail because of their socio-economic situation.

Other related social statistics indicate that family breakdown is occurring among native people. The number of children in care among native people was five times the national average (DIAND, 1979). From 1962 to 1978 adoptions out of native families increased 500 per cent, with a large portion of the adopted children going to non-Indian families. The divorce rate among Indian people has also been on the increase, and the rate of births outside marriage is more than four times the national rate.<sup>22</sup>

## V. THE COST OF THE PROBLEM

The employment situation of native people is only symptomatic of the larger problems that Indian people must deal with on a day-to-day basis. This situation has high costs associated with it in terms of the loss of productivity of native members of the population. The cost to treat the symptoms and the human costs are, of course, immeasurable.

In terms of unemployment, the costs are associated with a loss of potential income and productivity (had those individuals been working). There is also the cost of the created dependency on social assistance as a direct result. In 1974, 55 per cent of the Indian population was using social assistance, compared to 6 per cent of the non-Indian population in Canada. In 1970/71, the social support expenditures of all federal programs for Indians amounted to \$84,267,000, of which 41.1 per cent went toward direct social assistance and 43.4 per cent went to cover medical service. By 1978/79 the total amount expended was \$242,158,000. Social assistance accounted for 43.0 per cent and medical services accounted for 38.8 per cent of the total. Other expenditures included childcare (13.9 and 10.2 per cent, respectively, for 1970/71 and 1978/79); other social services (adult care, welfare aids; 1.3 and 4.1 per cent, respectively); treatment for alcoholism (.2 and 2.3 per cent, respectively); legal services and native justice (.7 per cent for 1978/79); and recreation (.1 and .9 per cent, respectively).

The cost of medical and in-hospital patient care for Indians in 1975 was \$630 per person, compared to \$250 for the average Canadian (DIAND, 1980).

The total cost to treat these same areas now exceeds \$1 billion annually (NIBA, 1982:9) and is expected to exceed \$2 billion by 1986 (NIB, 1981). It is important to note that even at these costs the quality of social services to Indians is much lower than for that of the non-Indian population, and that many services available to municipal residents are not available to Indian communities (DIAND, 1980:28).

There are also costs associated with keeping Indian people in jail, with loss of productivity while in jail, with loss of potential income while in hospital, and with the loss of dollars invested on students who do not complete school and end up unemployed. The cycle continues and perpetuates itself. Without education it is difficult to find jobs, and there just are no jobs on reserves.

## VI. THE CAUSES

The most important question is, why do these problems exist? To answer this question it is necessary to look at the history of the native people and their relationships with Euro-Canadian peoples and governments. Only in examining the history can we begin to understand the answers to this all-important question, and only in answering this question can we begin to deal with solutions.

### Cultural Intolerance and Misunderstanding

The Special Committee on the Disabled and Handicapped (in its follow-up report on the native population) makes a very astute and currently relevant observation that to a large degree sums up the main reason for many of the problems encountered by native people today.



*Perhaps the key problem which exists in the relationship between Native people and other Canadians has been the inability of Native people to explain and the inability of non-Native people to comprehend the nature, scope and importance of Native cultures.... The gap in communication is the result of two totally different ways of looking at life, both of which are incredibly rich in unconscious values, customs and patterns of sentiment, thought, language and action. Native and non-Native peoples in Canada have lived for three centuries in an uneasy relationship based on two totally different ways of organizing and strengthening human relationships, two different ways of proving one's individual worth, two different ways of identifying and solving problems which affect a whole community and two totally different ways of reaching group decisions. (SCDH, 1981:9)*

The greatest and single most cogent reason for the current situation of native people in Canada has been this inability to understand and accept the value and legitimacy of other peoples and cultures in Canada. In essence this is racism. Canada's history and systems of governance and behaviour have institutionalized this racism into current reality. No other cultures or institutions can be tolerated.

#### Historical Roots

The earliest explorers to North America simply did not consider the inhabitants they met there to be people. Instead they were called savages, "sometimes defined as demons and sometimes defined as beasts in the shape of men" (Jennings, 1975:15). The earliest rationalizations for colonialism in North America were based on alleged religious and (later) moral (racial) superiority. Quite simply from day one until today there has been a total lack of understanding and acceptance of the indigenous peoples of North America as legitimate peoples with a right to survive as a people, called by the United Nations the "right to self-determination".

Christopher Columbus started the long history of misunderstanding by calling the indigenous peoples he came in contact with "Indians", assuming they were all one race of people. Yet at the time there were more than 100 nations of indigenous people in the western hemisphere with a population estimated at 90 to 112 million people, of which 10 to 12 million lived north of the Rio Grande (Jennings, 30).

The history of the relationships between indigenous governments and European governments is a source of contention and lies at the base of Canada's current Indian policies and attitudes. A vast majority of the history books (written by non-Indians) state that (at some point) Indian nations lost their sovereignty and became citizens of the now dominant government. Yet Indian peoples today state that this is not the case and many reiterated their claims to sovereignty on Canadian national television during the March, 1983, First Ministers' Conference.

#### Two Histories

An Indian view of history (mostly from an oral tradition) is radically different from the Euro-Canadian view. For example, while it is clear that the earliest relationships between Europeans and indigenous peoples were based on economics (fur trade) and friendship (military alliances), the history books

speak of the relationships as being primarily based on land treaties, whereby the Indian nations gave up vast areas of land and their sovereignty in exchange for presents, annuities, and reservations. An Indian view of the treaty period is more consistent with Indian statements today, i.e., that European governments and Indian governments were equals and entered into relationships as such. There was never any notion in signing a treaty that a loss of sovereignty was possible, although this is steadfastly maintained by the Canadian government.<sup>21</sup>

Indigenous governments did exist with all the attributes now used to define nationhood. They had defined territories, a permanent population, an operating government, and the ability to enter into relations with other nations.<sup>24</sup> European governments did recognize them as governments and dealt with them with all the "protocol of diplomacy reserved for sovereign states".<sup>25</sup> Despite this fact both parties had different understandings of the nature of their treaties and relationships based on different preconceptions and expectations.

#### Nation to Nation

What the European governments were never able to understand is that they were dealing with peoples who had governments, institutions, religions, and behavioural norms based on totally different values. For example, the manner in which a vast segment of land was acquired in North America (through treaties) could be questioned today when we are aware that the understandings as to the nature of the treaty transactions were not mutually shared. Indians thought it ludicrous that Europeans had a tradition of selling land. To them it was like trying to sell air, or water flowing in a river. Yet even in entering into treaties the Indian nations could only have passed what they then understood their rights in land were — that is, a right to hunt and fish, maintain a residence, and cultivate a garden (Jennings, 130).

In terms of contemporary Indian-government political relationships, many Indian governments still see themselves as equals to the Canadian government. They have no evidence that anything has happened to change this. Even by current international standards there is no evidence of a loss of sovereignty through a "just war" or "voluntary subjection" by the indigenous people. As far as many indigenous nations are concerned, their relationship to Canada is more closely likened to that of a protected state under international law.<sup>26</sup>

Many Indian nations feel that Canada assumed the obligations of its predecessor, the British Crown, in 1867 when it was formed by the British North America Act. This idea was in fact supported by a British court in 1981, which heard arguments from the Chiefs of Alberta that the Crown had outstanding obligations to the Indian nations in Canada and therefore could not patriate the Canadian Constitution. The court in essence said that Canada had assumed all of its obligations through the 1867 British North America Act and/or the Statutes of Westminster.<sup>27</sup>

In any case, many Indian positions state that Canada could only have acquired from the Crown what it was the Crown's to give — that is, treaty obligations and a recognized equal status. Section 91(24) of the BNA Act was simply a transfer of such obligations from the Crown to Canada.

In no way could the Crown have passed any notion of sovereignty over Indian people. Canada maintains the opposite.<sup>28</sup>

The Indian Acts that were passed after Confederation were to an Indian historian consistent with a protectorate status, in that they were meant for Canadian citizens<sup>29</sup> in prescribing how they were to relate to Indian people and lands. The largest aspect of the earliest Indian Acts is that they dealt primarily with protection of Indian lands<sup>30</sup>. These early Acts were entirely consistent with the Royal Proclamation of 1763 which prescribed the manner in which Indian land could be dealt with—that is, through the sovereign of Britain and only with the Chiefs of the Indian nations. The Royal Proclamation is held by many Indian people to be one of the earliest British laws affirming Indian sovereignty and aboriginal rights.

By Confederation, the treaties had relinquished part of the aboriginal territory of the Indian nations and had created permanent settlements (reserves) and a permanent income (annual presents and cash annuities)<sup>31</sup> for many Indian nations. The fact that Indian nations' tribal economics suffered and changed dramatically since contact meant that they could no longer depend totally on the natural environment and traditional lifestyle to support all their members. At the same time, their "great father" (the British Crown, now Canada) would take care of them, as they had been promised in their treaties.

The money made from sales of land by the Indian tribes was held in trust by the British Crown until 1860, when it was transferred to the United Provinces of Upper and Lower Canada and then held in trust by Canada. The Indian Department was responsible for expending the funds on behalf of those Indian groups for which it held monies. Thus the practice of expending Indian monies on Indians originated in the trusteeship role of the Crown and later was transferred to the Canadian government. These monies were in every sense of the word "Indian" monies because they were trust funds, and DIAND took on its guardian role on behalf of Indians.<sup>32</sup> The fact that the Canadian government was taking care of them and protecting their land was entirely consistent (from an Indian point of view) with their alliance and protected relationships established during the early treaty period. The fact that they were pretty well left alone on their land was further evidence that their treaties were still being respected.

#### Government Paternalism called "Policy"

From a Canadian government point of view, Indian people were still considered "uncivilized children" in need of being taken care of. Their policies sought to gradually civilize the Indian population by allowing them to learn at their own pace away from the "evils of unscrupulous land speculators and whiskey salesmen". The churches were brought in to civilize and educate the Indian people. Churches were given Indian land to encourage this.

The concept of enfranchisement appeared at this time. Once the government had established its policy to protect Indian land, it was then necessary to establish who could live there. The earliest definitions for government purposes included anyone who considered himself/herself Indian, was reputed to be Indian, who had one Indian parent, lived

among the Indians, or was adopted by the Indians. This definition basically said that anyone the Indian nations considered to be Indian was Indian, which is quite natural and, from an Indian point of view, the way it had always been.

Later the idea that blood Indians could lose their status as Indians was introduced. It appeared first in the 1869 Indian Act and applied to Indian women who married non-Indian men. This enactment was both sexist and racist and was done to ensure that no non-Indian man could gain title to Indian land (it being assumed that Indian land passed along the male line, as was the tradition in Canada). Again there was no appreciation or recognition that many Indian cultures were matrilineal (i.e., Iroquois—Haudenoshonee). An Indian woman lost her status upon marrying a non-Indian because she was considered to have elevated herself and would then be taken care of by a Canadian man, and thus no longer in need of being considered Indian.

Indian people also lost their status by being out of the country for more than five years and for obtaining a degree from a university.<sup>33</sup>

The government's policies also sought to discredit and replace traditional forms of government with elected municipal-style governments. The 1869 Act for the Gradual Enfranchisement of Indians and the Better Management of Indian Affairs (Can. Stat. c VI (1869) s. 10) provided for elections by vote and three-year terms. Yet at the same time the Crown officers dealt with the traditional government when it was to their advantage. For example, the traditional chiefs were still dealt with for land surrenders and treaties, such as the treaties between 1871 and 1923, formally called the numbered treaties.

In almost all aspects the government sought and eventually established control over Indian people's lives. The way it did this was through creating economic dependence. I present for debate the view that the Indian department was allowed by Indian governments to tamper with Indian government because the Canadian government was required to ensure that the Crown fulfilled its obligations of protection and payment to Indians of monies owing as a result of treaties. Since Canada held these monies in trust in Canadian banks it needed a relationship with Indian governments. Eventually the Canadian government control became all-pervasive.

#### Colonialism Today

Today the Minister of Indian Affairs is totally powerful according to the Indian Act. He can determine who is or is not an Indian, s.109, s.4(2); he may authorize reserve land to be used in ways that he deems appropriate, s.18,19; he must approve land holdings by members, s.20; he may authorize anyone to reside there s.28; all authority for matters testamentary (relating to wills and estates) resides with the Minister, including declaring wills null and void, s.46(1); he may dispose of band resources without a surrender, s.58(4); he is responsible for Indian monies, s.61; band council by-laws must be approved by him, s.82(2); he can force an Indian population to have an elected government, s.74(1). The minister has the power under the Act to make Indian children go to school until the age of 18, s.116(2); and to a school of his choice, s.118. Perhaps the greatest power extended under the Act is that the Minister can enfranchise a whole band and all its members, s.112. What is most subversive and insidious

about the Act is that it has never received Indian governments' sanction.

### **Distinct Indian Nations**

I must at this point add a note of clarification. Although I have used the term Indian to talk about the situation of all indigenous governments and peoples in Canada, it is in no way meant to diminish or deny their individual identities or rights. Each Indian or indigenous (and I use the terms interchangeably) nation has its own distinct relationships with the Crown and consequently with Canada (although some could state that the Crown could not pass on treaty obligations—consistent with the Vienna Convention or the Law of Treaties). Many have no relationship (as witnessed by land claims and the absence of treaties) and consequently are attempting to establish a relationship with Canada, most recently through the First Ministers' Constitutional (s. 37) Conference. To attempt to cover each nation's relationship would take many more volumes than could perhaps be written in one lifetime. Instead I have attempted to consolidate similarities between the Indian nations and their relationships.

### **Institutional Discrimination**

What I have attempted to show in the preceding paragraphs was that the perceptions of the relationships between Indian and Canadian governments differed radically and that the relationship evolved into one of paternalism (ward and guardian), which automatically defeated any chance of a respect for Indian cultures and societies on the part of the Canadian government. This one-sided approach was (and is) saying simply that there is room for only one culture in Canada. With systems set up to reinforce and perpetuate that culture, all other cultures and systems fall by the wayside.

This is an important point, because Indian people did not immigrate to Canada and agree to become Canadians. Indians were here and it was just assumed that because Canada grew up around them they were Canadians. This is still the case, even though Indian cultures are radically different from Canadian culture, and I am not speaking of material goods or technology. It is possible to adopt technology and maintain one's identity. The problem is partly one of stereotyping, whereby Indian peoples are seen to be less Indian or non-Indian because they have adopted Western technology.

## **VII. ECONOMIC HISTORY**

The economic history of Indian peoples again is wide and varied, but an attempt will be made at consolidating its similarities.

Traditionally or historically, all indigenous peoples have lived by means of tribal economic systems. Such systems deal mainly with sustenance activities (providing for food, clothing, shelter); because of their dependence on nature or the environment, indigenous peoples needed to have an intimate understanding of and affinity with their environment. Many creation stories deal with a time when man and animals talked together and could intermarry and change into one another. Indigenous peoples saw themselves as an equal part of the circle of life (or the ecosystem, as it would now be called) and understood that no one being could have dominance over another. The major Western religions teach that man was created to have dominion over the animals. When Indians hunted they believed that their animal brothers were

actually giving up their life voluntarily so that man could live. This being so, it was necessary to show respect through a ceremony on behalf of the animal brothers. Today one still sees the first salmon taken on the West Coast returned to the water in a traditional ceremony. Indian people were aware that the creator made all things and therefore all his creation should be shown respect and could be worshipped. Western missionaries considered this idolatry and paganism. Out of the Indians' perception of how things worked in the universe grew their social and governmental systems. The best Indian government was almost non-government. Indian law has been called descriptive law, while Western man's laws have been called prescriptive. What this means is that Indian governments didn't pass laws dictating or prescribing to their people how they should behave (as Western governments did), but rather where there was agreement on how individual families and nations would behave the Indian governments simply recorded such agreement.

This is still the way in which traditional councils (as opposed to elected councils) operate today among the Haudenoshonee (Iroquois) Confederacy. Individuals in the Indian society had strict moral and behavioural codes, which they learned from birth. As a result, there was no need for police to enforce laws. Every individual and every family was a policeperson. Perhaps the greatest punishment to any individual among many Indian societies was that of banishment. The system of decision-making in government was also radically different. The Indian governments used a consensual style, ensuring as much as possible agreement and understanding of issues being discussed. Consensus sometimes took a great deal of time, and where decisions could not be arrived at an issue was put off, sometimes indefinitely, because no issue was important enough to create animosity among the council.

The governments or councils themselves were made up of heads of families or clans (large extended families). Perhaps in this way natural laws were recognized, since families have a natural disposition to watch out for the better interest of family members. Because of this as well no family was unrepresented in government. When Canada introduced and in many cases imposed elected governments, it created a massive cultural conflict that still exists today. Firstly, Indian people knew that the way to make decisions was by consensus but that when you vote you have "winners" and "losers". This creates animosity among council members. Secondly, because Indian governments use elective systems this ensures that certain families will not be represented in government. Today band council elections still tend to go along family lines. There are many other examples of how Indian culture still permeates Indian society, even though the Canadian government imposes its systems and laws. Indian culture is still very much alive. The central point is that there is a great difference between the Indian and Canadian cultures and that it still exists today.

Historically there was never any question about employment among native people. Everyone contributed to the common good of the whole society for its survival. As time went by and through contact with Europeans, the Indian technology changed and adapted. Many Indians continued to rely on the environment for their survival, but Western cloth and tools replaced native-made articles. To acquire



them, repair them, and replace them meant establishing trade with their producers. The earliest barter items were furs and food. Later, as the fur trade diminished and the European reliance on Indian goods and technology dwindled, it became necessary for Indian people to enter into the market (wage) economy that had developed.

With most Indian peoples in permanent settlements, their environment could only support a limited number of families on the reserve. Others had to "find work" in non-Indian towns and villages. Since Indian settlements (reserves) were mostly isolated (away from urban centres) by location and legislation, this task proved difficult. Those who did get jobs had to be able to speak English (which many Indians had acquired by attending residential, religious, and federal schools); and they were employed as labourers in primary industry jobs, such as logging, fishing and mining.

For the most part, Indians had been left alone on reserves to get by as best they could. Those individuals who went to school were taught trades of the day, such as animal husbandry or horticulture, but the general economic situation on reserves evolved through circumstance rather than plan. The Indian Affairs Department raised money and created jobs for some reserves by logging portions of the reserve and selling the timber, but for many Indian people the choice was either hunting, fishing, and trapping or finding work in the towns. With little or no education or training, the best that could be hoped for was seasonal work, but in essence what we are talking about for most Indian communities was poverty compared to the national standard.

Indian communities were quite simply passed by from the early 1900s until the 1960s. "Indian affairs" were simply not a high priority of the government, and even lower on the scale was economic and employment development for Indians. Canada was just too busy worrying about Canada's economic future and Canadian employment to really bother with Indian economic development. There seemed to be no thought that Indian society could be self-supporting and successful outside the dominant social and economic structures.<sup>14</sup>

### VIII. GOVERNMENT POLICY: ASSIMILATION

The government's policy of separation and assimilation of Indians into the Canadian mainstream continued until the 1960s, when the government took a critical look at the Indian condition in Canada through the Hawthorn-Tremblay Report of 1966-67.<sup>15</sup> The Hawthorn Report stated the dismal circumstances in which native people found themselves, with 80 per cent considered below the poverty line, the average duration of employment among natives being 4.8 months per year, and only 28 per cent of the native population being employed longer than nine months of the year.

Weaver (1981) states that the government (DIAND) experimented with community development projects and relocation programs as a result of the report, but both of these failed. The community development projects failed because when Indian communities became organized they pressed the local Indian agents to give up their control. The agents resented their loss of authority and put pressure on the department to cancel the projects. The relocation projects failed because they "failed to help adults make the difficult adjustment to off-reserve life". Weaver states that DIAND was simply

unable to use its resources to reduce the poverty and patronage of Indians. The net effect of the period left the Indian problem unchanged and more highly visible (as a consequence of the Hawthorn Report). The dilemma the department faced, according to Weaver, was how to protect Indian interests while at the same time integrating Indians into mainstream society on an equal basis with other citizens. If the policy was too protective, integration was jeopardized, and if the legal and administrative protections were minimized, integration could be enhanced but possibly at the cost of the loss of Indians' special rights and the security of Indian lands.<sup>16</sup>

The fact was that in 1968 Indians were still the poorest in Canada, deprived of social services, dying of diseases that were preventable, and still had the poorest housing conditions (Weaver, 1981: 47).

Something had to be done. The government's response was the White Paper of 1969. It proposed to bring equality to Indian people by doing away with Indians and their special rights.<sup>17</sup> The process would be to: (i) repeal the Indian Act and give land title to individual Indians; (ii) phase out the Department of Indian Affairs and have the provinces extend all their services to Indians; (iii) make substantial funds available for economic development; and (iv) create an Indian claims commission. In short, the solution to the Indian problem was to get rid of Indians.

Weaver's analysis of this period is quite accurate in my view. The White Paper was a response to white liberal demands, thus accepting their "public" definition that the "Indian problem was one of discrimination". The analysis is worth quoting at length:

*The simplistic view of ethnic minority survival led some policy makers to believe that the past could be closed off in some fashion as to re-orient the Indian world view to the future.*

*...the future moreover was envisioned largely as a white world, not one that recognized or accommodated Indian cultural values. Implicit in this thinking was a view that Indian emphasis on special rights was basically a reaction to their being denied equal status; in essence a defense mechanism based on their exclusion. Indians were viewed as poor aspiring whites who preferred what they did not have. To the extent that Indian-cultural systems were recognized, they were cast in the past tense and viewed as outmoded. The importance of these cultural systems to Indians, no matter how acculturated, was simply not understood. In short Indians were viewed in terms of their socio-economic class structure.... (p. 196)*

Thus when the government finally took stock of the Indian situation it found itself with a "public eyesore" and came up with a totally inappropriate solution because it had failed to identify the real problem. This is perhaps totally predictable, because the Canadian government has never really understood indigenous cultures. The 1969 White Paper is a demonstration of that fact.

Indian people across Canada vehemently rejected the White Paper and presented the government with their own view of the nature of their rights in "Citizens Plus" or the "Red Paper", produced by the Indian Chiefs of Alberta. With

other Indian groups and papers joining in the rejection, the White Paper was eventually withdrawn.<sup>38</sup>

One of the positive aspects of the 1969 White Paper is that it forced the Indian leadership in Canada to reawaken and take another look at the nature of native rights and relationship to Canada. If Canada was so confused as to this relationship that it could come up with a paper like the White Paper, then it was time to restate and redefine those rights and relationships to Canada. This reawakened nationalism eventually led to the formation of the present-day native organizations. Another result of the period was a commitment by the government to fund native organizations to do research on the Indian Act and land claims. The results of this research were brought front and centre in 1980 when the government announced its intention to patriate its constitution. Indian organizations on behalf of Indian nations restated that the Indian nations still exist and retain their sovereignty. They demanded rights of self-determination and other human rights recognized by international forums.<sup>39</sup>

The 1969 White Paper and the constitutional patriation struggle were really two blessings in disguise for native people because they were catalysts for native action to restate their true nationalities, to tell Canada that its assumptions were wrong and that Indian people were not Canadian citizens.

It is for these reasons that native cries of sovereignty, nationhood, and self-determination have emerged in the last decade and have caught many people, including those in government, off guard.

Since the Canadian government has never really understood native people it stands to reason that their programs have failed to deal with the problems of native people. The Department of Indian Affairs deals only with symptoms of the problems.<sup>40</sup>

DIAND expenditures are directed mainly at providing Indian governments with the capacity to supply basic needs for their communities. The other major portion of the expenditures goes toward dealing with the effects of their poverty.

The primary determinant of Indian poverty is lack of economic opportunity in their communities.<sup>41</sup> The centre of the native employment problem exists in the communities, and this is where the effort must be put to solve the problem.

DIAND has failed to recognize this, and current funding policies prohibit the department from doing very much about the problem. The National Indian Brotherhood stated to the Parliamentary Task Force on Employment Opportunities for the '80s that only five per cent of federal and provincial expenditures could be classified as truly developmental.<sup>42</sup> Most of the funds that an Indian band gets to operate government programs are non-discretionary and therefore must be spent on the area for which they were allocated. Even if a band were to do an economic development plan, there is no capital to carry out such a plan and develop the communities.

The major DIAND initiative created to deal with the lack of economic development on reserves is the Indian economic development loan fund. It is essentially a fund to provide loans and grants to individuals and bands to stimulate Indian economic activity and employment on reserves. This initiative has also proved to be a failure. As of September 30, 1981,

3,201 loans, with a cash value of \$54.9 million, were outstanding, made up of a principal of \$43.8 million and interest arrears of \$11.1 million. Of this \$22.7 million of the principal and \$8.9 million of the interest were in arrears for a period in excess of two years. In addition, 29 per cent of the outstanding loans were owed by enterprises that had ceased operation.<sup>43</sup>

## IX. ECONOMIC UNDERDEVELOPMENT—WHY?

### Inability to Compete

Indian reserves are underdeveloped for a variety of complex reasons, but the major reasons deal with an inability to compete within existing economic institutions and markets.

The main economic base of most reserve communities has been hunting, fishing, trapping, logging, and mining.<sup>44</sup> This is due in part to their remote locations, where primary resources tend to be located. It is also due to the fact that these activities are consistent with traditional economic activities. NIB (1977) states that apart from economic activities that utilize local resources or provide services to the local area, there is limited opportunity for other types of economic development in many Indian communities. For reserves with low income and high unemployment there are few opportunities for commercial services. More often than not non-Indian communities located near reserves provide the services.

The lack of skills required in most modern capital-intensive industries is also a major obstacle to economic development for Indian people, assuming that locational disadvantages can be overcome.<sup>45</sup> (Indian communities are generally so removed from urban and market centres that economic development is stifled because of added expenses.) There are also institutional factors inhibiting economic development for Indian communities. They are found inherent in the functioning of the economic and corporate systems of the industrialized Western nations.<sup>46</sup> NIB (1977) summarizes these functions:

*The modern economic system is now dominated by large multinational corporations. One aspect of this function is the development of a legal and institutional entity of limited liability that can exercise property rights, bear risk, and thereby mobilize capital, technology and other needed resources. Another function, linked to the first, is the social and economic authority of the corporation, utilized in directing and regulating the activity of the people (human resources) participating in the enterprise. The management role of the corporation extends to administering the allocation of these resources in order to achieve the goals of the organization. Finally there are trading functions of the firm which bear on the relative prices the firm must pay in order to produce, including technology, capital, transportation, raw materials, human resources, access to markets and information about all these resources.*

Indian people and groups generally lack the access to capital markets of large corporations. Most Indian people are unable to bear risk because of their poverty and the legal definition that has been applied to them through the Indian Act. The legal status of band councils is unclear (according to Justice Department lawyers). Individuals are inhibited from forming corporations because such corporations are taxable.

Reserve lands can't be used for collateral because they are non-seizable under the Indian Act. This automatically inhibits capital access through normal loan agencies. In addition, the personal property of Indians is non-seizable on reserves, thus eliminating the use of such property as collateral.

In summary, their location, lack of infrastructure, and lack of human and institutional capital increase the risk of native enterprises, and if they fail, the fixed assets (buildings) are not easily disposed of. As a result, financial institutions are reluctant to finance Indian enterprises.<sup>47</sup>

There are also problems in human resources terms. To be successful on the labour market requires skills and education that most Indians lack, as well as a willingness to conform to the rigid personnel systems developed in a highly urbanized industrialized setting. The lack of skills and employment experience and the rejection of some non-Indian attitudes and values not only reduce the ability of many Indians to cope with the labour market, but affect the suitability of conventional management roles for Indian people. The absence of the technical and managerial capabilities and the conflict of the authoritarian role of the manager with Indian lifestyles and attitudes may inhibit the development of autonomous Indian economic institutions.<sup>48</sup>

There are also institutional barriers to access to markets, technology, and specialized technical services since many large corporations have tied franchises which control marketing and distribution, thereby assuring them a share of the market.<sup>49</sup>

The knowledge, evaluation, and development of appropriate technology is an important element in economic development. Indians generally lack the specialized technical resources of large corporations and the ownership and control of technology and production processes. Indians must also compete with the market research and advertising campaigns of large corporations.<sup>50</sup>

All of these factors militate against the successful operation of Indian economic development enterprises under current economic and institutional conditions.

## X. URBAN NATIVES

One of the consequences of lack of economic and employment opportunities in Indian communities is the "out migration" or "push factor" to the urban centres. McCaskill (1981) states that most studies of urban Indians in Canada have given the primary reason for migration as being economic gain or employment. The next significant reason was education. Other factors include lack of facilities on reserves, involving such things as housing, education, and medical care.<sup>51</sup>

There tends to be a greater percentage of non-status Indians and Metis peoples than of status Indians in the urban centres.<sup>52</sup> This is probably due to the fact that Metis and non-status Indians can't live on reserves, which are rural, and thus tend to migrate to urban centres, where chances of employment are greater.

The urban native population tends to be young,<sup>53</sup> with the most mobile group being in the 25-29 age group for males and the 20-24 age group for females. Less than 10 per cent of urban Indians are over 50 years of age. Frideres (1974) states that the urban native population tends to be more educated than their on-reserve counterparts, and this is supported by Maidman (1981) but contrary to McCaskill's

(1981) findings. The largest percentage of households tends also to be single parent (single, divorce, or widowed).<sup>54</sup>

Although seeking employment is the main reason for moving into the cities, for most native people unemployment is still a major problem, as mentioned by McCaskill (1981), Maidman (1981), and NIB (1977). McCaskill states that this cycle of high unemployment, low income, and heavy reliance on social assistance implies that a stable economic existence is beyond the reach of most urban migrants. McCaskill and Maidman attribute the high levels of unemployment to low education levels (compared to national population), cultural differences, and discrimination.<sup>55</sup>

It is also clear that most native migrants experience serious obstacles in adjusting to the urban setting, which is also affected by the above factors. Frideres (1974) states that 80 per cent of status Indians return to their reserves within five years. He explains that the adjustment difficulty is also affected by the type of reserve or community from which one migrates. Those migrating from isolated communities, which tend to have poorer access to the larger Canadian society, are more likely to have greater difficulty in adjusting than those from "transitional" communities which are more accessible. He states that migrants from isolated communities also have higher return rates.<sup>56</sup>

McCaskill states that urban adjustment cannot occur without economic stability, and that native people tend not to participate in the institutional structure of the urban society but tend to associate with other native peoples. He states that among status Indian migrants a kinship network is established within the urban centres and between urban centres and the reserves.<sup>57</sup> In short, assimilation is not occurring.

It would also appear that the relative socio-economic condition of urban natives is just slightly above their reserve counterparts, but that many of the same problems are being experienced.

## XI. ROOTS OF THE EMPLOYMENT PROBLEM: DISCRIMINATION

A distinction should be made between discrimination emanating from an evil intent and that of differential treatment, and they should probably be measured by consequence or effect. McDiarmid (1971) states:

*As long as there are separate groups with distinct cultural identities some bias is perhaps inevitable, conditioned as we all are by differing points of view, but there is no place in a healthy society for negative bias—the condemnation in either explicit or implicit terms of one group by another.*

It is with the first definition that I would like to deal. McDiarmid found implicit discrimination in Ontario textbooks in his 1971 study. As mentioned earlier in the urban native discussion, discrimination was identified as a factor contributing to employment problems and urban adjustment. One problem with such studies is that the statements are based on the "felt" impressions of native respondents in terms of going for jobs, housing, or goods and services, and as such are lacking in hard data. Short of setting up a "sting" to catch racist employers, landlords, etc., discrimination is hard to prove. Yet as members of visible minority ethnic groups we have all "felt" it.



A report by the Canadian Human Rights Commission lists 88 complaints by native people from March 1, 1978, to August 31, 1983, under two sections of the Canadian Human Rights Act. Under section 5 (denial of goods, services, facilities, or accommodation) there were 26 complaints, and under section 7 (employment matters) 62 complaints. Of the 88 complaints, 79 were based on the grounds of race, five on the grounds of sex, three on the grounds of family status, and one on religious grounds. In terms of disposition of complaints, 52 were dismissed, 14 were settled, 17 were opened, and five were disciplined.<sup>58</sup>

Berry *et al.* (1977) conducted a study on multiculturalism and ethnic attitudes in Canada.<sup>59</sup> The study was based on two questions: (1) do Canadians view cultural diversity as a valuable resource?, and (2) is confidence in one's own identity a prerequisite for accepting others? (This is known as the "multicultural assumption", with its opposite being the "ethnocentric assumption".) Stated simply, positive self or own group attitudes are generally associated with negative attitudes towards other groups; if borne out, then the development of ethnic tolerance is unlikely to occur with the enhancement of individual cultural identities.

The study compared the attitudes of the two "charter groups", English and French Canadians, with the attitudes of German, Chinese, Ukrainian, Jewish, and Italian Canadians in various regions of the country towards immigration, specific ethnic groups, and multiculturalism. The study's conclusions are quoted:

...a certain level of covert concern and reluctance to accept ethnic diversity was also uncovered. Although overt racism was low, race was shown to be an important dimension for categorizing people and racially different groups appeared at the bottom of the perceived ethnic group hierarchy.<sup>60</sup>

In respect of native people the study concluded:

As a group unlike the two charter groups or those of other ethnic background, attitudes toward native peoples are an important element in understanding a multicultural society. First, Native peoples were viewed as relatively "similar to themselves" by most respondents, but second, they were placed at the bottom of the evaluation scale.

And in the structural analysis of attitudes, Canadian Indians seem to occupy a position which was supporting neither the ethno-centricism hypothesis nor the multicultural assumption.

The evidence suggested that Native peoples occupy a special position in the attitudes of Canadians: this position may best be characterized by the term marginal. That is there seems to be some recognition of their special status as indigenous people, but this is insufficient to create a set of positive attitudes towards them.<sup>61</sup>

As a note of interest, respondents in the prairie provinces were least favourable in their evaluation of native people, followed by respondents in British Columbia, Ontario, and the Atlantic provinces.<sup>62</sup>

## XII. DISCRIMINATION IN LAW

I would next like to deal with the major Canadian legal cases dealing with discriminatory legislation pertaining to Indians, and then comment on this type of discrimination.

Most of the cases involving native people came about as a result of a conflict with the Canadian Bill of Rights, section 1(b) (the equality before the law section), and other legislation (usually the Indian Act).

The first case was *R. v. Drybones* (1970) 3 C.C.C. 355. The accused, an Indian, was charged with being intoxicated off a reserve, contrary to the Indian Act, which provided a minimum penalty. There were two objections raised: (1) Under the Territorial Liquor Ordinance, the accused would have been guilty of an offense but *not* subject to a minimum penalty, and (2) It was an offense for an Indian to be intoxicated in a public or private place while off the reserve.

The majority held that if the effect of the existing legislation is to create an offense punishable by law on account of race, the commission of which others are free to do, it results in inequality before the law within the meaning of the Canadian Bill of Rights. As such, Ritchie J. held section 94(b) of the Indian Act inoperative.

The second case is *A.G. Can. v. Lavell; Isaac et al. v. Bedard* (1973), 38 D.L.R. (3d) 481, 23 C.R.N.S. 197. The issue argued was alleged inequality before the law between Indian men and women as to the relinquishment of status by women who marry non-Indians, through which they are denied property and other rights, whereas the status of Indian men remains unchanged upon marriage to non-Indians.

Equality before the law was again examined by Ritchie J. He held that equality before the law meant equality of treatment in enforcement and application of the laws of Canada before the law enforcement authorities and the ordinary courts of the land. He preserved his reasoning in *Drybones* by distinguishing between the civil rights of Indians residing on the reserve (Lavell) and criminal legislation, whereby an offense was established for an Indian while off the reserve. The former was Parliament's plan for the regulation of internal domestic life and the latter was legislation exclusively concerned with the conduct of Indians off the reserve. The legislation, (section 12(1)(b)) of the Indian Act was upheld.

The next case is *A.G. Can et al. v. Canard et al.* (1975) 52 D.L.R. (3d) 548. This case deals with testamentary sections of the Indian Act. Mrs. Canard was denied the right to administer her late husband's estate because section 42(1) of the Indian Act gives "all jurisdiction and authority in relation to matters testamentary" to the Minister of Indian Affairs. The issue being internal, Ritchie J. distinguished between the administrative aspects of the Indian Act and its declaratory assertion of rights. He held that the discriminatory sections of the Act did not offset its benevolent nature of protection of Indians and therefore the special status accorded Indians under the BNA Act of 1867 was not to be taken away without express legislation.

A more recent case is *Regina v. B.* (1982) 66 C.C.C. (2d) 359. This case involves section 120(a) of the Indian Act and at issue is whether this section, in designating an Indian child who is expelled or suspended from school as a juvenile delinquent within the meaning of that Act, section 3, is inoperative

by reason of section 1(b) of the Canadian Bill of Rights and thereby provides for unequal treatment before the law.

Kirkland Prov. Ct. J. found that discrimination did exist between the treatment of the Indian child and the non-Indian child. He held that the discrimination was racial and substantive and not administrative or procedural. He consequently dismissed the charge and held section 120 of the Indian Act inoperative.

These decisions dealing with what Canada considers a class of its citizens are not, in and of themselves, a problem. The problem occurs when Canada presumes to have the jurisdiction over Indian people in its courts at the expense of Indian legal systems.

As expressed earlier, the BNA Act gave Canada (from an Indian perspective) only the authority and obligation to enforce the Crown's treaties with, and obligations to, the various Indian nations. Canada's legislative jurisdiction under section 91(24) of the Act was only in respect to enforcement of its treaty obligations to Indian nations at the exclusion of the provinces. The Crown could not grant what it did not have, which is legal jurisdiction over Indians as subjects or citizens.

In today's terms this challenges the basic tenets of Canadian law in respect of Indians. It is a radical proposition but one which must be dealt with.

If the indigenous people are indeed citizens of Canada, then there is no question that Canada must apply its human rights principles and laws to all citizens. It would then stand to reason that Indian people would only remain distinct with special rights until affirmative action laws and programs "ameliorated their conditions of disadvantage" as stated in section 15(2) of the Constitution Act (1982). The inclusion of section 35(1) recognizing and affirming aboriginal and treaty rights would thus be self-defeating from a Canadian government point of view, for it would only serve to perpetuate the separate and distinct (special) status.

From an Indian point of view<sup>63</sup> aboriginal rights include a recognition of the national rights and rights of self-determination consistent with international norms. The rights being demanded by Indians are basic human rights, rights based on principles that founded the United Nations for the protection and preservation of all peoples and for world peace.

Canada must first show where it received its jurisdiction over Indians according to accepted international human rights standards. The Indian Act is an act of the Parliament of Canada and has never been sanctioned by Indian governments. The court cases arose over a law that Canada made, and subsequently it is Canada that is being found guilty of discriminatory practices. The discrimination would not exist had Canada not passed the Indian Act. Even if it had existed, it would be argued that it was none of Canada's business to interfere with another nation's internal sovereignty. By applying Canadian law it is applying values and rules for behaviour to which Indian people have never consented. This is a form of institutional discrimination.

Indian societies, laws, norms, and values must be allowed to exist and apply to Indian people in Canada. Application of Canadian and provincial laws to Indians only perpetuates the problem.

From the discrimination found in employment as cited earlier in the Canadian Human Rights Commission study (1980), to the reluctance to accept ethnic diversity and the categorization of people based on race found in the multiculturalism study (1977), as well as the "felt" discrimination of respondents to an urban native study (Maidman 1981),<sup>64</sup> it is clear that both covert and overt racial discrimination are operating in Canada. These types of discrimination will always be a barrier to the progress of native people in Canada. Through education, over generations, it is hoped that much of this type of discrimination can be eliminated, but the more devastating discrimination to native people's long-term progress is the institutional discrimination that is occurring in Canada. It is the Canadian government's disallowance of native values, laws, and systems of government as well as native peoples' forced dependence on Canadian programs that is in reality hampering native progress.

Inequality is not necessarily discrimination. Indian people will always be unequal in Canada because they will always have different or special rights and freedoms, and these come to them not as Canadian citizens but as members of their indigenous nations, which are urgently trying to establish a lasting and meaningful relationship with Canada. Indian people want to progress from their poor socio-economic situation in Canada but not at the expense of their identity and special rights. A majority want development and progress consistent with their native values, systems, and aspirations.

### XIII. EDUCATION

Education is another major factor in the socio-economic situation of native people. Native people are (generally) not well-educated by Canadian standards. While the native enrolment in elementary school is almost equal to the national level, secondary native enrolment has been steadily declining since its peak in 1972-73. Native students finishing Grade 12 remain at less than 25 per cent of the national average.<sup>65</sup> Native university enrolment (percentage of population aged 18 to 24 years) is only half of the national average. These figures show a considerable improvement in Indian education from the early 1960s, when a quarter of the native population has no "formal" education and almost half had less than five years' education.<sup>66</sup> As well, through the 12-year elementary and secondary school cycle, the Indian dropout rate was 94 per cent.<sup>67</sup>

Two chief goals of education in the modern liberal society are socialization and preparation or training for work as a productive member of society. It is clear that both of these goals remain unattained in respect of Indians. The educational system in Canada was developed for the average, white, middle-class citizen and has proven to be irrelevant to native people's everyday life.<sup>68</sup> To some extent it even undermines life values in Indian communities.<sup>69</sup>

The roots of its failure can be seen in the educational history of native people in Canada.

Traditionally, Indian people educated their own people through oral and experiential teaching methods. The purpose also was to socialize the Indian child to give him the values and skills necessary to prepare him to become a productive member of society.

Later, after contact and the treaties, Indian bands became settled on permanent reserves. The Crown, in its attempts to

civilize them, sent in missionaries to establish schools among the Indians. Churches operating schools were given land, per capita grants, and operational and maintenance funds. Frideres (1974) states that Indian education until 1945 was education in isolation. The ideology was segregation for acculturation and civilization. The Indian people were to be protected from the evils of white society and many times separated from the "poor influence" of their home communities.<sup>70</sup> These denominational residential schools often removed Indian children from their communities for 10 and sometimes 12 months of the year. The Indian students were forced to work 10 to 12 hours per day in summer and then given a few hours of instruction in the three "R's" and "religious instruction". They were strictly forbidden to use their Indian languages under the threat of corporal punishment.<sup>71</sup> These residential schools continued until the late 1960s.

In the 1950s the government changed its policies from segregation to integration. Provincial curricula were introduced into federal schools (reserve and residential) and Indian students were encouraged to attend provincial schools (when in close proximity). This was arranged through cost-sharing agreements whereby the federal government agreed to pay the provincial school boards a tuition fee for each Indian student in the school, as well as contributing to the capital and operating costs of the schools.<sup>72</sup> The basic policy of government in the education of Indians has been assimilation.

Today there are still federal schools on reserves run largely by the Department of Indian Affairs and Northern Development and staffed by federal public servants. The Indian teaching staff in federal schools on reserves is only 25 to 30 per cent of the total teaching staff.<sup>73</sup> Today 49.8 per cent of Indians attend provincial schools; 28.2 per cent attend federal schools (DIAND-operated); 20.5 per cent attend federal band-operated schools<sup>74</sup>; and 1.5 per cent attend private schools.

Indian people are not succeeding in education in Canada because of many factors. To children entering the system it is an alien place where they are taught mostly by non-Indians and about subjects that have no relevance to them. The fact that 12 per cent of the Indian children entering school speak neither English nor French is also a strong barrier.<sup>75</sup>

Values being taught through teaching styles and imparted by teachers are also alien to many Indian children, and this causes conflicts with values at home.<sup>76</sup> Inferiority, alienation, rejection, hostility, depression, and frustration are some of the personal adjustment problems facing the Indian child when he enters integrated schools. Discrimination encountered in integrated schools is also a factor leading to a student's decision to leave.<sup>77</sup>

In summary, the education that Indian people are getting is largely irrelevant and alien to them. The educational system has simply not equipped them with the skills and knowledge to cope with an alien, urban and industrial society.<sup>78</sup> There is also the factor that the jobs they are being trained for do not exist in Indian communities. Indian students must make a critical decision about continuing their education. They can either choose to become educated and live off the reserve for most of the rest of their lives, or they can choose to stay with their families and communities and settle for a life of dependency.

For those who do get an education there are often complaints by parents and elders when they return to their communities that they have changed, that they have taken on too many of the negative values and behavior of the "white man". This is more of a factor for the isolated communities which still practice traditional subsistence activities (hunting, trapping, fishing, and gathering of wild rice) and where the non-Indian would have had less of an impact.

It is generally accepted in Canada that people with less education are less employable. With Indian people having such low education levels compared to the national level (in 1971, 64.8 per cent of Indians had less than a Grade 9 education compared to 33.5 per cent of Canadians), it is to be expected that their employment levels would also be the lowest. This leads to the dependency on support services and the plethora of other social ills.

This institutional discrimination in the educational system is a great barrier to Indian employment and socio-economic progress. As long as Indian values, cultures, needs, and priorities are ignored, the educational system will continue to be alien and irrelevant to Indian people. Again, this situation exists because of a lack of recognition and understanding on behalf of the Canadian government in Canada as to the legitimacy of Indian governments and societies. Indian communities and parents have little influence on the quality and content of the education their children receive. This is despite the fact that DIAND contributes millions of dollars annually to provincial school boards. Yet the curriculum remains largely one designed by and for non-Indians. This situation must change if progress is to be made.

#### XIV. GOVERNMENT PROGRAMS

Slavik and Munroe *et al.* (1981)<sup>79</sup> state that there are 10 federal departments involved in varying degrees with Indian socio-economic development. CEIC (1981)<sup>80</sup> lists eight main federal departments or agencies providing programs or services to native people. The two lists include CEIC, DIAND, Ministry of the Solicitor General, the Public Service of Canada, DREE, Health and Welfare, Secretary of State, Canada Mortgage and Housing Corporation, Ministry of State for Economic Development, Department of Finance, and the Federal Business Development Bank.

No claim is made that these are the only federal branches with an impact on native people but this list represents the major ones. No attempt is made here to describe the various programs or their relative impact on native people. Materials available from four major departments currently involved in Indian socio-economic development and employment include:

1. DIAND — (a) functional descriptions of its native employment programs; and (b) its 1981-82 and 1982-83 reports to Treasury Board.
2. CEIC — (a) descriptions of its programs and partial statistical evaluation of its relative impact on native people; (b) CEIC's description of the new National Training Program, and a description of its job-creation policy and programs; (c) a description of its new Job Creation Strategy; and (d) a 1981 report, "A Summary of Federal Programs and Services to Native People".



3. Treasury Board — (a) its June 27, 1983, press release on affirmative action in the federal public service and related press kit; (b) a "report on the Policy of Increased Participation of Indian, Metis and Non-Status Indians, and Inuit People in the Federal Public Service, 1980 and 1981"; and (c) analyses of individual departmental reports.
4. Public Service Commission — (a) a "Statistical Overview of Indigenous Participation"; (b) a 1976 report on "Native People and Employment in the Public Service of Canada"; (c) a communique describing its indigenous participation programs; (d) an overview of its numerical targets to increase the representation of indigenous people for 1982-83; and (e) a report on the distribution of native content positions, by department and region (1982-83).

In a study (Slavik and Munroe)<sup>61</sup> done for NIB and DIAND in 1981, a detailed analysis is provided on three major federal departments that impact on native socio-economic development. This paper analyzed the "relationship, impact and co-ordination of CEIC, DIAND and DREE programs relating to Indian socio-economic development". As such it must be read for a fuller understanding of how these government programs affect Indian people.

#### XV. WHY THEY FAIL

Several important observations are made in this report on the failure of government programs to address the complexities, process, problems, and priorities of Indian economic development.<sup>62</sup> One major reason is because they fall under separate departments in the federal government, they have separate parliamentary mandates, and consequently there is a diversity of goals, objectives, policies, and operational procedures affecting Indian socio-economic development. There is no common or shared perspective on the complexity and nature of the problems related to Indian socio-economic development and therefore no similar philosophy, assumptions, or approach to solutions. In short, there is at present no apparent integrated or comprehensive strategy by the federal government to deal with Indian socio-economic development.<sup>63</sup>

Focus has not been put on the details of government socio-economic development and employment programs because the problem is not with the specific details of the individual programs but rather with their collective orientation. The programs, like the federal departments and the government in general, fail to recognize who the indigenous peoples of Canada are and consequently they have wrongly defined the problem. The result: programs that deal with symptoms and can never solve the disease.

The problem with native employment is not one of (native) individual inequality in Canadian society. It is a problem of the inequality of the (native) peoples (many and distinct) as a collectivity, indeed as nations with other Canadians and Canada. The problem isn't in the urban centres, away from native communities, but in those native communities, reserves, and societies. It is there that the problem must be resolved. The solution is not simply to extend "government" programs to Indian communities or create "affirmative action" programs to encourage hiring of native people because they are native. These initiatives, while they may

deal with the symptoms, still fall short. The solution (for most native people) is to facilitate the attainment of stable, viable, healthy and productive native societies, economies, and cultures based on their values, aspirations, processes, institutions, and authorities.<sup>64</sup>

The first step in this long road is the clarification of Indian government-Canadian government relationships.

#### XVI. STRUCTURES, RELATIONSHIPS, AND PROCESSES OF INDIAN GOVERNMENTS

It is necessary at this point to deal with the structures, relationships, and processes of Indian governments in Canada today. An understanding of such current realities is necessary to more fully comprehend the Slavik-Munroe analysis and to gain an insight into the roles that the various components of Indian government may play in the future in dealing with employment and other socio-economic development problems. At the risk of over-simplification I provide the following summary.<sup>65</sup>

Native organizations exist in every province and represent all native people and governments in Canada. The three main national native organizations representing the "aboriginal" peoples of Canada as defined by the Canada Act 1982 are: the Assembly of First Nations (AFN), which was formerly the National Indian Brotherhood (NIB) and which represents status Indians in Canada; the Native Council of Canada (NCC), which represents Metis and non-status Indians in Canada; and the Inuit Tapirisat of Canada (ITC), which represents the Inuit people in Canada.

The major roles played by these organizations are:

- (i) advisors/consultants to native governments and peoples;
- (ii) advocates of native rights;
- (iii) liaison between governments and native people.

These roles are performed through several functions. They include: (a) consulting with native governments and peoples; (b) developing position/policy statements on their behalf (researching, analyzing, writing); (c) lobbying native positions with government representatives; and (d) advising Indian governments and peoples.

Generally speaking, native organizations act as a civil service to native governments and peoples.

The leadership of native organizations is usually elected for fixed terms by their constituents, whether they are Indian chiefs or community members.

They are primarily funded by the federal government (DIAND and Secretary of State) and are usually incorporated under provincial or federal laws to enable them to receive funding. The funds received are used to acquire office facilities, hire directors, advisers, consultants, and lawyers, to pay for operating expenses, to consult with their constituents, and to fulfil their other functions.

Their consultation process involves hundreds of meetings each year with native governments, communities, and peoples and many meetings with Canadian government officials.

The ultimate authority in all the native organizations is the native people themselves at the community level, and they express themselves through their representative structures (Indian governments, committees, spokesmen).

The Assembly of First Nations represents most of the Indian governments of Canada through their individual band government chiefs. These 576 chiefs meet annually to give direction to their national organization (or secretariat) and to sanction or endorse/review positions or policies taken since the last meeting. An interim body (Confederacy of Nations) can make decisions (give direction, commission studies) when the national assembly is not sitting.

Most Indian governments are also represented locally by provincial or regional organizations which provide a similar role to the national organization but generally deal with problems and issues more specific to their constituents. An Indian organization may encompass several Indian nations.

Generally speaking, Indian organizations deal with broader issues (affecting several Indian nations) and longer-term priorities, and the Indian band governments themselves deal with local and more immediate issues and problems.

The major point to be made in this background on native organizations is that they will play an important and integral role in representing Indian governments and consequently in the attainment of solutions to Indian socio-economic and employment problems.

## **XVII. SUMMARY**

Canada's native people are in the worst socio-economic situation of any peoples in Canada. This situation largely results from their cultures, societies, and governments being radically different from Canadian culture and society, and from an inability on the part of the Canadian government to understand and tolerate this fact. Canadian government policies and programs for Indians have primarily tried to assimilate Indian cultures. This assimilation has not worked. Government programs see the problem as being one of a disadvantaged ethnic minority and a problem of regional economics. They have concentrated too much on the individual and not enough on the collective communities. They have failed to identify the problem and consequently their solutions deal only with the symptoms (social ills).

While remedial programs help to ease the situation under which Indians live, a long-term, comprehensive approach is needed to deal with the problem. Radical changes are necessary.

### **Toward Solutions—Clarification and Confirmation of Relationships**

In moving toward solutions of the employment problems of the native peoples in Canada one must deal with their socio-economic situation. Native peoples must not simply be viewed as an economically disadvantaged social class within Canada's mosaic and dealt with through special programs aimed at making them equal.

If real, long-lasting solutions are to come, then Canada must first of all deal with who the native people are and what rights they have as a result of that identity. That is, the Canadian government and Canadians must accept the fact that native people are not Canadians but members of their own nations, societies, and cultures. Canada must stop trying to assimilate native people and accept their distinctiveness and their right to that distinctiveness as recognized through international standards.

The next step in the movement toward solutions is the clarification of relationships with the native peoples in Canada through formal processes (constitutional and legislative).

Many indigenous peoples in Canada already have relationships with Canada through the Crown even though Canada refuses to recognize many of them. The treaties that affirmed their relationships must be upheld and updated if necessary as a first step to clarification of the relationship. Domestic legislation cannot be deemed to supersede treaty rights and obligations as recognized in international law (Vienna Convention on the Law of Treaties). If Canada wants to change relationships, rights, or obligations recognized in the treaties it must renegotiate them. This is a two-party process in which both parties must agree to changes.

In essence the first step involves the Canadian government's recognition of the equal political status of Indian and Inuit governments.

Where Canada has no relationship (no treaty) with an indigenous people, then it must negotiate such a relationship since many non-Indian Canadian citizens are currently living on Indian land. Where there are no treaties, then Canada must recognize that those people have prior rights or aboriginal rights and this includes territorial rights. Canada must discard the colonial notion that it had or has a right to annex entire peoples and their territory simply by acquiring its own sovereignty.

The next step in clarifying the relationship is to clarify territorial ownership. Canada quite clearly does not own what it interprets as being Canada. The notion of discovery cannot exist in 1983. Where it has no agreements with native people for their territory, then it cannot claim a right to that territory. New treaties will be necessary and they should be consistent with current international treaty standards.

The notion of land claims must be discarded. It is ludicrous that the aboriginal people of this continent should have to make a claim against Canada for land that has always been theirs. If treaties were improperly enacted, then Canada cannot claim to have acquired the territorial subject of that treaty. Where Canada claims to have acquired ownership to land by a treaty with an Indian band who did not have a right to surrender interest in that land, then Canada must deal with the original owners. Simply stated, the treaties and their territorial ownership subject must be clarified once and for all.

Canada currently calls this process a land claims process. This idea must be eliminated. Canada must stop trying to acquire new land by forcing Indian governments to extinguish their rights to that land before the ownership of that land is settled. Once Canada admits that it doesn't own land (through formal acceptance of a claim), then that band of Indians has the right to deal with that land as it sees fit. The Indian band may dispose of the land, or not, at its discretion and subject to the terms that it agrees to. Where Canadian squatters live on Indian land, then they must either be removed or Canada must compensate the Indian government for their loss of use of the land.

This first stage then is the clarification and recognition of Indian peoples, governments, and territories.

This goal can be achieved by an internationally supervised process whereby Canada recognizes in its highest law, its

Constitution, the rights and status of the indigenous nations in Canada. The current constitutional initiatives do not go far enough. An exemption from the Charter of aboriginal and treaty rights, a recognition of undefined "existing" aboriginal and treaty rights, and a commitment to have a few more meetings with native people simply is not enough. As long as the Canadian governments can unilaterally change the rights and freedoms recognized in the Constitution, then there is no protection or equality.

The protection that is needed is to require Indian governments' consent on any changes to those sections that recognize or protect their rights. This could be accomplished by making them a partner in the amending process. There is a whole realm of choices but you must first have the political will to obtain the goal.

The recognition of Indian governments' authority and responsibilities then will be the starting point for true socio-economic development. It is only through such development that the employment problems of native people can effectively and finally be resolved.

Indian development will require a new relationship, "a partnership" between the federal, provincial, and Indian governments. This relationship will require institutional cooperation among all the parties for the goal of Indian socio-economic development to be reached. But it will be Indian communities setting the objectives, deciding the priorities, planning and controlling their future.

The federal, provincial, and Indian governments will need to respect each other's laws, so jurisdictions will need to be clearly established. Relationships will also need to be clarified for mutual benefit. Working consultative and negotiation processes must be put into place so that, for example, developmental plans won't adversely effect the social, economic, or environmental conditions of others.

Federal, provincial, and municipal government agencies have complex interrelationships with each other and with large national and multinational corporations, trade associations, labour unions, and independent bodies such as courts and human rights commissions. It will be important that Indian governments have the ability to monitor and influence the activities of this "establishment complex" <sup>86</sup>

Indian societies will need time to rebuild and become socio-economically stable.

To accomplish this they will need resources. The first step in acquiring resources is the accounting for, and transfer of, funds currently held by DIAND in trust for specific Indian bands. Since some of these funds have been held in trust accounts since 1860, they need to be accounted for and then turned over to Indian governments. Other financial resources could come in the form of transfer agreements and resource-sharing agreements, since much profit has been made in Canada from the resources of Indian land without Indian people getting any benefit. Transfer funds from the federal government could be looked at in terms of Third World development funds.

What is clear is that a new fiscal relationship will need to be established between Indian and Canadian governments. Indian governments must no longer be accountable to the federal government but to their own constituents.

Other forms of fiscal support could include equalization grants, equity capital, established lending institution credit lines, debit financing, labour subsidizing, and start-up financing. The creation of Indian-owned and -run financial institutions could also do much to assist Indian socio-economic development. Such institutions could provide expertise in management systems, access to technology, markets, and financial services to Indian businesses.

Settlement of territorial disputes or land claims could also do much to provide an enlarged land and resource base for Indian governments. Indian governments' ownership of large resource areas would enhance their bargaining position and development potential.

The next resource area that Indian governments will need to enhance is that of human resources. Indian people will need to be developed and trained to make stable socio-economic conditions on reserves a reality. Indian people will need to be educated and trained for the types of jobs that will be developed on reserves. For such education to be successful it must be controlled to a large extent by Indian governments. Indian training institutions could be set up to accomplish this goal.

Education must equip Indian people with the skills necessary to get by in today's technological industrial society, but at the same time it must reaffirm and strengthen their identity and culture. <sup>87</sup>

The mechanisms and processes for these changes can and will be worked out over time. Initially, provincial institutions will continue to provide education and training to native people with increasing Indian input and control over the curriculum and programs. As more and more Indian people become educated, they will be capable of designing their own curriculum. Gradually Indian governments will be able to develop, plan, and implement their own educational programs and maintain a consistency with their own socio-economic development plans.

The NIB "Strategy" (1976) concludes with the following statement of five goals and four processes of development. <sup>88</sup>

- (i) Cultural goal: to retain and strengthen Indian constitutional and cultural identity so as to promote full Indian contribution to Canadian society, culturally, socially, and economically.
- (ii) Economic goal: to achieve security from want, shelter, and a decent standard of living, and to obtain real access to the widest range of opportunity, options, and freedom from exploitation.
- (iii) Purposeful life goal: to live purposeful lives, including dignity, and independence for individuals to obtain real access to education, political equality, and social amenity.
- (iv) Land goal: to maintain possession of and contact with the land to the fullest degree possible with optimal development of reserves and maintenance of environmental quality.
- (v) Post-industrial society goal: a fifth goal is implicit in all four of the above goals, and that is the opportunity to achieve the goals without necessarily being forced totally into the standard industrial mold.



The processes include:

- (i) Revitalize and rebuild Indian cultural identity by reasserting the special constitutional status of Indian people and by moving to Indian community self-government.
- (ii) Focus major future actions on the community as the implementation base that will prevent assimilation and that will provide an appropriate milieu for individual growth and success.
- (iii) Work toward the development of an economic base that will ensure Indian autonomy, re-emphasize positive gain to communities, and calculate reduction in welfare and community breakdown in the measure of cost effectiveness.
- (iv) Organize integrated supportive programming in a joint Indian government coordinated effort for a 10-year period.<sup>89</sup>

The cultural goal rejects assimilation of Indian people into the larger society and implies a plea/demand by Indian people to non-Indians that they accept the validity of Indian culture so that future interaction will result in creative cultural evolution rather than destruction of a minority culture.<sup>90</sup>

The economic goal is a basic necessity upon which to build all other activities—cultural, social, educational. Economic well-being does not necessarily mean a high standard of living or great wealth, but rather freedom from want achieved through meaningful activity. It means having available and being able to choose from the widest possible range of options respecting lifestyle.

The economic goal implies the building up of an entire range of appropriate services in the communities themselves and the complete manning by Indian people of these services and activities. It means Indians forming realistic expectations while at school and preparing themselves to take jobs that they know will be there when they finish. This in itself will keep a great many more Indians in school. This goal rejects the welfare and charitable institution ethic.<sup>91</sup>

The purposeful life goal means a change of consciousness. The people of the community must really believe that they have power over their own lives. Only then can people's lives be purposeful. They must be able to make the decisions that direct their lives.<sup>92</sup>

Social amenity means quality of life. It is the whole pattern of activities in the community, which adds up to a fulfilment of human aspirations and needs.<sup>93</sup>

Land is the touchstone of Indian culture. Without it, cultural destruction and assimilation would be inevitable. To a great extent large numbers of Indian people are still at least partly dependent on the land for their livelihood.

Indian people see the rebuilding of tribal cultures on their land as being an essential element in the process of socio-economic revitalization.<sup>94</sup>

Many of the traditional Indian values and beliefs are more consistent with the emerging post-industrial society's values and beliefs.

Most Indians are in isolated locations. In general the people are not mobile nor do they wish to be. Yet at the same

time they want an economy that will allow them to marry all that they wish from their own history and culture with that part of the technology, institutions, and culture of the Euro-Canadians they find necessary and desirable to achieve their stated goals.<sup>95</sup>

In essence they don't want economies simply dependent on an industrial market and wage economy. When the industry is gone or the market for the industry is gone, then the wages are gone and you enter the dependence cycle. Indian people don't want to be forced into an obsolescent way of life.

### Self-Determination

The underlying theme of all these goals is self-determination. But self-determination is not necessarily a renouncement of Canada or Confederation. Justice Tom Berger summarized it very well in his book *Fragile Freedoms*. He stated that the native people were "proclaiming that they are a distinct people, who share a common historical experience, a common set of values and a common world view. They want their children and their children's children to be secure in that same knowledge of who they are and where they come from. They want their own experience, traditions and values to occupy an honourable place in the contemporary life of our country".

Native people have a legal and moral right to an equal place in Canada. It is only in assuming that place and crawling out from under the weight of paternalism and dependence that they will solve their socio-economic problems and consequently their employment problems.

In the time it will take to achieve this goal many years may pass, and during this transition phase DIAND will slowly be dismantled, with its powers and responsibilities transferred directly to Indian governments. The federal government will need to deal directly with Indian governments in the future when designing employment programs and regional economic development programs.

Many native people will continue to live and work in the cities, and for these natives the employment and affirmative action programs should be continued and enhanced. The private sector should be encouraged to hire and train native people on a much larger basis than they now do because not all native communities can be expected to become self-sufficient. To complement this affirmative action in employment, consideration should be given to affirmative action in education, because affirmative action will work only if job applicants have the prerequisite skills or knowledge.

Racial discrimination is an insidious and elusive problem, which makes it almost impossible to combat. The only generally agreed-to approach is education and human rights legislation to deter it from becoming blatant. Both of these are necessarily long-term solutions. Institutional discrimination will need to be gradually weeded out by government itself. Those institutions, systems, laws, and policies that reflect and favour the majority culture in Canada will eventually have to be changed to recognize Indian cultures and societies.

The solutions will not come easily, but we have in Canada a chance to establish a unique indigenous people-colonial government relationship. The test of Canada's integrity will be how it handles this challenge.

## NOTES

1. *Re. Eskimo* (1939) S.C.R. 104.
2. The Haudenoshonee (Iroquois) Confederacy made a presentation to the Special Committee of Parliament on Indian Self-Government, Issue No. 31, May 31, 1983, whereby they state they are sovereign in the international community; that they meet the international definition of nations, i.e., permanent population, defined territory, having a government, and the ability to enter into relations with other nations. For a fuller understanding see this paper.
3. For a basic summary see Berger, T. *Fragile Freedoms*, Clarke, Irwin & Company, Toronto, 1981.
4. Frideres, J.S. *Canada's Indians: Contemporary Conflicts*, Prentice-Hall, Scarborough, 1974.
5. DIAND. *The Historical Development of the Indian Act*, Policy Research and Evaluation, Supply and Services, Ottawa, 1978, p. 25.
6. *Supra*, note 3, p. 27.
7. See especially Sawchuck, Joe. *The Metis of Manitoba: Reformation of an Ethnic Identity*, Peter Martin Associates Ltd., Toronto, 1978.
8. The Metis are now recognized as one of the "aboriginal peoples" in Canada's new Constitution (s. 35).
9. This is due in part to the fact that many Indian people do not consider themselves to be Canadian citizens.
10. DIAND. *Indian Conditions: A Survey*, Supply and Services, Ottawa, 1980.
11. *Ibid.*
12. An example of a cell for the average income category is men aged 25 to 34 in sales occupations with Grade 9 to 13 education.
13. Canadian Human Rights Commission. "Visible Minority Groups in Canada: Their Comparative Economic Situation: Native Indians, Blacks, Chinese, Japanese and Indo-Pakistanis." Research and Special Studies Branch, 1980. Source: Unpublished data from the 1971 Census of Canada obtained from Customer Services Section, Social Statistics Branch, Statistics Canada.
14. *Supra*, note 10, p. 30.
15. *Ibid.*
16. Only 32 per cent of reserves have adequate fire protection services.
17. *Supra*, note 10, p. 36.
18. The following statistics are taken primarily from the DIAND (1980) report, *Indian Conditions*. To the author's knowledge no similar statistics are available for the Inuit and Metis populations. It is offered for debate that these figures would not reflect the same degree of disadvantage among the Inuit because of their income being based on 50 per cent traditional lifestyles, and because a stronger family unit based on a shorter period of contact contributes to less family breakdown. For the Metis populations (a majority of which live in urban centres) the effects are presumed also to be not as bad, due to their treatment by governments as provincial citizens and thereby affording them direct access to provincial health and social services programs.
19. Maidman, F. *Native People in Urban Settings: Problems, Needs, and Services*. A Report of the Ontario Task Force on Native People in the Urban Setting, Toronto, 1981.
20. Correctional Services Canada. Operational Information Services: Inmate Record System, Native and non-Native Population Profile. Selected Trends in Canadian Criminal Justice, Ministry of the Solicitor General, Ottawa, 1981.
21. To the author's own knowledge many native people from northern locations plead guilty to charges just to get them over with and to save the time and trouble of having to commute to often far-away cities (where the courts are) should their case be remanded several times.
22. *Follow Up Report: Native Populations*. Special Committee on the Disabled and Handicapped, Fourth Report, Supply and Services, Ottawa, 1981, p. 8.
23. The Canadian High Commission in the United Kingdom stated this in a communique to Indian representatives lobbying against the Canadian Constitution in London, to which the author was a witness. (July, 1981.)
24. See especially Hansard Reports on the Special Committee on Indian Self-Government. Issue no. 31 (May 31 - June 1, 1983). Members of the Haudenoshonee (Iroquois) Confederacy made a presentation to the Special Committee that is consistent with their position made at the League of Nations at the Hague, 1924. They warn the Committee that only representatives of their nation can represent their nation and that Canada has treaty obligations passed from the Crown which it must uphold.
25. Jennings, F. *The Invasion of America: Indians, Colonialism and the Cost of Conquest*, W.W. Norton, New York, London, Toronto, 1975, p. 111. Jennings' work covers contact along the east coast of the U.S. from the 15th century to the 18th century.
26. See especially the Anishinabek presentation to the Joint Senate-House of Commons Parliamentary Committee on the Constitution recorded by Hansard on January 7, 1981.
27. *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs Ex Parte, The Indian Association of Alberta* [1982] All E.R. 118.
28. *Supra*, note 10, p. 103. DIAND holds that the Royal Proclamation of 1763 extinguished Indian claims to sovereignty and independent status.
29. Indians were not considered citizens in Canada until 1960, when they were extended the right to vote. Consequently Canada could not be seen as passing laws which had application to Indians if they were not citizens of Canada. See Sanders, Douglas. "The Rights of the Aboriginal Peoples of Canada". *Canadian Bar Review*, Vol. 61, March 1983.
30. Bartlett, Richard H. "The Indian Act of Canada", *Buffalo Law Review*, Vol. 27, Fall, 1978. No. 4, State University of New York at Buffalo, p. 583.
31. It is interesting to note that the Canadian government has not to date accounted for any band trust account funds since they were established. In fact recently (three years ago) the National Indian Brotherhood managed to lobby enough members of the House of Commons to get a motion passed ordering the Auditor General to perform audits for 77 bands. None has been completed.
32. *Supra*, note 5, p. 79.
33. *Ibid.*, p. 54.
34. NIB. *A strategy for the Socio-Economic Development of Indian People*. National Indian Brotherhood, Ottawa, 1977, p. 178.
35. Hawthorn, H.B., et al. *A Survey of the Contemporary Indians of Canada*. 2 Vols. Indian Affairs Branch, Ottawa, Queen's Printer, 1966-67.
36. Weaver, Sally M. *Making Canadian Indian Policy: The Hidden Agenda, 1968-1970*, University of Toronto Press, Toronto, 1981.
37. Frideres, J.S. "Indian Organizations" in *Canada's Indians: Contemporary Conflicts*, *supra*, note 4, p. 121.
38. *Ibid.*, p. 122.
39. For the best reference, refer to Hansard reports of the Indian presentations to the Joint Committee on the Constitution; see especially January 7, 1981.
40. Beaver, J.W. *To Have What is One's Own*. A report prepared for the National Indian Socio-Economic Development Committee. Sponsored by DIAND/NIB, Ottawa, 1977, p. iv.
41. NIB. *A Strategy for Socio-Economic Development of Indian People*, Background Report No. 1, National Indian Brotherhood, Ottawa, September, 1977, p. 54.
42. NIB Submission to the Parliamentary Task Force on Employment Opportunities for the '80s, NIB, Ottawa, 1981, p. 11.
43. See National Indian Business Association presentation to the Sub-Committee on Indian Self-Government as reported in Hansard, December 15, 1982, Issue No. 15, Supply and Services, Ottawa, p. 8.
44. *Supra*, note 41, p. 53.
45. *Ibid.*, p. 61.
46. *Ibid.*, p. 63.
47. *Ibid.*, p. 64.
48. *Ibid.*, p. 66.
49. *Ibid.*, p. 66.
50. *Ibid.*, p. 66.
51. Stanbury, W.T. *Success and Failure: Indians in Urban Society*, Vancouver, University of B.C. Press, 1975, p. 27-35, 243.
52. Frideres, *Canada's Indians*, *supra*, note 4, p. 99.
53. McCaskill, Don. "The Urbanization of Indians in Winnipeg, Toronto, Edmonton and Vancouver", *Culture*, 1(1) 1981, p. 82-89.
54. *Ibid.*, p. 85.
55. *Ibid.*, p. 82; *supra*, note 19, p. 254.

56. *Supra*, note 4, p. 93.
57. *Supra*, note 53, p. 85.
58. Canadian Human Rights Commission. Complaints by Native People to the Canadian Human Rights Commission, Sections 5, 7, March 1, 1978, to August 31, 1983, CHRC, Ottawa.
59. Berry, J.W., Kalin, R., Taylor, D.M. *Multiculturalism and Ethnic Attitudes in Canada*, Minister of State for Multiculturalism, Supply and Services, Ottawa, 1977.
60. *Ibid.*, p. 248.
61. *Ibid.*, p. 246.
62. *Ibid.*, p. 110.
63. Minutes and Proceedings of the Sub-Committee on Indian Self-Government. Issue no. 13, December 9, 1982, p. 6.
64. *Supra*, note 19, p. 252.
65. *Supra*, note 10, p. 49.
66. *Supra*, note 4, p. 41.
67. *Ibid.*, p. 44.
68. *Ibid.*, p. 47.
69. *Supra*, note 34, p. 36.
70. Kaegi, Gerda, and Bigwin, Terry. "The Comprehensive View of Indian Education". Paper produced by the Indian-Eskimo Association of Canada, Toronto, 1972, p. 11.
71. *Supra*, note 4, p. 31.
72. Speigal, S. Indian Education in Canada. Unpublished paper for University of Ottawa law course, p. 10.
73. *Supra*, note 4, p. 52.
74. Caution must be exercised when dealing with these statistics because of their subjective interpretation by DIAND in its 1980 Survey on Indian Conditions previously cited. Band-operated in many instances simply means the band gets to administer and implement DIAND-designed programs, policies, and provincial curriculum.
75. Labour Canada. *A Statistical Comparison of the Native Indian Population with the Total Canadian Population: 1971 Census of Canada*, Ottawa, 1976, p. 16.
76. NIB. "Indian Control of Indian Education". A policy paper presented to the Minister of Indian Affairs and Northern Development, Ottawa, 1972, p. 25.
77. *Supra*, note 70, p. 25.
78. *Supra*, note 34, p. 36.
79. Slavik, J., and Munroe, G. Report on Relationship Impact and Co-ordination of DREE, CEIC and DIAND Programs for Indian Socio-Economic Development. DIAND/NIB, Ottawa, 1981.
80. CEIC. A summary of Federal Programs and Services to Native People, Ottawa, 1981.
81. *Supra*, note 79.
82. *Ibid.*, p. iv.
83. *Ibid.*, p. 1-3.
84. This position is largely taken from the largest native groups in Canada—the Indian people. The danger throughout this paper is to state a native view that may only be held by one of the recognized native groups. This position, for example, may not reflect the view of the Metis, who are primarily based in urban centres and lack a land base. For them, government programs may provide for their needs and aspirations to a greater degree than Indians. The Inuit are also distinct and have not had the same degree of contact with non-Inuit society as Indians. They are also less dependent on the Canadian economy according to Berger (1977) and therefore their needs may be less, but their aspirations appear to be similar.
85. Based on the author's working knowledge and understanding of the current Indian political structures and processes.
86. O'Connell, Victor. *A Review and Analysis of a Strategy for the Socio-Economic Development of Indian People (1976-77)*, National Indian Brotherhood Socio-Economic Development Committee, NIB, Ottawa, 1979. This section of DIAND approaches to economic development is largely based on O'Connell's analysis. Paraphrasing and direct quotations appear throughout and great liberty has been taken in this simply because O'Connell "said it" better than anyone. Quotations are used to make central points but not all of the analysis by O'Connell is recorded here. For clarification one should read the entire analysis starting with NIB's *A Strategy*, *supra*, note 34.
87. *Supra*, note 76, p. 3.
88. *Supra*, note 34, p. 63-69.
89. This may have to be adjusted.
90. *Supra*, note 41, p. 81.
91. *Ibid.*, p. 84.
92. *Ibid.*, p. 85.
93. *Supra*, note 34, p. 86.
94. *Ibid.*, p. 87.
95. *Ibid.*, p. 89.



## **LABELLED DISABLED AND WANTING TO WORK**

**Marcia H. Rioux**

### **Sommaire**

La présente étude examine les obstacles en matière d'emploi auxquels sont confrontés les personnes handicapées, en fonction des cinq catégories générales suivantes: attitudes et politique sociale; questions juridiques; politique d'emploi; régimes de revenu en cas d'invalidité; transport et études. L'auteure examine comment chacun de ces obstacles influent sur l'accès aux possibilités d'emploi.

La dernière partie décrit divers moyens d'aplanir ces obstacles. À long terme, toutefois, il n'y a qu'un changement d'attitudes qui règlera la situation d'emploi des personnes handicapées. Comme l'indiquent les données sur le chômage et le sous-emploi des personnes handicapées, ce changement d'attitudes ne survient pas, ou, du moins, survient trop lentement pour être admis comme unique solution à ce grave problème social. Il faut par conséquent aborder les obstacles structurels sous d'autres angles.

Il est impérieux d'adopter une approche générale qui englobe la formulation de politiques par le gouvernement, les employeurs et les syndicats si nous voulons atteindre l'égalité dans l'emploi. Les contradictions dans les lois et politiques actuelles doivent être étudiées et éliminées.

Une approche globale doit principalement porter sur les aspects suivants: répondre aux besoins des groupes les plus défavorisés, actuellement négligés; offrir de la formation professionnelle dans le cadre des services destinés aux personnes handicapées; analyser les besoins du marché du travail en considérant les personnes handicapées comme partie intégrante de ce marché; l'adaptation des emplois en faisant appel à l'analyse des postes et à la modification, y compris celle du lieu de travail, pour favoriser l'embauchage du plus grand nombre de personnes handicapées; la nécessité de confier la responsabilité des services à des organismes qui, en plus de fournir les services requis, servent la cause de l'autonomie et de l'intégration des personnes handicapées; la nécessité d'intégrer des programmes de revenu d'appoint et de réadaptation.

La formule actuelle où l'administration des services est assurée par divers paliers de gouvernement et de nombreux organismes sociaux est extrêmement inefficace. Il faut une méthode unifiée d'administration des services et des revenus d'appoint, qui tienne compte non seulement du handicap de l'intéressé, mais également des obstacles fonctionnels que pose son handicap et de ceux imposés par le marché du travail.

### **Summary**

This paper examines employment barriers faced by persons with disabilities under five general categories: attitudes and social policy approaches; legal issues; employment policy; disability income schemes; and transportation and education. The effect of each on access to employment opportunities is analyzed.

The final section outlines some approaches to eliminating these barriers. Changing attitudes is advanced as the only real, long-term solution to employment of persons with disabilities. As the facts about unemployment and underemployment of disabled persons indicate, this is not happening, or at least is happening at a pace too slow to be acceptable as a solution to a major social problem. Therefore, the structural barriers need to be addressed in other ways.

An overall approach that includes government policies, employer policies, and union policies is imperative if there is to be equality in employment. Conflicts in law and policy that are now in place must be reviewed and eliminated.

An overall approach must emphasize the following elements: reaching high-priority target groups currently neglected; job training as an integral aspect of services for disabled persons; labour market analysis that includes planning for disabled persons as an integral part; job development that focuses on job analysis, modification, and accommodation to result in enabling and maximizing participation; the placement of responsibility for services in agencies that not only provide the needed services but can adapt to and promote the philosophy of integration and self-determination of persons with disabilities; and integrating income-assistance programs and rehabilitation programs.

The present splintering of services among the various levels of government and social service agencies leaves gaping holes in service delivery. An integrated service- and income-delivery approach must be established that takes into account not merely the individual disability but the interplay between the functional limitations imposed by the disability and the limitations imposed by the labour market.



# **LABELLED DISABLED AND WANTING TO WORK**

**Marcia H. Rioux\***

## **I. INTRODUCTION**

Psychologically, socially, and legally, the disabled throughout history have enjoyed among themselves a peculiar "equality"; they have been equally mistrusted, equally misunderstood, equally mistreated, and equally impoverished.<sup>1</sup>

Beginning any study on discrimination, no matter what the perspective, demands that the problem be defined in relation to the group about whom we are talking. Statistical evaluation of the size of the problem is also necessary. In the case of disability and employment, there is no readily available method of doing these.

People who have handicaps (or have a mental or physical limitation or live with disabilities) are not identifiable as a distinctive social group. They do not share common physical, mental, or cultural characteristics. Persons who are paraplegic, who are blind, who are overweight, or who have brain damage may all be classified as "handicapped", while having less in common with others in that category than they have in common with peers who are not similarly labelled. And generalizations that can sometimes be made about groups of persons against whom discrimination is practised seldom seem logical when the category is disability.

Forms of discrimination cannot be neatly delineated. Some are a result of factors that genuinely interfere with the ability to do a job. They are *bona fide*. Some exist because of attitudes. Others come about because of factors extraneous to the actual job, such as programs or architectural designs that preclude an individual from carrying out job functions even though she or he is otherwise qualified.

The particular demands of a situation may result in a condition being a handicap in one circumstance where it is not a factor in another circumstance. One individual may, for example, have a visual acuity problem and never perceive it, or have it perceived of, as a disability. Another person may find that same limitation to be a major influencing factor in his or her life.

The development of services and programs for persons with disabilities reflects the lack of a clear understanding of the problem.<sup>2</sup> No clearly identifiable underlying philosophy has been developed. One school believes in protecting people by placing them in institutions, while at the other extreme total integration in society is advocated, regardless of mental or physical capacity. Qualifying mechanisms for funding policies are based on everything from charity to income replacement. Jobs and employment policies for persons labelled disabled are created and abolished as randomly as the theory behind them can be developed and replaced. The basis for them ranges from therapeutic to training to regular employment. Federal, provincial, and municipal building codes and

architectural regulations supersede other codes and regulations before they are even implemented. Under some pension and benefit schemes, it is advantageous for persons to be labelled unemployable, while other schemes demand that persons be available for work and thus classified as unemployed. Occupational health and safety laws restrict the potential workplaces of some persons. Attempts to encourage greater employment of persons with disabilities use such slogans as "hire the handicapped". The irony of using labels like "handicapped", which randomly define people without consideration of their attributes, seems to be missed even by people supposedly working for a fairer deal for disabled persons. The end result is to fight discriminatory policies with discrimination.

These kinds of confusion both in principle and in policy have led, not surprisingly, to an atmosphere in which little progress can be made either at the policy level or in changing people's attitudes. Badly needed incentives to enable persons with disabilities the same employment opportunities in relation to their skills as others have are simply not in place. The most pressing need is for an overall, consistent, rationalized approach to social and legislative policy. Until this happens, there is little chance that employers will become equal opportunity employers and even less likelihood that the skills of persons with disabilities will be fully utilized.

## **II. THE PROBLEM OF DEFINITION**

Generally persons who are employment disadvantaged are those who have the appearance of being somewhat less suitable or adaptable to the needs of the labour market, and who therefore remain unemployed, underemployed, or in marginal employment situations. The problem, then, is to identify such persons and bring them into the economic mainstream of society by identifying factors that result in their being in that position. Generally the method of doing this is by, first, specifying the characteristics that are to be used as a basis for identifying the population to be studied. It is relatively easy to identify the women in society, or the members of a racial or ethnic group. Having identified the population, it is then possible to find patterns of discrimination, that is, to look for factors that account for systemic discrimination.

This is much more problematic when dealing with the amorphous category called disability. Different terms are sometimes used to identify similar aspects of disability and the same terms may be used to identify different aspects and

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levels of physical or mental capacity. The language used and the methods of determining disability may reflect the objectives of the organizations using them and the purpose for which they are being used.

The result is that methods of counting disabled persons are decided by the administrative use that is made of the results. For example, population or health surveys commonly rely on self-identification by the individual of his/her limitations in activities,<sup>3</sup> while organizations with a responsibility for benefit or compensation awards tend to accentuate the restrictiveness of the impairment in medical terms.<sup>4</sup> Statistics collected to decide who can or should be rehabilitated, however, tend to focus on vocational potential and "marketability" of the client.<sup>5</sup> Because programs differ with respect to their purpose and client-coverage, most individuals can fairly be said to be administratively disabled. Their entitlement to and level of services and financial support will more likely be determined by something other than an objective condition.

It is evident that some clarification and consistency of terminology need to be imposed if the myriad of programs and services is to be evaluated and rationalized.

The World Health Organization<sup>6</sup> distinguishes among impairment, disability, and handicap. An impairment "embraces any disturbance of or interference with the normal structure and functioning of the body, including the systems of mental function". Health and Welfare Canada statistics<sup>7</sup> place the number of Canadians who have some form of physical or mental impairment at 5.5 million. Disability, according to the World Health Organization, "is the loss or reduction of functional ability and activity" that results from an impairment. In other words, an impairment does not necessarily produce a disability, a fact reflected in the Health and Welfare statistics that estimate that less than half (2.3 million) of "impaired" Canadians can be termed disabled. A handicap "is the disadvantage that is consequent upon impairment and disability".

The distinction between disability and handicap takes on a particular significance when employment is an issue. Persons with disabilities experience some limitation of their functioning because of a physical or mental impairment. But the extent to which their disability affects their everyday lives, that is, handicaps them, is determined by how society reacts to the disability. A disabled person need not be handicapped. Impairments may restrict activity not only through identifiable functional limitations (that is, an incapacity to do something) but also through therapeutic limitations, environmental restrictions, energy reserve losses, and psychological factors. An individual is handicapped in relation to the demands placed on him or her on a day-to-day basis. The capacity to meet those demands or expectations is the deciding factor in determining the extent of the handicap.

Figures about the prevalence of mental retardation are illustrative of this interaction between social demands and disability.<sup>8</sup> Cross-cultural analysis has shown that the reported prevalence of mental retardation rises dramatically at about the age of school entrance and increases steadily until the middle teens (the legal age of school termination), after which it begins to decline. Such a finding can be argued to more accurately reflect the systematic demands for intellectual functioning and adaptive behaviour that exist in the

school system than the actual incidence of sub-normal intellectual behaviour.

The difference between disability and handicap can be seen in other examples, such as the situation for those people who are wheelchair users. Traditionally, the lack of ramps into public buildings or specially designed washrooms has made shopping, going to school, work, or leisure activities difficult. However, a few quite simple architectural changes can vastly improve the capacity to work and play. This disability is still present, but changes in the physical and social environment can reduce and even eliminate handicaps.

The distinction between disability and handicap has important implications for how we assess social, health, and employment policies. The failure to differentiate disability from handicap has led to unnecessarily restrictive attitudes toward, and policies regarding, persons with disabilities. There has been a tendency to label all disabled persons as uniformly incapacitated and to ignore the fact that a disability need not lead to serious handicap.

### III. THE PREVALENCE OF THE PROBLEM

Since disability is not a scientific or specific category, who is included will depend on the purpose for which a person is being categorized as disabled.

According to estimates made by Health and Welfare Canada,<sup>9</sup> there were 2.3 million disabled persons in Canada in 1979. That is, close to 10 per cent of the population had some level or type of disability in that year. This is in contrast to other surveys: estimates of 7.1 per cent reported by the Canadian Sickness Survey of 1950-51;<sup>10</sup> British surveys which have estimated 7.8 per cent;<sup>11</sup> the Canada Health Survey<sup>12</sup> which reported a figure of close to 12 per cent.

The Health and Welfare Canada chart provides a breakdown of persons classified as disabled (see Figure 1).

In the Canada Health Survey,<sup>14</sup> nearly 12 per cent of the population were reported to be affected with a long-term disability, which is defined as a limitation of activity during the previous 12-month period. Of those reporting an activity limitation, seven per cent reported a limitation on their major activity and two per cent reported being unable to perform their major activity (see Table 1). "Although similar proportions of males and females have some form of activity limitation, a significantly larger proportion of females report the less serious forms of limitation, while males were more commonly unable to perform their major activity."

Of the non-institutionalized population of working age (15-64 years), eight per cent have some form of activity limitation, with six per cent being limited in their major activity and two per cent being otherwise limited, according to the Canada Health Survey. Of that same age group, two per cent are inactive (not working or retired) because of health reasons, and more than two-thirds are male.

According to the Health and Welfare study,<sup>15</sup> there were an estimated 1,415,000 disabled persons of working age (15-64 years) in 1979. Of these, 159,000 (11.2 per cent) were permanently unable to work due to disability and 248,000 (17.5 per cent) were temporarily unable to work due to disability.

**FIGURE 1**  
**Distribution of Disability in Canada, 1979<sup>13</sup>**

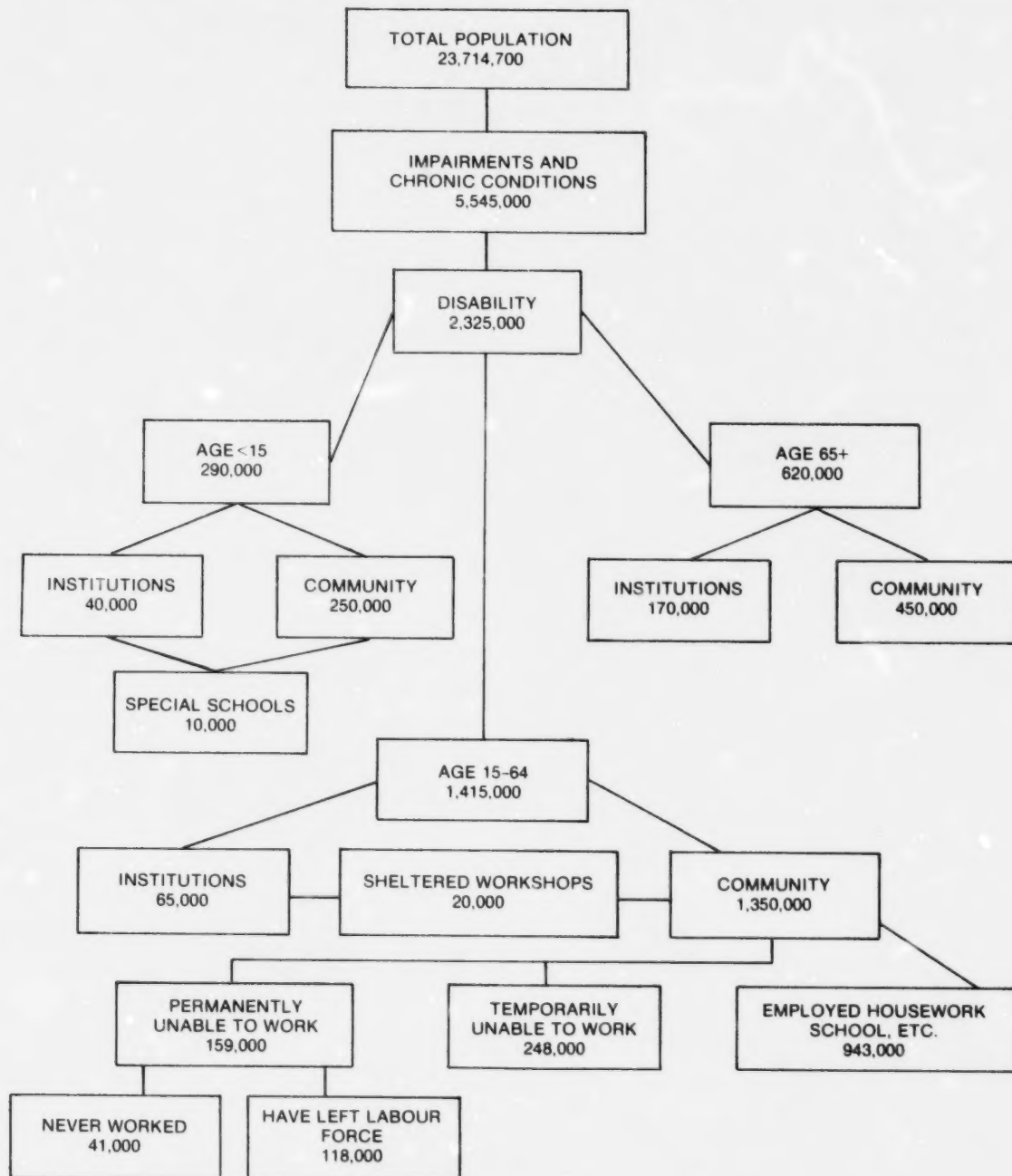


**TABLE 1**  
**Major Activity Limitation by Sex, Canada, 1978-79**

|                                  | ALL AGES |       |        | 15 — 64 |       |        |
|----------------------------------|----------|-------|--------|---------|-------|--------|
|                                  | Both     | Male  | Female | Both    | Male  | Female |
| <b>Major Activity Limitation</b> | 100 %    | 100 % | 100 %  | 100 %   | 100 % | 100 %  |
| No limitation                    | 88.4     | 89.1  | 87.8   | 88.8    | 89.4  | 88.1   |
| Some limitation                  | 2.2      | 1.8   | 2.6    | 2.5     | 2.1   | 3.0    |
| Major activity limitation        | 7.3      | 6.0   | 8.4    | 6.7     | 5.5   | 7.8    |
| Cannot do major activity         | 2.1      | 3.1   | 1.2    | 2.0     | 3.0   | 1.0    |
| <b>Working Total</b>             | 39.6     | 52.8  | 26.6   | 58.0    | 76.8  | 39.3   |
| No limitation                    | 36.4     | 48.3  | 24.6   | 53.4    | 70.5  | 36.5   |
| Some limitation                  | .9       | 1.2   | .6     | 1.3     | 1.7   | .9     |
| Major activity limitation        | 2.3      | 3.3   | 1.3    | 3.2     | 4.6   | 1.9    |
| <b>Inactive Health Total</b>     | 2.1      | 3.1   | 1.2    | 2.0     | 3.0   | 1.0    |
| Cannot do major activity         | 2.1      | 3.1   | 1.2    | 2.0     | 3.0   | 1.0    |

Table 2 shows that for those permanently unable to work who left the labour force within the last five years, 46,000 out of 55,000 (84 per cent) left due to illness or disability. "If we assume that the same proportion applies to the 49,000 who never worked and the 85,000 who left the labour force more than five years ago we estimate that a total of approximately 159,000 Canadians of working age (15-64 years) are permanently unable to work due to illness or disability."<sup>17</sup>

According to estimates made early in 1966<sup>18</sup> in the United States, only one-third of people who are blind were employed; only 47 per cent of the nation's paraplegics could get work; fewer than 25 per cent of persons with epilepsy had jobs; and only one of seven persons with cerebral palsy were employed. And this was before the general increase in unemployment.

Koester<sup>19</sup> estimated that: "Though 95 per cent of all men and 54 per cent of all women of working age are employed, the comparable figures for handicapped persons are only 60 per cent for men and 29 per cent for women."

A survey in British Columbia<sup>20</sup> found that only 0.5 per cent of employees were handicapped and of those 74 per cent were employed full-time and 26 per cent part-time.

Although these studies are not directly comparable, what they do show is that there is a significant proportion of the working age population whose activity in the labour force is restricted due to a disability. It is evident that employability is closely linked with the type and severity of impairment and with the individual's personal characteristics, such as age and sex.

Employment opportunities are even less if a person has double jeopardy characteristics. Conley's<sup>21</sup> data from the United States National Health Survey found that the proportion of persons who report limitation of activity due to physical or mental conditions is greater among the aged, under-educated, non-white, and rural than among the rest of the population. "Although a number of factors explain these dif-

ferences, the most interesting and important is the combination effect of two or more employment impediments which causes aged, uneducated, or non-white persons who suffer from serious physical or mental conditions to have their work prospects reduced far more than the sum of the independent effects of their work impediments."<sup>22</sup> A United Nations report<sup>23</sup> made a similar finding with respect to girls and women with disabilities.

Thus a person who has a double impairment, or who is both disabled and female or native or a member of a visible minority, is even less likely to be employed. Income from employment is also likely to be lower.

#### IV. INCOME

Figures on the income of disabled persons are sketchy but there is clearly a negative correlation between disability and income. And income needs obviously increase where there is limited labour force participation.

In a survey of Canada Pension Plan Disability Benefit Recipients,<sup>24</sup> almost half of the CPP disability population reported total personal incomes below \$3,000, another 25 per cent between \$3,000 and \$6,000, and more than two-thirds reported less than \$9,000. The average industrial earnings in 1979 were approximately \$15,000. Thus more than two-thirds of CPP disability pensioners had less than 60 per cent of the average wage. CPP beneficiaries as a group are likely better off than many other disabled persons, especially those living on welfare, which makes the above results even more striking.

The survey also revealed that the longer a person received a CPP disability pension, the worse off he or she was financially. "Those in receipt of benefits for under 2 years averaged \$7,763 in personal income in 1979, recipients in the 2-4-year range got \$6,584 (\$1,179 less) while those with more than 4 years averaged only \$6,443. Moreover, women were much worse off than men. Over 40 per cent of the female



**TABLE 2**  
**Estimate of Labour Force Activity, Canada, 1979<sup>16</sup>**

|        | PERMANENTLY<br>UNABLE<br>TO WORK           |                                          |                      | TEMPORARILY<br>UNABLE<br>TO WORK                                        |                                                                                       |
|--------|--------------------------------------------|------------------------------------------|----------------------|-------------------------------------------------------------------------|---------------------------------------------------------------------------------------|
|        | Never<br>worked<br><br>(reason<br>unknown) | Left labour force<br>within last 5 years |                      | Left labour<br>force more<br>than 5<br>years ago<br>(reason<br>unknown) | Left labour<br>force within<br>last 5 years<br>due to own<br>illness or<br>disability |
|        |                                            | due to<br>own illness<br>or disability   | for other<br>reasons |                                                                         |                                                                                       |
| MALE   | 22,000                                     | 37,000                                   | 7,000                | 52,000                                                                  | 84,000                                                                                |
| FEMALE | 27,000                                     | 9,000                                    | *                    | 33,000                                                                  | 164,000                                                                               |
| TOTAL  | 49,000                                     | 46,000                                   | 9,000                | 85,000                                                                  | 248,000                                                                               |

\* Unreliable estimate due to small frequency.

CPP recipients had a total personal income of less than \$3,000 compared to 17 per cent of the men."<sup>25</sup>

At least part of the income discrepancy of employed persons with disabilities can be attributed to where they are found in the labour force. Results of a study done in 1975-76 in the United States<sup>26</sup> "confirm the intuitive presumption that the seriously handicapped fill job vacancies predominantly in the secondary labour market — specifically among small, non-union firms in the service industry. ... The factors contributing to this high concentration are high primary market entry wages, low self-esteem on the part of handicapped applicants, institutional rules and barriers among unions and primary employers, and the reward structure under which job placement counsellors work."

The study by the Social Planning and Review Council of British Columbia<sup>27</sup> confirmed this finding, with the highest ratio of handicapped to non-handicapped being in community, personal, or business service industry (1:95). The overall ratio was 1:187.

#### V. BARRIERS TO EQUAL OPPORTUNITY EMPLOYMENT

The barriers to employment for persons with disabilities come from a variety of directions. They are legal, social, and economic, and although changes in one area may plug the dyke temporarily, an overall approach is the only way any long-term effect will be felt.

Study after study lists the barriers that are faced by persons labelled disabled. One study<sup>28</sup> identifies the mental blocks in employers' minds as concern about: structural obstacles; job description changes necessary; insurance rates; employer, consciously or not, tending to relate physical impairment to slower mental abilities; general employment forms asking questions about injury or condition and ignoring the fact that each case may differ greatly in degree; psychological shock factor; and company medical policies that are probably discriminatory. Other studies<sup>29</sup> identify attitude,

education, and architectural obstacles as the principal barriers to jobs.

Myths<sup>30</sup> about disabled persons that lead to rejection in the workplace include: the insurance myth (insurance rates will soar); the safety myth (the company's safety record will be jeopardized); the dependability myth (disabled workers have poor attendance records, their medical problems result in high absenteeism rates); the productivity myth (the disabled worker is not productive, is slow, and has a poor quality of work); the accommodation myth (job sites would have to be specially redesigned at great cost to suit disabled employees); and the double-standard myth (regular employees will not accept disabled workers or the special privileges that will have to be granted to them).

In the British Columbia<sup>31</sup> study cited earlier, the following reasons were reported by 95 businesses which responded to questions about why they did not hire a handicapped person:

- The disabled do not apply for employment here.
- Workplace is architecturally inaccessible to the handicapped.
- Disability prevented them from doing the job.
- Work equipment cannot be operated by the handicapped.
- An able-bodied person was equally suitable.
- A disabled person would not fit into the work group.
- Applicant could not be enrolled in company insurance plan.
- Attitude of other employees was not favourable.

The International Labour Organization<sup>32</sup> identified three general types of barriers: prejudicial attitudes, discriminatory behaviour, and societal factors. They summarized the causes of social barriers as "...the lack of knowledge on the part of some employers and fellow workers of the employment

potential of disabled workers and discriminatory diagnostic labelling and unwarranted fear that hiring the disabled would increase the risk of absenteeism, sick-leave payments and accidents and require a corresponding increase in insurance or compensation obligations".

The British Committee on Restrictions Against Disabled People<sup>33</sup> reported that, "The findings of a survey by the Manpower Commissions Employment Rehabilitation Research Centre confirm that disabled people are far more likely to be successful in their job applications if they conceal their disability initially".

The United Nations study group<sup>34</sup> listed some of the structural barriers to employment as:

- (a) *Employment policies, which make no provision for the vocational rehabilitation and employment of disabled persons;*
- (b) *The existence of rules which, directly or indirectly, restrict or prohibit the entry of disabled persons into employment;*
- (c) *The existence of fixed pre-entry physical standards which bear no relationship to the physical requirements of a job;*
- (d) *Collective agreements which make no provision for the special requirements of disabled persons, such as the need for job adaptation and flexibility in working hours;*
- (e) *The absence of adequate safety measures and policies in individual establishments.*

The employment barriers will be dealt with here under five general categories: attitudes and social policy approaches; legal issues; employment policy; disability income schemes; and transportation and education. Problems in each of these areas will be discussed, with some explanation of the elements within each of these major areas. It would be presumptuous to suggest that every element is included in this review but it is at least an outline of some of the major stumbling blocks to equal opportunity. The final section will outline some approaches to eliminating these barriers.

### **A. Social Policy Approaches as Barriers to Employment**

Policies and programs usually reflect a set of attitudes and assumptions about the people for whom they are created. They are not designed in a vacuum. This is equally true with programs developed to serve the needs of disabled persons.

Disability is not simply one specific, unchanging, clearly identifiable condition. It includes a variety of conditions, and whether those will result in disability or handicap is influenced by many things. Functional ability, adaptive capacity, and physical or social demands and advances in medical technology may all contribute to the existence and extent of handicap that is experienced. The decisions about who is "disabled" as a basis for entitlement to benefits will alter as social or administrative needs or requirements change.

Attitudes about disability must be part of any evaluation of the existing programs and possible alternatives to them. Consideration must be given to the reasons for the establishment of a program and the goals it is expected to achieve. In other words, because the definition of need and, therefore, entitlement to benefits will reflect the policy-maker's attitude,

an understanding of ways of thinking about disability is important.<sup>35</sup>

Assumptions about the needs of persons with disabilities are often premised on notions about what the person cannot do. The disability becomes the characterization of the whole person rather than one aspect of that person. The problem with such characterization is that all needs that arise in relation to the person, or to "the disabled" in general, are seen as a function of disability. Needs are generalized and presumed to be the same for all persons who have a disability or who have the same disability. Generalizations make it easy to translate a single disability into total incapacity. It is true, for instance, that persons who have back problems may be subject to deterioration and should take care with lifting. It is quite another thing to say that no one with a bad back should be hired as a bricklayer. Likewise, it is true that a person with a hearing impairment cannot hear or has very limited hearing and that this may result in learning problems. It is quite different to say that special schools for "the deaf" must be established. Needing attendant care due to paraplegia does not necessarily translate into institutionalized living arrangements.

Incapacity seen as a generalized condition, rather than as a limited and specific condition, tends to incorporate notions of incompetence. Incompetent (unable) people cannot look after their own affairs and thus are dependent on others to provide for them. There are three general results of this perception of incapacity and dependence. Rights and responsibilities are taken from individuals. Decision-making powers of such individuals are taken over by others. And service providers then establish "special" services, based on their own discretion and good will.

An extensive bureaucracy, both public and private, has evolved that provides for persons with disabilities. The individual provided for is reduced to dependent status in many ways. To maintain this dependency, the service providers see disabled persons as sick, as deviant, as charity cases, as children, and as beggars. In each case, the classification of the person enables them to be segregated from normal social life. This segregation ranges from institutionalization (there still exist a large number of institutions for disabled persons in Canada — some with populations of more than 800), to economic segregation in the form of sheltered workshops, to inaccessibility to employment, services, facilities, accommodation, or adequate income.

#### **a. Disability as Sickness**

An individual with a disability may be defined as "sick" and treated accordingly. The basis of this is in a medical context, meaning that there is a "patient" who has a condition that is diagnosed and can be treated. A cure or alleviation of the condition is the goal in the process. The physician as a technically competent expert is the principal decision-maker and is accountable for the care of the patient, through a chain of authority. The sick role (characterized by the use of the word "invalid") assumes a loss of rights related to the condition or disease. The physician makes decisions about what activities can or cannot be continued, and the individual becomes dependent on the doctor for guidance in making these decisions. Treatment in the form of surgery or drugs becomes an important clinical procedure in the life of the patient.

The presumption of disability as disease or sickness gives the medical professionals the control over programs affecting them. Therapy or rehabilitation may be substituted for surgery or drugs as an appropriate mechanism for "cure".

The doctor determines who should be institutionalized, who is competent, what employment is appropriate, and so on. How extensive this influence is is illustrated by the involvement of the medical associations in setting licensing requirements for automobiles, and the reliance of many employers on medical opinions in deciding who should or should not be hired.

Much of the current emphasis on rehabilitation and labour market participation of disabled persons points to an underlying conception of disability as a disease from which, with appropriate therapy, the patient can recover.

The main problem with this approach is that cures are seen to be impossible. The differences between able-bodied persons and disabled people will continue to exist, despite the rigours of treatment or the good management of the medical profession. Attempting to "get well" is hardly an option if one is not "sick". And rather than suspending normal activities to concentrate on a "cure", the individual needs most of all to be accommodated in such a way that s/he can be involved in the mainstream of society.

#### **b. Disability as Deviance**

A person is considered deviant if s/he is seen as different, in a negative way, from others in some respect important to our society. If the person's behaviour does not meet the expected social norms, s/he may be considered deviant. Whereas the medical model highlights biological differences, the deviant model regards the social or behavioural peculiarities. The differences are emphasized and they result accordingly in the characterization of the whole person. Deviant behaviour justifies isolation, and rights and responsibilities are denied because the inferior status of the person makes him/her less capable and competent. There is the presumption that care and treatment can best be determined by others, ranging from family to experts. The deviant person is stripped of his/her ability to make independent judgements. An adult may be denied even such simple decisions as when to go to bed or eat meals, and what to eat — complaints heard often by users of attendant care services. The person is reduced to dependent status in all parts of his/her life, as in the medical model, rendering impossible responsible employment and independent income management.

#### **c. Disability as Charity**

The charity-volunteer models of service delivery also assume and create dependence on service. The ultimate charity case has historically been the disabled person who, in return for "being kept" by society, has been expected, to one degree or another, to accept what has been provided for him/her. This is the most insidious of the models because it

*...magnifies and emphasizes the difference and gaps between able-bodied givers and disabled recipients. A direct relationship seems to exist between the perceived degree of need and poverty of opportunities and resources in the recipient and the felt sense of magnanimity, self-sacrifice, wealth,*

*health and power of the able-bodied giver. Overall, this feature of the relationship between the charitable giver and the disabled recipient enhances the abnormality of the disabled as perceived by the public mind.<sup>36</sup>*

The disabled individual becomes dependent on the service provision, which is provided on the basis of what is perceived by the volunteer or charity giver to be acceptable. Services may be withdrawn or provided as defined by the good will of the giver — not as a right, but as a gift. Access to goods and services that are normally provided to persons as members of a society or a community become "special" services when provided for persons with disabilities. For example, transportation is translated into "alternative" transportation when provided for wheelchair users. The public transportation system is available through a charitable organization. Employers who accommodate the needs of non-disabled persons either as good corporate citizens or because of labour negotiations see themselves as under no obligation to do the same for persons with disabilities.

#### **d. The "Beggar" Stereotype**

*The "beggar" stereotype of the person with a disability includes the following untested assumptions: that he is destitute; that he lacks dignity and pride; that he is a non-contributing member of society, in the sense that he is not economically viable or employable; that he is somehow a collection or testing agent for the supernatural, in the sense that he is morally deserving of help, or conversely that he is dishonest by not being truly disabled or destitute and therefore not morally deserving.*

*The "beggar" stereotype is underpinned by an implied assumption that assisting people with disabilities is not of utilitarian or of economic value, but is rather a matter of good or morality, and, being a matter for the individual conscience, is therefore not a government concern.*

*The effect of the "beggar" stereotype is to further stigmatize people with disabilities, depriving them of dignity and pride. In turn, society's subjugation and exclusion of these people begins to appear justified. The stereotype itself actually contributes to the general destitution, unemployment and non-contribution of people with disabilities. These conditions serve to further exclude people with disabilities from much ordinary experience. The philanthropic giver's inherent suspicion of the person with a disability who has been stereotyped as "beggar" may force a kind of dishonesty upon the person with a disability, to his or her further subjugation or exclusion. The "beggar" stereotype in turn affects the typecast person with a disability by making him or her feel guilty and morally beholden to the givers, which only further aids in his or her subjugation.<sup>37</sup>*

All of these approaches emphasize the dependence of persons with disabilities on others to look after not only the particular needs that exist because of the disability but also major aspects of their lives. They reinforce incapacities rather



than capacities, and in so doing they not only presume greater dependence than there may be but they also generate dependence. The implications for policy are obvious. The problem is presumed to lie principally with the individual rather than with the society, and the barriers that the individual faces that turn disability into handicap are not seen to need change, and are not addressed. The person is presumed to be unable to make his/her own decisions, to participate in activities, in need of being habilitated or rehabilitated, and denied the right to determine his/her own behaviour.

## **B. Employment Policies as Barriers to Employment**

The high correlation between disability and financial need is related to two factors: one is the inability of many disabled people to compete in the open labour market for one reason or another, and the other is the inadequacy of income provisions for unemployed persons with disabilities. There is a correlation between disability and poverty, as shown in the Canada Health Survey<sup>36</sup> and various U.S. data.

To understand how employment and income interact it is important to distinguish between people who are "employable" and people who are "unemployable", and why they are placed in one or the other category and how that is affected by disability. Employers' hiring criteria also have a significant impact on disabled persons' employment prospects and will be discussed.

### **a. Unemployed and Unemployable: Rehabilitation**

Unemployable refers to two groups:

1. those who, due to the severity of the disability, cannot compete in the open labour market. This includes both those who might be able to be productive employees but would require a sheltered employment environment and those who are not able to compete in any setting; and
2. those who are labelled unemployable for the purpose of collecting the benefits associated with that status. This includes both those whose disability interferes with their capacity to obtain or do the type or work that they would normally do without a disability, based on capacity, training, skill, etc., and those who cannot get a job because of economic conditions, social attitudes, and so on related to disability.

The interrelationship of employment and disability must distinguish between the mere existence of a physical or mental impairment or limitation and the presence of a vocational disability arising from that impairment.

Chronic conditions and impairments may provide the necessary precondition to the development of work limitations. However, variations in the severity of the impairment on work requirements, or in the ability of the individual to adjust to impairments or job requirements, or in labour market conditions, determine whether the impairments actually result in work disability.

Labour market conditions dictate to some degree one's chances of gaining employment. In poor economic times, marginally disabled persons are at a competitive disadvantage that might not exist in periods of low unemployment. In addition, the employable are more able to contribute to self support through their own productivity, either in sheltered workshops or on low wages elsewhere.

Occupationally disabled persons are those unable to work at a "satisfactory" level — that is, either at the same level as prior to onset of impairment, or at the maximum potential level reachable through habilitation or rehabilitation. It includes those in need of services to achieve or maintain maximum employment potential.

It is important to recognize that the presence of an occupational disability does not imply the need for special employment-related services. Work limitations imposed by the disability may not constitute any serious barrier to employment. Also, some persons with disabilities may work in more flexible or less demanding environments or conditions of employment, or may have resources that enable them to compensate for and better adjust to capacity losses, thereby removing them from the group that needs employment assistance services.

Certain health conditions or disabilities are less handicapping than others, and they create less need for services and for income assistance. The fact that they are less handicapping may be because of the condition/disability itself; because of external factors (e.g., fewer negative attitudes toward persons with the condition or demands on the individual that can be met even with the disability); or because the needs for services are being dealt with by the existing service system. Other impairments are likely to need extensive services to overcome obstacles to employment and less likely to be served by the current programs, or at least inappropriately provided for by the current programs. The number and kind of services needed is correlated with other factors that result in marginal labour force participation or unemployment.

It is obvious that an illness or injury that limits a person's physical and mental functioning may interfere with his or her working and consequently his or her income. If the injury is severe, it may result in withdrawal from the labour market; if mild, it may result in a reduction in hours worked or affect the effort and skills available to perform a job. Variables other than the degree of impairment affect changes in labour supply.

Further, the extent to which a handicap becomes vocationally disabling may be more related to the vocational prognosis of the individual if s/he did not have the disability than to the degree of impairment. There are disabilities that limit the employment of persons merely because of the state of public opinion and stigma regarding them. As well, there are impairments that appear with greater frequency among the economically disadvantaged and that have a higher statistical correlation with vocational disability.

Persons with job skills, education, and work histories can in most cases be successfully re-integrated into the labour force, usually with a minimum of special services. Vocational rehabilitation may be necessary, however, where work skills are affected by disability.

Vocational rehabilitation centres have come under criticism, however, for their paternalistic methods and the inappropriateness of the training they provide. And sheltered workshops in particular have a history of providing people with unmarketable skills or providing skills that lead only to marginal employment opportunities.<sup>39</sup> The effect is that those who are unemployed and disabled are defined as unemploy-

able because of a disability rather than because of these other socio-economic factors, which are the real cause of their unemployability. This is disadvantageous for those whose unemployment can be directly attributed to disability and those whose unemployment is attributable to other factors.

One of the side effects of this is related to funding for rehabilitation programs for disabled persons. There is a tendency to use funds for the people who are most easily rehabilitated (who coincidentally might be better served by generic services) at the expense of those who clearly need specialized services. If success is measured by numbers of rehabilitated persons, the tendency will always be to choose those applicants who promise greater likelihood of success at the lowest cost.

The solution to employment problems of those persons who are potentially employable must be directed simultaneously in two directions. One, a system of services must be provided to disabled persons to prepare them for the employment market; and two, the economic and social conditions that prohibit the employment of disabled persons must be changed to create maximum opportunities for employable disabled persons. Neither one on its own will be effective. In both the short term and long term the effects of providing maximum opportunities for the employment of persons with disabilities will be felt by income assistance programs.

#### **b. Employer Hiring Criteria**

Employer hiring criteria also present problems. It is not an uncommon practice for employers to establish physical and mental occupational requirements for particular jobs. Such standards are, by definition, discriminatory in that they preclude groups of persons who cannot meet them. This denies individual assessment in the hiring process. However, setting standards on which to screen job applicants is not unacceptable if the standards accurately reflect the needs of the job. Unlike occupational skill requirements, which are normally revised regularly and relate directly to the job description, demands for mental and physical characteristics are commonly found to have little direct bearing on doing a job.

This problem is rarely a result of conscious policy or direct intention, but more the result of institutionalized operating practices and reward systems embedded in corporations, unions, placement offices, and government agencies because they have evolved over the years to deal with problems of efficiency, employee protection, and administrative control. In cases where standards are set that are in excess of actual job demands or where they are inappropriate to the functional needs of a job, they become mechanisms whereby discrimination against persons with disabilities can be legitimated.

Objective job analysis outlining in detail the job qualifications requires that jobs be evaluated independently of the incumbents. Otherwise, the possibility exists that the job will be assumed to need the physical or mental capacities of those doing them. It must be recognized that the "usual" method of performance of job tasks may not be the only way of accomplishing the tasks. The focus must be on the tasks performed and the results expected, rather than on the attributes of the incumbents, which may or may not be necessary to the job performance.

A person with a disability should be assessed by his or her ability to complete a task in a reasonable manner rather than by a particular method of performance. Such evaluations must contain built-in mechanisms or tools for ensuring that the evaluation mechanism is measuring job requirements and not measuring the method of fulfilling job functions. For example, a job may require the ability to read, but that does not necessarily require high levels of visual acuity, since reading can be done by talking machines. Since most job evaluations, including functional evaluations, have a tendency to incorporate method into functional definition, careful analysis should be made of such evaluations.

It can be argued that the standard (administratively defined) disability criteria, though inaccurate, are adequate for public policy purposes, since the persons to be considered are only those unable to maintain their income through working. This argument ignores the fact that programs designed to reduce a family's losses from disability contain disincentives to work. In addition, prevention or remedial programs should be done in the context of the economic costs of disability.

By ignoring these considerations, studies of disability have overestimated the social benefits of disability programs (such as vocational rehabilitation, occupational safety, and public health income assistance programs) and obscured the causal relationship between disability income programs and questions of adequacy without reference to their underlying assumptions and whether those are valid.

#### **C. Disability Income Schemes as Barriers to Employment**

*Most jobs, especially entry level positions, do not pay enough to allow a disabled person to pay for his own care. Thus when accepting employment an attendant care consumer works to his economic disadvantage. The irony is that the eligibility criteria to receive aid for independent living contain the very elements that undermine the independent living goal.<sup>40</sup>*

There are at least 10 kinds of income schemes in place at the present time designed to provide income for disabled persons.

Tables 3, 4, and 5 list these programs and some of their particular characteristics.

Independent of the capacity of these schemes to provide adequate levels of income for persons who are disabled<sup>42</sup>, at least some of these programs have a direct effect on employment.

Looking at the three main sources of long-term income for persons with disabilities — Workers' Compensation, Canada and Quebec Pension Plans, and provincial social assistance schemes — provides some enlightenment regarding the dilemma that faces a person with a disability when he or she wants to work.

**Workers' compensation**, which operates in all provinces and territories, provides insurance protection against wage loss as well as medical and related expenses resulting from occupational injury or physical or psychological loss. The degree of incapacity influences the amount of compensation in the case of permanent disability. The majority of claims are for temporary income loss.

TABLE 3

## Compensation Measures — Federal

| PROGRAM                                 | TYPE                                          | FUNDING SOURCE                                                                                | BENEFITS<br>RELATED TO<br>ACCIDENT/SICKNESS<br>COMPENSATION                                                             | MAXIMUM                                                        | TAXABLE |
|-----------------------------------------|-----------------------------------------------|-----------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------|---------|
| UNEMPLOYMENT<br>INSURANCE               | Social<br>Insurance                           | Contributory —<br>employer                                                                    | Earnings related<br>(average<br>industrial wage)<br>due to injury, illness<br>guarantee                                 | Short-term.<br>Max. wks.<br>Set rate for<br>set time<br>period | YES     |
| CANADA<br>PENSION PLAN                  | Income<br>Protection                          | Contributory<br>(5 years of past 10)<br>up to 65 years.<br>Employer/employee<br>contributions | Long-term disability/<br>survivor —<br>incapacity of pursuing<br>any gainful employ-<br>ment — disability<br>indefinite | Set rate                                                       | YES     |
| VETERANS'<br>PENSIONS AND<br>ALLOWANCES | Based on<br>military<br>service<br>("status") | Military service<br>(non-contributory)                                                        | Pensions and allowances<br>based on degree of<br>disability                                                             | Set rate<br>(not affected<br>by other<br>income)               | NO      |

TABLE 4

## Compensation Measures — Provincial

| PROGRAM                                                             | TYPE                   | FUNDING SOURCE                                 | BENEFITS<br>RELATED TO<br>ACCIDENT/SICKNESS<br>COMPENSATION                                                                                                                            | MAXIMUM                                                                        | TAXABLE                |
|---------------------------------------------------------------------|------------------------|------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------|------------------------|
| WORKERS'<br>COMPENSATION                                            | Social<br>Insurance    | Employer<br>contributions                      | —Temporary total/<br>partial disabilities<br>—Permanent total/<br>partial disabilities<br>—Earnings related (75 %<br>average gross earnings)<br>with a ceiling (medical<br>assessment) | Set rate<br><br>(Also medi-<br>cal and reha-<br>bilita-<br>tion<br>assistance) | Usually not<br>taxable |
| CRIMINAL<br>INJURIES<br>COMPENSATION<br>(Except N.S.<br>and P.E.I.) | Social<br>Insurance    | General<br>revenues                            | —Earnings related if no<br>earnings benefits<br>established by minimum<br>wage base<br>—All other payments<br>deductible                                                               | Benefits<br>same as<br>Workers'<br>Compen-<br>sation                           | Non-<br>taxable        |
| MOTOR VEHICLE<br>ACCIDENT<br>INSURANCE                              | a) Social<br>Insurance | Premiums<br>contribution<br>(public liability) | No-fault insurance<br>—temporary<br>—total                                                                                                                                             | Set rate<br>for perma-<br>nent and<br>partial                                  | Non-<br>taxable        |
|                                                                     | b) Private             | Tort liability<br>(negligence<br>action)       | Benefits related to<br>suffering, etc.,<br>through fault and<br>negligence                                                                                                             | Variable                                                                       | Non-<br>taxable        |
| SOCIAL<br>ASSISTANCE<br>(Welfare)                                   | Social<br>Insurance    | Taxes—<br>public funds                         | Based on need due<br>to disability<br>(financial hardship)                                                                                                                             | Variable<br>with<br>maximum                                                    | Non-<br>taxable        |



**TABLE 5**  
**Compensation Measures — Private**

| PROGRAM                                             | TYPE                                                                             | FUNDING SOURCE                                                                                          | BENEFITS<br>RELATED TO<br>ACCIDENT/SICKNESS<br>COMPENSATION                                                                                                                   | MAXIMUM                                                                                                                                                                            | TAXABLE |
|-----------------------------------------------------|----------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| PAID SICK<br>LEAVE                                  | Insurance                                                                        | Contractual<br>arrangement                                                                              | Limited/short-term<br>usually for persons<br>who are temporarily<br>ill                                                                                                       | Variable—<br>based on<br>continuing<br>salary or<br>wage<br>benefits                                                                                                               | YES     |
| DISABILITY<br>PENSION                               | Insurance                                                                        | Employer<br>contribution                                                                                | Usually totally and<br>permanently                                                                                                                                            | Earnings and<br>contribution<br>related<br>(usually<br>limited)                                                                                                                    | YES     |
| PRIVATE<br>ACCIDENT<br>AND<br>SICKNESS<br>INSURANCE | Insurance                                                                        | Individual<br>contribution or<br>group policies<br>with joint<br>employer-<br>employee<br>contributions | Three types of policy<br><br>a) accidental death<br>and dismemberment<br><br>b) disability benefit<br>or income<br>replacement policies<br><br>c) medical expense<br>policies | a) lump-sum<br>payments<br><br>b) fixed or<br>% of wage<br><br>c) covers in<br>whole or<br>part medical<br>expenses<br>over and above<br>those covered<br>by public health<br>care |         |
| LIABILITY<br>CLAIMS                                 | Tort<br>liability—<br>based on<br>fault or<br>negligence<br>of another<br>person | Legal action—<br>recovery                                                                               | Compensation related<br>to loss of earnings,<br>pain, suffering, loss<br>of expectation of<br>life, and impairment                                                            | Determined by<br>court<br>or settlement                                                                                                                                            |         |

This system is based on the feasibility of determining a causal classification of disabilities and death. Many claims are therefore denied because the disabilities cannot be conclusively shown to have resulted from employment. In cases where accidents are involved, showing cause is problematic; in cases of disease, where medical diagnosis is difficult and the establishment of cause is in many cases impossible, the proportion of successful claims is obviously very small. Objections to workers' compensation arise from two sources: first, compensation is denied to disabled persons who are not eligible for benefits; and secondly, compensation is denied to some who should be eligible and would be if the scientific determinants of their disabilities were known. The applicant is in the position that s/he must show that a disability occurred during a particular time (that is, on the job) and in a particular way (that is, as a result of the work). In the end result, it is easier to disprove a claim rather than to prove entitlement.

Essentially the system is supposed to operate so that if the insurable contingency occurs, the premiums are paid independent of other factors (such as financial situation, proof of need, etc.). In fact, it does not work in that exact way. Maximum ceilings are placed on the benefits receivable, so that the benefits do not in all cases bear a fixed ratio to the premiums, with periods of coverage being adjusted dependent on the administrative interpretation of the disability or the conditions of its occurrence. Benefits payments may be withheld or reduced dependent on other income. The relationship of benefits, premiums, and wages is thereby affected by a variety of intervening variables. The individual must prove entitlement based on a variety of contingencies not always clearly related to the occurrence of entitling events. It is, at a minimum, these reasons that workers' compensation boards have in nearly every province found themselves embroiled in constant controversy.<sup>43</sup> The need to prove fault obviously encourages an emphasis on disability rather than

ability and, because of the stigma attached to disability, hinders future employment prospects.

Disability benefits are paid under the **Canada and Quebec Pension Plans** to contributors under the age of 65 who meet the contributory requirements (a minimum of five years of contributions) and who suffer a severe and prolonged mental and physical disability. To be entitled to collect, the disabled worker must be *incapable* of any gainful employment. The payments themselves tend to be wholly inadequate (the 1980 average disability benefit was \$2,699 a year; the QPP was slightly higher), but more important for our purposes here is the fact that about one-quarter of applicants are rejected for CPP/QPP disability pensions because of the restrictive definition of mental or physical disability. They must be both "severe and prolonged". The proof of entitlement would clearly disqualify an individual from any employment in most employers' eyes.

The **provincial social assistance schemes** (welfare) support the majority of persons classified as disabled. It is estimated that the number of disabled social assistance recipients is about 36 per cent of all welfare recipients. Since most of the other income schemes are employment-related plans, they ignore the needs of those who have never worked or have worked on only an irregular basis.

*There are strict limits on the amount of outside earnings a disabled recipient can earn before his welfare cheque is deducted at a 100% tax rate (e.g. N.S.: \$0-100, 100%), a restriction that does little to encourage the extra work-related expenses of disabled employees. Any income from C.P.P./Q.P.P., U.I., Veterans' Pension, private disability pension, group insurance income and kinds of disability income is deducted 100% in determining the amount of welfare payment, since of course welfare is based on an income means-test and goes to persons with little or no other source of income. The programs are still administered in a harsh poor-law manner with little recognition of the rights and feelings of recipients, and public mistrust of welfare cheats persists. There is a great deal of variation in definitions of disability and much room for interpretive leeway on the part of welfare officials, so geography may have a strong effect on how an application is treated.<sup>44</sup>*

One of the most serious problems with welfare is its tendency to foster and reinforce dependency. Inadequate as the financial benefits may be, social assistance does bring valuable in-kind benefits such as free drugs and dental care, homemaker services, clothing allowances, education costs, and exemption from health insurance premiums and hospital user fees. A disabled person on welfare who tries to venture into the workforce therefore risks the loss of these benefits and may end up in worse financial straits than on welfare. Also, he or she faces new work-related expenses while forsaking the security of welfare.

Public assistance, based as it is not on right but on government largesse and charity, established by the need of the individual, results in government discretion as to the amount, character, and conditions of aid. The means test, differing from province to province, determines the entitlement. Criticisms of means tests are well documented: they debase the

dignity of the person; they withdraw from the recipient the management of his/her own affairs and invade the principle of the cash payment; they subject the recipient to harassment and controls which weaken his/her resources of self-reliance; they impede his/her rehabilitation; they destroy his/her freedom and perpetrate his/her dependence; they entail a degree of administrative discretion that opens the way to administrative abuse; and they proliferate bureaucratic machinery, create an army of welfare workers, and skyrocket the costs of administration.

In essence, the decisions about "need" are made by the social assistance agency, not the individual. What services are appropriate, what wants are to be recognized, what needs may be budgeted for, what funds are to be allocated to what, what ambitions are to be strived for — are all decisions that, to one extent or another, are taken over by the program administrator. "The recipient is told what he wants as well as how much he is wanting." Compliance with the requirements established by the entitlement provisions is the price paid for the assistance. The effect on individual incentive is obvious. The message is clear: persons with disabilities are incompetent to manage their own lives and affairs.

Underwriting requirements for **Private Insurance** schemes, because they may dictate which employees or groups of employees may be able to receive benefits under particular financial arrangements, may influence the employer's decision about hiring an individual. There are a number of ways this may occur.<sup>45</sup> Where human rights legislation does not apply, and participation for new employees is compulsory, an employer may consider that a potential employee's health status is such that s/he will be unable to join the insurance plan in question and base the hiring decision on that presumption. An employer may also apply his/her own underwriting criteria when s/he believes that the enrolment of such an employee in the insurance plan will lead to poorer experience and subsequent premium rate increases. Even where human rights legislation demands that the same benefits be extended to disabled as to non-disabled employees, an employer may find other reasons not to hire an individual if s/he does not believe it is feasible to provide the insurance benefits or if s/he believes s/he will be faced with large potential liability under a self-insured arrangement.

Other public programs designed to provide medical care, rehabilitation, and prevention strategies compete with rather than complement the financial compensation measures. For instance, to collect financial compensation, an individual may have to prove that he or she is permanently disabled and thereby a poor candidate for rehabilitation programs. Where fault must be established to collect, clearly incapacities must be emphasized.

In summary, under the eligibility of some of these programs, in particular social assistance, CPP/QPP and workers' compensation, a person loses several thousand dollars' worth of benefits when accepting gainful employment. The source of the problem is that a person's eligibility is closely linked to that person's income maintenance status. This is true as well for some employment programs. In any program where there is an eligibility requirement that a person must be unable to work, there is a major disincentive to work. If the definition of disability incorporates the notion of unem-

ployability, the benefits of not working will normally outweigh the benefits of working. The combination of benefits, including such things as clothing allowances, technical aids, medical costs, and so on, add up to a significant dollar amount which a disabled person, even with an above-average income, cannot afford to replace from his/her own income.

#### D. Legal Barriers to Equal Opportunity

Legal barriers to equal opportunity crop up in a number of ways. They may result from laws that are written in a way that precludes disabled persons from being employed, or from laws that have a systemic impact on disabled persons without specifically mandating the exclusion of persons; or it may be that the absence of enabling legislation results in disabled people being excluded. An overall view of the discriminatory laws that act as barriers to employment is beyond the scope of this paper. In any case, the provisions of the new Charter of Rights and Freedoms will ensure that federal and provincial governments review the laws in place at present to identify and remove discriminatory provisions to enable compliance with the Constitution. The discussion here will therefore be limited to occupational health and safety legislation and building codes.

##### a. Occupational Health and Safety Legislation

Employers are reticent to hire people with disabilities on the grounds that the employer would not be complying with occupational health and safety rules.<sup>46</sup> Because health is generally within provincial jurisdiction, most of the occupational health and safety laws are provincially enacted. There is no federal occupational health and safety act, but under the Canada Labour Code there is reference to responsibilities of employers and employees concerning health and safety. Also under the Canada Labour Code there are 20 regulations that specifically relate to safety at the workplace. In addition, there are other regulations and statutes that deal with safety as it applies to specific types of employment, such as safety on ships under the Canada Shipping Act.

A study of federal legislation found there were three areas where possible conflict between occupational health and safety legislation and access to employment for disabled persons could arise:

- a) *regulations which describe the general duty of employer or employee in regard to health and safety on the job;*
- b) *regulations or acts containing medical standards, and*
- c) *specific areas where health and safety rules could not be complied with because of a physical handicap.<sup>47</sup>*

In addition to these direct conflicts there are a number of practices that result from an employer's perception of requirements necessary to ensure a safe and healthy work environment.<sup>48</sup> Selection criteria for potential employees are often premised on assumptions about the type of person who will enable health and safety legislative requirements to be met. The use of such criteria to screen participants is acceptable if they reflect necessary requirements of the job. Safety and health can, however, be safeguarded both by modifying the workplace and modifying the workforce.

Although these approaches are neither exclusive nor incompatible as attempts to deal with sources of risk, a modification of the workforce runs the risk of shifting the burden of health and safety protection to the shoulders of those most-at-risk or those with special sensitivities. Thus from the employer's point of view, one of the most obvious ways of complying with occupational health and safety regulations is likely to be seen to be structuring of the workforce in a way that there would be no worker-caused accidents and no worker susceptibility to workplace toxins. Since persons with disabilities are often perceived as the sources of reduced safety in the workplace, they are likely to be screened out as potential employees under the guise of arguments about a healthier, safer workplace.<sup>49</sup>

In other words, the employer screens out persons with disabilities on the premise that by so doing the statutory responsibility<sup>50</sup> to ensure the safety of the workplace is met and to satisfy him/herself that employees are capable of working safely. The problem is that the efficiency and accuracy of medical tests and methods of evaluation used to screen out applicants are often weak. And, further, presumptions based on the presence of a condition may be interpreted as having a work-related effect that is inaccurate.

There are both moral and legal conflicts arising where the issues of equal employment opportunities and medical standards and/or medical monitoring arise. As long as there are laws that are either ambiguous or require that persons with disabilities not be hired, equal opportunities in employment cannot be expected to occur. Asking an employer to break the law or not act in a manner that s/he thinks will break the law or be disadvantageous to his/her business is not the way to promote such opportunities.

##### b. Building Codes

There is a *National Building Code* and all provinces have enacted codes. (See Appendix A for list of codes and their applicability.) In some provinces, human rights codes also have provisions respecting accessibility. Generally these codes apply only to wheelchair accessibility and include only buildings to which the public is admitted. The definition of public building as set out by the *National Building Code* is "... a building to which the public is admitted but does not include apartment buildings, houses, boarding houses or buildings of Group F major occupancy". "Group F" includes factories, warehouses, television stations, service stations, salesrooms, etc. Most of the provinces have adopted the National Code or made their codes applicable to public buildings as defined by that code. The result is that many places of employment are not physically accessible to persons with disabilities.

In itself, this limits the labour market within which persons can work. There is no incentive for the employer to make adaptations that would enable the disabled applicant to be hired. The issue is not reasonable accommodation for an individual who is to be offered a job, but the ability to have access to the application process itself. In hard economic times, the only way to find employment for many persons is to knock on doors but if the door is not accessible there is little hope. The lack of effective legislation in this area means not only that persons are not hired now but that future unemployment can also be presumed.



## E. Transportation and Education Policies as Barriers

Inaccessible transportation<sup>51</sup> is another major barrier to employment. In the United States, there have been transportation codes enacted in many cities and states mandating accessibility of the regular transit systems. This has not occurred in Canada. The solution here, where anything has been done, has been to operate alternative transit systems. The requirements for use are generally quite restrictive and they normally demand a good deal of advance notice as well as limiting the number of times they may be used in specified time periods. These factors make them less than desirable as services for persons with regular jobs or for persons in the job search process. (What happens if a meeting extends beyond the hour at which one has scheduled a pickup? Or if the bus can fit you in only at 9:15 a.m. and your work begins at 8:30 a.m.?) There are some related areas that have to be dealt with in relation to transportation: reasonable accommodation, reliability and effectiveness of alternative services, cost as undue hardship, risk and safety, and carrier liability. Inaccessibility of public transportation acts generally as a disincentive to employment. And in some cases, transportation is an area provided for by income assistance schemes. If an individual is disintitled because s/he works, the cost of transportation may become prohibitive. The financial unfeasibility of these costs in relation to the income earned may preclude a choice even if a job offer presents itself.

The impact of discriminatory policy<sup>52</sup> has much wider implications for the individual than the simple denial of service. Disentitlement to educational opportunities, or an education achieved in an overly restrictive, segregated facility, may well result in an individual's being unable to compete equally with others in the labour market. The lack of suitable educational opportunities and the exclusion of persons with disabilities in education programs present barriers to employment similar to those have been well documented for women and other minority groups. Those problems are compounded for persons with disabilities because it is often assumed that the right to an education does not extend to them. It is not uncommon for educational institutions to refuse to accept into programs those persons the school, college, or university does not believe will be employed after the completion of the program. Employment choices are, in such a case, being made by the education system. Segregated education denies individuals access to normal schooling and to the wide range of skills and attitudes that enable persons to compete successfully in the job market. Finally, persons with more severe disabilities, particularly those with mental handicaps, are often presumed not to be the responsibility of the public education system. They are regularly provided with only a few, if any, years of schooling of any kind and therefore do not even develop the skills that could be used in the limited job market at their disposal. Experimental work programs in the United States have shown that even those persons with the most severe mental disabilities can make an economic contribution with appropriate training and skill development.<sup>53</sup> The denial of training and education is in effect a denial of the right to equality of job opportunities.

## VI. SOLUTIONS: SOME APPROACHES TO ELIMINATING BARRIERS

There are a number of approaches that have been used to eliminate barriers that have made employment inaccessible

to disadvantaged groups. These include affirmative action, quotas, contract compliance, subsidies, designated employment, advertising campaigns, and extensive sheltered workshop programs. These have met with various degrees of success depending on how the programs have been administered. Before addressing such specifics, however, it is necessary to decide the philosophic premises on which an approach to equality for disabled persons is to be based. Also it has to be understood that there is no one solution that will solve the problem. As the overview of barriers to employment for persons with disabilities has made evident, a number of policies will need to be changed if any overall effect is to be accomplished. Any single change, no matter how effective, can easily be undermined by the adverse effect of another policy. It is obvious, for example, that vocational rehabilitation will have limited effect if jobs are unavailable. Providing services without ensuring their accessibility is also of little value since securing a job is not beneficial if one cannot get to it because transportation is inaccessible. Having established a perspective from which to address the problem, I will now discuss some policy options.

### A. An Independence (Integrated) Model for Approaching Disability

An independence model of disability is based on the presumption that disability is not primarily a medical or deviant condition. Disability is viewed as a consequence not only of a physical or mental limitation or psychiatric condition but also of a number of other social and economic factors. Handicapism is a social fact that results from the way a disabled person is treated by others. Its causes are the socially learned attitudes, preconceptions, and misunderstandings of the able-bodied; the denial of usual rights and responsibilities of other members of society; the stigma attached to disability; the expectation that disabled persons have no future in normal social life; and the inaccessibility of the labour force and the benefits that come from that.

The independent living<sup>54</sup> model has been adopted by the disabled consumer movement in its policy perspective. It is contrasted with the broad rehabilitation approach based on the medical model that has dominated policy, practice, and research in the disability field. The "independent living movement" has picked up and adapted a number of ideas or concepts from other social movements. To understand the underlying conceptualization of independent living, it is important to be aware of the impact of these other movements — specifically, demedicalization/self-care, deinstitutionalization/normalization/mainstreaming, consumerism, self-help, and civil rights.

The basis of demedicalization is a challenging of the extent to which the management of disability should remain under the control of the medical care system once medical rehabilitation has occurred, that is, once the individual is beyond the acute care stage. Medical intervention that presumes that disability is sickness and therefore that the individual requires treatment and management by the medical profession is countered with arguments that individuals can and should assume the responsibility for their own health and medical care. The behavioural expectations of the "sick role" that presume that a condition is temporary and the individual is dependent and must be cared for are considered inappropriate.

ate for persons with medically stabilized conditions. Emphasizing independence and self-sufficiency results in a rejection of a model that does not encourage persons with disabilities to assume control and responsibility for their own lives.

Deinstitutionalization, mainstreaming, and normalization are also logical goals of the independence model. Normalization is the "... utilization of means which are as culturally normative as possible, in order to establish and/or maintain personal behaviours and characteristics which are as culturally normative as possible".<sup>55</sup>

Mainstreaming refers to the accessibility and use of the usually available services and facilities (that is, being in the mainstream). Non-segregation is the primary goal. This involves as a first step moving persons out of institutions and their progressive integration into the social life of the community with full access to the services and facilities normally available to the public. The dignity of risk and the possibility of failure are intrinsic to these concepts and they are clearly goals for anyone advocating self-sufficiency and independence.

Consumerism is based on the "buyer beware" principle. It presumes that the consumer does not rely on the good will and honesty of the provider of goods and services but rather assumes responsibility for determining product reliability or service adequacy him/herself. Consumerism means challenging professional dominance in disability policy and rehabilitation. The consumer (that is, the disabled person) or his/her advocate is best able to determine his/her own needs.

Self-help organizations have been established as mutual-aid groups either in addition to or as alternatives to established human services agencies. For the disabled movement, self-help organizations provide advocacy services, peer counselling, and provision of knowledge and delivery of human services. They provide a mechanism for the individual to learn how to exercise control over his/her own life and needs.

The effect of the black civil rights movement on the disabled movement has been in the form of the heightened awareness of rights and how those rights have been denied. There has been increasing public lobbying to expand the prohibited grounds of discrimination in human rights codes in this country to include both mental and physical disability. (See Appendix B for a synopsis of protection of disabled persons under human rights codes in Canada.) A massive and successful lobby was mounted by the disabled constituency to have disability included in the Charter of Rights in the proposed new Constitution of Canada. Integration clearly entails the inclusion in legislative provisions and governmental programs of disabled persons to the extent that they apply to other groups that traditionally have been denied equal rights.

From all these bases the independent living concept has been developed. The long-range goal is for individuals to be independent and self-supporting and to live with dignity in the community. Self-determination and a focus on the individual means that social-service dollars normally available be attached to the individual rather than to an institution or social program. This enables the individual to purchase the support services that are needed to live as normal a life as possible in the community. For example, the individual who

needs attendant care would be able to hire, supervise, and pay his/her own attendant and determine what that person's duties as an employee would be. This increases the person's individual choices and thereby increases individual dignity.

The policy options developed from the perspective of the integration model, with its emphasis on self-determination and independence, are quite distinct from those developed from the perspective of a dependence model. For instance, the presumption that the career choices for disabled people are limited to social assistance, or to rehabilitation leading to employment in sheltered workshops, will not be made when a distinction is recognized between instances where exclusion from the able-bodied economy because of limitations is the only realistic option, and where exclusion is merely convenient. From this perspective, policies about employment would distinguish between two categories: people whose functional limitations are irrelevant to their ability to perform the job functions; and people whose functional limitations in some way compromise their work capabilities. Education programs, including rehabilitation, would be tailored to the broad range of choices available to the individual rather than based on traditional presumptions of inability to be economically self-sufficient. Traditional presumptions about disabled persons are similar to those once made about women which directed them to educational programs and training that led to female occupations, such as secretarial work, nursing, and hairdressing, because it was only in those sectors of the labour force that job openings were available to women.

Developing policies and programs from the perspective of this model leads one to look at a variety of solutions. Solutions would be aimed toward devising mechanisms that would modify work environments and jobs and would encourage or mandate employers to enable persons with disabilities to compete effectively in the labour force; that would enable, where necessary, others to work productively in sheltered settings; and that would enable those unable to work to receive an adequate income from other sources. The focus of the service and income delivery systems would be to promote the same capacity for self-determination for persons with disabilities that others have.

There are three different basic strategies to bring about full participation of disabled persons.<sup>56</sup> One is to prevent further obstacles to full participation from being formed. A second is to eliminate existing obstacles to full participation; and the third is to dismantle social institutions that support the stereotypes of disabled people and replace them with community institutions serving the real needs of everyone. The following solutions all adopt one or more of these strategies. In looking at solutions generally, it is possible to ask if the proposed solutions enable one or more of these three goals to be met. In other words, they provide benchmarks against which programs and policies can be measured.

The solutions proposed here are only briefly outlined. While each deserves a paper in itself to clearly and lucidly outline in detail how it could be implemented, the parameters of this paper preclude that being done. In the context of the previous part of the paper, these outlines will at least enable the reader to understand why they might or might not be proposed as solutions to the employment problems faced by persons with disabilities.

## B. Vocational Rehabilitation

The goal of vocational rehabilitation and training must be presumed to be employment. Where the reason for unemployment is the incapacity of the labour market to adjust to integration of disabled persons, it is likely to be more beneficial to rehabilitate the labour market than to rehabilitate the individual with a disability.

The dependency of employable disabled persons on the capacity of the labour market to absorb them results in successful rehabilitation not being adequately measured and service delivery not being appropriately evaluated. Individuals are often kept in sheltered workshops, rejected as unqualified for employment, and made incapable of realizing their maximum potential because of lack of job opportunities, not because of their disability. The success of habilitation or rehabilitation can be viewed as being, at least to some extent, tied to the potential rate that absorption into the labour market can be achieved. The tendency has been to treat the lack of access to the labour market as an automatic consequence of disability.

The real unemployment rate of disabled persons is masked by the numbers of persons who are designated unemployable. Because of the lack of integrated services and the existence of specialized programs, such persons are unemployable. The existence of these social barriers to employment has therefore relieved the pressure on a labour market unprepared to deal with it, particularly in tight economic times.

Restrictive hiring policies (many in the form of established and rigid physical and mental standards for employment) and the non-extension of the concept of reasonable accommodation (obvious examples for the non-disabled are flexi-hours, air-conditioning, sick leave) to disabled persons have been, until recently, acceptable labour market practice. This is, in part, attributable to the fact that the provision of alternative accommodation (special, segregated services) to persons with disabilities has been considered an acceptable substitute.

Rehabilitating an individual where the cause of the handicap is the labour market or rehabilitating the labour market where an individual disability is the handicap are both counter-productive, as well as costly.

There are some rather obvious conclusions. One is that there are a number of — if not a great many — people being "vocationally rehabilitated" who either do not need it or for whom it will have no impact. If rehabilitation is an activity (a "keep busy" program) it should be defined as such. There are clearly more interesting, more beneficial ways of fulfilling that function than through testing and training people for an inaccessible labour market. This is analogous to presuming that disabled people, by definition, are sick and require medical care.

Secondly, there are at least some disabled persons who are being inappropriately "rehabilitated". This would include people who may well need one form or another of vocational rehabilitation but the service they are receiving is not appropriate to their capacity and interest. Training the filmmaker who is a paraplegic to cane chairs, because that is the contract the sheltered workshop has, can hardly be termed rehabilitation. As dysfunctional as it is for the individual, how-

ever, it may be useful to those managing a program, in that it provides an efficient worker who can carry the workload of a number of less-able workers and thereby secure the continuation of the contract.

Thirdly, effective access to services is dependent on a coordinated referral system and proper evaluation of individual need. This must be distinguished from an *a priori* presumption that vocational rehabilitation is necessary and an almost automatic referral to the most readily available rehabilitation program.

Finally, for some people vocational rehabilitation is not the solution to the problem. Rather the need is for adequate income to enable the individual to compensate for his/her disability or to allow him or her to work or to satisfy needs that will be permanent because that individual will be unlikely to secure employment income.

## C. Income Schemes

Although income security may be achieved through social assistance payments, the qualifying requirements entitling the individual to those payments act as disincentives to labour force participation and thereby delay or inhibit rehabilitation initiatives. The only possible method of straightening out this and other inconsistencies and inadequacies is a rationalized compensation system with an underlying set of principles that uphold the independence and equal status of persons who are disabled and enable the individual to have maximum self-determination in choosing his/her own way of life.

A system of universal disability insurance has been studied in a number of countries, principally New Zealand and Australia, and by several provincial governments in Canada, including Saskatchewan and Manitoba. (See Appendix C for a list of selected reference works on accident and sickness compensation.) The five<sup>57</sup> criteria that have been outlined as the basis for an adequate compensation system are:

1. Community Responsibility: In the public interest, and as a matter of social obligation, the community must protect all citizens from the burden of sudden individual losses when their ability to contribute to the general welfare through their chosen pursuits has been interrupted by physical incapacity. Stated another way, the social and financial costs of accidents and illness that randomly befall individuals should be shared on an equitable basis by all members of society.

The argument for community responsibility is four-fold. First, everyone in society is prone to accidental injury and illness. Second, those who have been disabled by accident or disease have contributed or were preparing to contribute to society through their participation in productive activity, including housework and child-rearing, and have not voluntarily chosen to reduce their contribution. Third, the cost per capita of alleviating the hardships caused by accident and illness is lowest and most easy to bear if spread over the greatest number of people. Finally, if rights (benefits) are universally enjoyed, then the attendant obligations must be universally shared.

2. Comprehensive Entitlement: All members of society should be covered with respect to all hardships arising



ing from accidents and sickness. Compensation should be assessed on the same uniform basis regardless of the cause of disability.

3. Complete Rehabilitation: The system must be deliberately organized to encourage every incapacitated person to recover the maximum degree of bodily health, vocational utility, and social well-being at the earliest possible time. Personal initiative, individual self-reliance, and self-respect should be encouraged.
4. Real Compensation: Income-related benefits must be provided for the whole period of incapacity to compensate for actual losses, in order that every incapacitated person will have the opportunity to maintain roughly the same living standards that s/he had earlier achieved by energy and hard work. Subsistence, means, and/or needs tested benefits are not sufficient. In addition, compensation must recognize the plain fact that any permanent bodily impairment is a loss in itself regardless of its effects on earning capacity.
5. Administrative Efficiency: Benefits must be provided without delays and must be assessed on a consistent basis. Waste must be avoided and contention should be minimized.

The universal disability compensation scheme is based on the recognition that the need exists, the risk is general, and universal coverage through a social security system is, in the final analysis, the only way to deal with this problem.

The purpose of this approach would be to counteract the pitfalls of the present system and to provide coverage to all persons for incapacity resulting from either accidents or sickness. The need has been summarized as follows:

*If a distinction between universal and employment related risks is eliminated and a net income replacement approach is used to provide a uniform level of benefits for all illness and injury, regardless of cause and location, it follows that in the interests of administrative efficiency and universal coverage the various programs should be administratively integrated.<sup>58</sup>*

All systems of compensation for disablement or premature death would be abolished as separate systems and blended into the new plan. That would include the provincial programs of tort liability, workers' compensation, automobile accident benefits, compensation for the victims of crime, and the federal veterans' disability pensions and Unemployment Insurance sickness and disability benefits.

Private insurance would not be incorporated into the plan, nor would it be prohibited, but it would become unnecessary unless an individual wanted to supplement benefits. Welfare (Canada Assistance Plan) would remain as a separate system.

Administered by an agency of government, the revenues for the fund would come from funds currently earmarked for income maintenance programs and through two other sources. First, assessments would be made against those responsible where the cause could be identified. In the case of employment-related disabilities, a certain portion of the cost could be charged to employment through an assess-

ment on employers, based on statistical estimates, independent of cause in any particular case. This would replace the present workers' compensation assessments and the premiums now paid for various types of group disability insurance. Replacing the existing personal injury premium paid for automobile insurance would be a charge to the operation of motor-vehicles. A premium or tax, based again on statistical probabilities, would be imposed on hazardous activities. A second method of funding would be through general taxation on a social insurance basis. This would only be used to cover any remaining costs after the other funding sources had been tapped.

The proposed compensation benefits would be based on the nature and duration of the injury, its economic significance for the individual, and the losses suffered. The cash benefit paid would be the same for the same disability or impairment. The income replacement benefits would be of the following nature:

- a. Total Disability Income Allowance: In cases of either permanent or total disability a percentage<sup>59</sup> of net earnings before tax would be payable. Eligibility for benefits would not be based on proving need or cause. Need would, however, influence the net amount received after taxes in the same way as it does for any other income assistance. A minimum and maximum level of benefit could be established. This allowance would be payable until the claimant is able to return to work, or until s/he becomes eligible for a retirement pension, or dies.
- b. Disability-Loss Compensation: Apart from the income replacement benefits, provision would be made for benefits to compensate for other losses. Actual medical costs would be paid by provincial health schemes as they are at present. This payment would cover:
  - i. non-monetary losses: this would cover the sorts of costs, such as pain and suffering and limitations on social activities, that are often awarded now in cases of tort liability.
  - ii. presumed loss of earning capacity: this would cover the potential loss of earning capacity even where there is no immediately demonstrable loss. For example, students or homemakers or temporarily unemployed persons may have no employment at the time of the disability but might have had in the future. A claimant able to return to his/her former occupation could be in the same position — the loss of earnings will surface at a later date.

The individual would be entitled to the following additional special service allowances. It would be through these that the different impact on the earning capacity of similar disabilities would be reflected.

- Rehabilitation costs and services would continue to be available and the costs would be available from those funds allocated at present for these costs. This includes retraining costs, educational upgrading, home adjustment, and so on.
- Special expense allowances would be available for the particular needs related to disability — for instance, cloth-

ing, attendant care, etc. (Veterans' disability pensions take these needs into account, as do some of the provincial social security schemes, in determining financial needs.)

The Report of the Special Parliamentary Committee on the Disabled and the Handicapped<sup>60</sup> recommended that such a comprehensive disability insurance scheme be implemented in Canada. It also recommended that until that could be put in place a number of changes be made to the Canada Pension Plan, to the Canada Assistance Plan, and to the Unemployment Insurance Act.

It would be possible to implement a comprehensive scheme on an incremental basis with changes to the present workers' compensation acts and to the CPP sickness and accident benefits and by introducing no-fault vehicle insurance where it is not in place. Changes could be made that would, at least, ensure coverage to greater numbers of people in a more rational way.

#### D. Anti-Discrimination

##### a. Human Rights: Employment, Transportation, and Education

Anti-discrimination legislation can have an impact on the employment of persons with disabilities in several ways. It can redress the aggrievement that an individual has suffered because of discrimination and it can reduce systemic discrimination. By and large human rights legislation in this country is directed toward the first goal. Boards are not empowered to do more than that, and the enforcement agencies do not have the power to initiate complaints on behalf of groups. In the United States, on the other hand, legislation has paid much more attention to systemic discrimination — by establishing and enforcing contract compliance, affirmative action, and so on.<sup>61</sup>

A number of changes could be made to human rights acts that would have an immediate effect on employment of disabled persons. The legislation of those provinces that do not include protection for persons with mental or physical conditions in the areas of employment and services, facilities, and accommodation should be amended to include this protection.

Human rights codes (acts) generally provide that if an employer or service provider has a *bona fide* occupational qualification or a *bona fide* justification for not providing service, then there is a defence to a charge of discrimination. Such a generalized exemption demands that there be some clarification either in the law, or in regulations pursuant to the law, that specifies what would constitute a *bona fide* rationale or discrimination. The Canadian Human Rights Commission<sup>62</sup> adopted regulations pursuant to its legislation to include the components of *bona fide* occupational requirements. Some provinces have developed policy guidelines in this area and also with respect to services, facilities, and accommodation.<sup>63</sup> Essentially they outline the exceptional circumstances under which services or employment may reasonably be denied to a person with a mental or physical condition, i.e., where providing such service would go beyond the principle of reasonable accommodation and into the realm of "undue hardship" for the employer or service provider.

Because human rights legislation was put into effect to ensure that discrimination was in fact the exception not the rule, the limitations outlined in such policy have been narrowly defined. The basis of the enforcement of the legislation in the area of employment must be that, in every case, an individual assessment of a person is made with respect to the ability to perform the specific task of the job. Reasonable cause for refusing an individual a particular job must be based on the ability to show:

- a. that a person is not qualified to perform the tasks of the job (functional incapacity), and
- b. no reasonable accommodation of that individual's condition is possible, or
- c. s/he cannot perform the job in a manner that would not endanger the health and safety of other employees or the public.

In other words, human rights legislation must be enforced in a manner that ensures that employment is denied only on job-related grounds and that the selection process operates fairly.

*...proper placement results when the full job requirements of skill, experience, aptitude, training and education have been met; when the physical ability of the worker is equal to the physical demands of the job; and when the physical condition of the worker will not be aggravated by working conditions and the worker's duties will not result in undue hazards to others....<sup>64</sup>*

Human rights legislation also should have provision to enable Boards of Inquiry to order that, where discrimination is proven, changes be made to rectify systemic forms of discrimination and that monitoring of hiring processes be carried out. This could include monitoring of medical history questionnaires, physical and mental standards, restrictive safety conditions, and pre-employment medicals.

The enforcement of human rights legislation in the areas of transportation and education is also critical to removing barriers to employment. Without equal access to these services, many persons will be limited in their ability to obtain and hold a job. The policy guidelines developed under the former Human Rights Code of British Columbia, respecting Section 3 (services, facilities, and accommodation),<sup>65</sup> addressed the issues of what should be provided and what would be considered undue hardship on the service provider. They provide a mechanism to determine when discrimination has taken place.

There is a need for coordinated action by all jurisdictions in human rights enforcement. A careful and narrow interpretation of the law is extremely important in the area where any one jurisdiction could inadvertently undermine the efforts of another by failing to recognize the point where *bona fide* reasons become discrimination. Consideration should be given to empowering these bodies to order affirmative action programs where systemic discrimination has been shown (see later sections of this paper for a discussion of affirmative action).

##### b. Deinstitutionalization

The issue of deinstitutionalization has become an area of some concern in the past few years. The problems of keep-

ing people in institutions have been well-documented. Obviously someone in an institution is not in a position to achieve equality in employment. Without going into any detail, it is enough to say that institutions are not fit places under any circumstances for persons to reside. People must be reintegrated into communities and be provided with support networks that allow them to live in normal rhythms of daily life. The issue of employment for those persons with disabilities who are able to work and who live in the community once they are no longer institutionalized needs to be addressed. The majority of institutions from which one can expect people to be released are for persons with mental disabilities,<sup>66</sup> many of which are quite severe. The experience of those who have created work opportunities for persons with severe or profound mental disabilities should be sought in considering this area.

### c. Building Codes

Architectural barriers are a key reason why many persons are denied employment. This bears no relationship to an individual's capacity to fulfil job requirements and therefore is unjustifiable. Building codes must be enacted that in the long term will eliminate this type of barrier to employment, to education and training, and to public transportation. The cost of providing barrier-free design in new construction has been estimated to be between one-tenth of one per cent and one-half of one per cent of the total construction of new buildings. In addition, the cost of making complete structures accessible to disabled persons when such structures are undergoing major renovation is estimated to range from .66 to 2.4 per cent of the total cost of renovation.<sup>67</sup>

Accessibility must not be restricted to wheelchair accessibility; one must look at obstacles present for other types of disabilities. Many jurisdictions in the U.S. have dealt with this in an economically feasible manner, and these may provide examples to be followed in Canada. The issues that must be considered are the scope and extent of applicability, the standards utilized, the ease and availability of waivers and exceptions, and the nature and extent of enforcement.<sup>68</sup>

## E. Taxation and Economic Incentives

### a. Reasonable Accommodation: Taxation Incentives

Once placement for an individual in a job has been made, then it has to be determined what needs to be done to accommodate<sup>69</sup> the disabled worker in his job and to maximize the individual's productivity. Economic incentives could be devised to encourage reasonable accommodation both in the form of architectural adaptation and the acquisition of technical aids for jobs. Since the cost of accessibility in publicly owned buildings is borne by the taxpayer, such incentives could be limited to private owners and employers.

Tax provisions have been put into effect in a number of states in the U.S. These could be investigated as to their feasibility in Canada. Examples include: Florida, where there is a tax provision "... which specifies that any taxpayer who renovates any building or facility used by the public in order to make it accessible to disabled persons shall, for the purposes of an *ad valorem* property tax, be deemed not to have increased the value of such building or facility except to the extent of the salvage value of the materials used"; and Oregon where "... the cost of renovating an existing building to

eliminate barriers is deductible from the state income tax and the corporate excise tax".<sup>70</sup>

### b. Model Workers' Compensation Act and Rehabilitation Law<sup>71</sup>

Although it has been suggested in this paper that consideration be given to a comprehensive, universal disability income scheme, it is nevertheless worth examining one aspect of the Model Workers' Compensation Act and Rehabilitation Law drafted by the U.S. Council of State Governments. In that proposed legislation, provision is made for reimbursement of an employer for compensation paid if a second injury occurred to an already impaired worker that left the worker with a substantially greater disability. "According to the provision of this model law: the employer must have prior knowledge of the worker's permanent physical impairment; the impairment, regardless of its cause, must be a substantial obstacle to employment; and the liability for disability must be substantially greater by reason of the combined effects of the pre-existing condition and the second injury. The employer or his insurance carrier would pay for all awards, but the second injury fund would reimburse this money after 104 weeks of disability."<sup>72</sup>

## F. Employment Programs

### a. Occupational Health and Safety

The conflict between occupational health and safety legislation and human rights legislation respecting equality in employment has to be addressed and resolved. The attempt to create and maintain a safe workplace must not be at the expense of persons with disabilities having equal opportunities for employment. The employer and the occupational health physician "... must precariously balance equal employment with occupational health obligations".<sup>73</sup> The dignity of risk accorded to the individual must be balanced against the potential safety hazard in the workplace.<sup>74</sup> At the present time, the employer may potentially bear the cost of having providing an individual with a job if that employee subsequently injures him/herself on the job. Under these circumstances, the incentive is for the employer to be overly cautious. Since there are so many attitudinal barriers to employment in any case, this tends to reinforce those barriers and the result is a set of untested, unscientific presumptions being used as the basis for discrimination.

Legislative conflicts must be resolved, keeping in mind the principles of an individual's right to self-determination in choosing employment and the rights of others to a safe workplace.

Medical monitoring and pre-employment medicals present conflicts<sup>75</sup> that also require that civil rights to privacy and integrity of the person be protected.

### b. Quotas: Preferential Employment

One method of placement to enable employment for persons with disabilities in the competitive labour market is the legal requirement that employers hire a given percentage of their total staff from that designated group. This is called the quota system. Where it has been implemented,<sup>76</sup> this method of providing jobs has been combined with other legal requirements that either reserve specific jobs or give preference to disabled workers for particular posts. The implementation of



the system varies in the burden imposed on employers; the degree of compulsion; and the extent of compliance in the countries where quotas have been legally imposed.<sup>77</sup>

*With minor exceptions, the operation of the quota system is generally approved in Britain. It is deemed creditable that the compulsory aspects of the law are barely visible although some would prefer more enforcement in order to reduce the rate of unemployment. A key factor in the system's acceptability is the care taken by the DRO [Disabled Register Office] to send suitable disabled workers to employers and the respect for employers' labour requirements in granting exceptions. Good rehabilitation and training services, adaptation of jobs and workplaces, construction of new buildings with ramps and other devices to aid the handicapped, and the cooperative employers and trade unions reinforce the British quota system. Voluntary organizations are active in educating the public and bringing pressure on behalf of particular disabled groups or individuals. A full employment economy at most times has been a major factor in the ease of administering the quota system.<sup>78</sup>*

Reserved jobs where they have been mandated are considered both less important and less successful for disabled persons than the quota system.

There is substantial variation in the way quotas are operationalized. For instance, Britain has a national percentage of three per cent of total staff of all liable firms, while West Germany has quotas that range from two per cent to 24 per cent, and these are subject to adjustment by the local employment offices, according to type of business and location. West Germany also gives weighted quota worth to different degrees of disability, thereby providing an inducement for the employer to hire the most severely disabled.

*Employers in West Germany are directed by law to adapt places and provide technical aids to make possible the permanent employment of "as many disabled persons as practicable" in jobs such "that they can utilize and develop their special skills to the greatest possible extent." Employers may not reduce wages below the normal level provided by a collective agreement merely because the disabled worker receives a pension, but if the worker's output is subnormal, a lower wage may be provided in the collective agreement. An employer must also grant disabled workers a minimum of six days a year of paid vacation over and above the normal vacation period. The legal protection against dismissal for those under quota employment is stronger in West Germany than in Britain.<sup>79</sup>*

Italy and France have other variations on the extent and means of compliance.

The most frequently mentioned criticisms<sup>80</sup> of quotas are the following:

1. Registration: where the quota system is based on registration
  - a. often employers put pressure on their employees who happen to suffer a very minor disability to register in order to meet their quota.

- b. registration is considered to be stigmatizing.
  - c. if the quota system is to function sufficiently, a definition of disability is needed.
2. Exemption: where authorities may issue exemption permits to allow an employer to hire a non-disabled person even though s/he is below quota
  - a. employers may make it their policy to apply for permits claiming that the nature of the available job does not allow them to hire a disabled person. Overcoming this requires in-depth investigation which may become unfeasible.
3. Legislation as opposed to public education as an approach
  - a. presumes that discrimination is the result of ignorance and misconception rather than having a systemic base.
4. Other criticisms:
  - a. the quota is interpreted as the maximum standard rather than the minimum;
  - b. high proportions of the quota are filled by persons with minor disabilities;
  - c. unless regional employment patterns are taken into account, the quota established may be either above or below what should be expected;
  - d. the quality of jobs acquired is not built into the determination of the quota;
  - e. there may be disincentives in income schemes which make the fulfilment of quotas problematic for the employer.

There are two ways in which the quota system in Great Britain<sup>81</sup> has been held to be successful.<sup>82</sup> First, it has kept the unemployment rate among disabled persons low. Second, it has played a role in increasing public awareness generally, and employers in particular, to the responsibility to employ disabled persons.

The main opposition to quotas in Canada has been that:

1. It is obligatory and infringes on the employer's freedom;
2. acceptance cannot be legislated;
3. budget cutbacks make it impossible for more resources to be allocated for its bureaucratic nature.

In a report put out by Health and Welfare Canada, the conclusion was put forward that:

*Canadian experience has generally not favoured the established of quotas as they tend to reinforce stereotypes and the minimum frequently becomes the maximum. Nevertheless, target goals for improvement from the status quo are generally approved.<sup>83</sup>*

Quota systems have not been recommended by organizations of disabled persons in Canada. This in itself is a strong argument for finding an alternative solution. But there is another reason for not using this scheme. It presumes that persons with disabilities share some common characteristics about their employability that make a quota fair and reasonable. It is difficult to accept such a presumption. Disability

may be closely related to whether one can fulfil job functions or it may be totally unrelated. A blanket approach diminishes the emphasis on individual determination of capacity that is the basis of anti-discrimination legislation. It enables the employment of persons with disabilities clearly unrelated to their work skills while leaving unemployed those who have disabilities but whom the employer, for whatever reason, does not want to employ.

A more in-depth analysis of the experience in other countries and the potential effect of the quota system will need to be undertaken to decide if this is an appropriate solution to the employment problems of disabled persons. It could not in any event be carried out in isolation and would have to be coordinated with other programs and legislation.

### c. Affirmative Action

One of the most popular recommendations for improving employment opportunities for disabled persons is affirmative action. It shifts the conceptualization from one based on unequal treatment to one that places emphasis on the effects of an employer's personnel practices.

In the United States, a section of the Rehabilitation Act was enacted in 1973 and revised in 1976 to provide for non-discrimination by federal contractors.<sup>84</sup> The law requires employers not to discriminate against "handicapped" employees who are qualified to perform available jobs. Employers also must make reasonable accommodation to the worker's disability and develop and maintain an affirmative action program for hiring, placing, and advancing disabled persons.

According to some reports, this law affects the hiring practices of some 3 million businesses and nearly 12 million employable disabled persons.

*Contracts for supplies or services, or for the use of real or personal property, including construction, are included. Subcontractors are also covered. Construction refers not only to the erection of buildings, but to their repair, alteration, extension or demolition. Services include such things as utilities, construction, transportation, research and insurance.*

*Every employer with a \$2,500 annual government contract or subcontract must agree not to discriminate against any handicapped person who is qualified to perform the job, and must agree to take affirmative action to recruit, hire, advance and treat handicapped people without discrimination.*

*Businesses holding government contracts or subcontracts of \$50,000 or more and having at least 50 employees are required to develop and maintain a formal affirmative action program which sets forth their policies and practices regarding handicapped workers.*

*The law defines a handicapped person as anyone who has a physical or mental impairment which substantially limits one or more of his major life activities, including employment; a person who has a record of such an impairment although it has now been corrected; or a person who is regarded as having such an impairment but actually is not impaired. "Severely handicapped" are to be given*

*priority. But the law is ambiguous as to the meaning of its terminology.*

*Affirmative action covers all levels of employment, including executive. It also includes such employment practices as recruitment, hiring, upgrading, transfer, demotion, layoff and termination.*

*Under the law, handicapped workers must be "qualified" to perform the job, with "reasonable accommodation" to their handicaps.*

*Jobs must be reviewed to see whether any physical or mental requirements disqualify the handicapped. When this is the case, the reason must be clearly job-related and consistent with business necessity and safe performance.*

*Inquiry into a worker's mental or physical condition must be based only on the requirements of the job and the information must be kept confidential.*

*A handicapped person who feels he has been discriminated against by an employer may file a complaint with the government. Such complaints either can be conciliated by the employer and the government or can come up for government review and/or hearings before a final decision is reached. The job applicant or employee has a right to request a review of a government decision. Conversely, the employer has the right to request a hearing. If the decision goes against the employer, the government is permitted to take punitive action in the form of sanctions or penalties, or the firm's government contract could be terminated.<sup>85</sup>*

Section 502 of the same Act mandates the Architectural and Transportation Barriers Compliance Board to ensure that established architectural standards are met. Also the 1976 Tax Reform Act provided a tax deduction of up to \$25,000 for companies that remodel to accommodate the needs of disabled persons. In other words, there has been an attempt to bring in other legislation that complements and encourages compliance to ensure equal employment initiatives.

The need to comply with the law has generated employer affirmative action programs and revamping of personnel policies and procedures.<sup>86</sup> A review of this experience<sup>87</sup> would provide a basis for evaluating the U.S. legislation and to determine its transferability to the Canadian situation. Affirmative action programs are designed to provide catch-up opportunities for persons who as a group have experienced systemic discrimination. These may be voluntary, as has been the case with the Canada Employment and Immigration Commission; they may be ordered by a human rights commission to equalize opportunities for a group once discrimination has been established; or they may be a mandatory part of human rights enforcement. Any decision about using affirmative action will have to evaluate how it will be used and how it will be enforced.

### d. Other Employment Schemes

Other solutions have been tried either on their own or in conjunction with those that have been discussed. These include:

- designated employment: saving and designating specific jobs for persons with disabilities;

- advertising campaigns: to educate employers as to the abilities and potential of disabled persons in an effort to convince them to hire such persons;
- subsidies/semi-sheltered employment: workers are given employment and the employer receives compensation for the hiring (this was unsuccessful when tried in Sweden<sup>80</sup>);
- sheltered workshops: establishing an extensive network of sheltered employment so that persons with disabilities have access to some sort of employment;
- home work: a version of sheltered employment that enables a person who has difficulty leaving the home to be allocated work by a sheltered workshop administration.

These options have met with more or less, usually less, success, where they have been tried. However, there may well be value in considering them in designing an overall employment program within the Canadian context.

## VII. CONCLUSION

The employability<sup>81</sup> of persons generally is dependent on three factors: the availability of employment; the availability of persons for employment; and the possession of skills and competence to meet the employment requirements. For persons with disabilities, additional factors such as the following may be present.

- (1) *stereotyped or prejudicial expectations which may affect recruitment or hiring;*
- (2) *the necessary education, training or experience may have been far below the person's potential and act as a barrier to effective competition or performance;*
- (3) *special aids in mobility, transportation, access to buildings, technical aids to enhance capacities, or ergonomic adjustments of work environments may be necessary.<sup>82</sup>*

A change in attitudes is the only long-term solution to employment of persons with disabilities. Since, as the facts about unemployment and underemployment of disabled per-

sons indicate, this is not happening, or at least is happening at a pace too slow to be acceptable as a solution to a major social problem, the structural barriers need to be addressed in other ways. No single solution is likely to be successful in isolation. An overall approach that includes government policies, employer policies, and union policies is imperative if there is to be equality in employment. Conflicts in law and policy that are now in place must be reviewed and eliminated. Although there has been an attempt to review some of the major barriers to equal employment for disabled persons and the potential solutions in this paper, it would be foolhardy to assume that it is exhaustive.

Perhaps the best that can be suggested is that in Canada we adopt a consistent perspective.

An overall approach must emphasize the following elements: reaching high-priority target groups currently neglected (that is, people with multiple or severe disabilities); job training as an integral aspect of services for persons with disabilities; labour market analysis that includes planning for disabled persons as an integral part; job development that focuses on job analysis, modification, and accommodation to result in enabling and maximizing participation; the placement of responsibility for services in agencies that can not only provide the needed services but that can adapt to and promote the philosophy of integration and self-determination of persons with disabilities; and the integrating of income assistance programs and rehabilitation programs. The present splintering of services among the various levels of government and social service agencies leaves gaping holes in service delivery and the possibility of a comprehensive employment and income model unlikely.

An integrated service and income delivery approach must be established that takes into account not merely the individual disability but the interplay between the functional limitations imposed by the disability and the limitations imposed by the labour market. It is only once an integrated system is in place that we can expect to make real inroads into the employment problems faced by a disabled individual who wants a job.



## NOTES

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- 11 *Ibid*.
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- 13 *Supra*, note 7, at page 7.
- 14 Canada Health Survey, 1981. *Supra*, note 3.
- 15 *Supra*, note 7. Estimates from the Canada Labour Force Survey, December, 1979.
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- 47 George, Anne, "Federal Occupational Health and Safety Legislation: Possible Conflict with Access of Physically Disabled People to Employment", Internal Working Document of the Canadian Human Rights Commission, March, 1981, at page 4.
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- 49 The implications of human rights legislation will be discussed in the next section of the paper.
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- 52 See Interpretation re Education, *ibid*.
- 53 For example, Bellamy, Thomas G., Horner, Robert H., and Inman, Dean P., *Vocational Habilitation of Severely Retarded Adults*, Baltimore: University Park Press, 1979; Horner, Robert H., Bellamy, Thomas G., and Colvin, Geoffrey T., "Responding in the Presence of Non-Trained Stimuli: Implications of Generalization Error Patterns", University of Oregon: Center on Human Development, n.d.; Sprague, Jeffrey R., and Horner, Robert H., "An Experimental Analysis of Generalized Vending Machine Use with Severely Handicapped Students", University of Oregon: Center on Human Development, n.d.
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  56. Derksen, Jim, "Full Participation of Disabled Persons". Paper prepared for the United Nations, 1981.
  57. Royal Commission Report, *Compensation for Personal Injury in New Zealand*, 1967; National Committee of Inquiry Report, *Compensation and Rehabilitation in Australia*, 1974.
  58. Canadian Union of Public Employees. Paper on Universal Disability Benefits, September 23, 1980, at page 59.
  59. Australia recommended 85 per cent with a ceiling. New Zealand pays 80 per cent of earnings' loss with a ceiling (of \$325 Can./week in 1979); Manitoba recommended 66 2/3 per cent of previous net earnings with a maximum; Saskatchewan recommended 80 per cent of net income; the Ontario Division of CUPE recommended 75 per cent of net income.
- The Ontario White Paper on the Workers' Compensation Act recommends that a dual-award system be instituted for permanent disability: a lump sum to be paid according to the degree of impairment, and continuing periodic payments to be made only when wages are actually lost. The 1976 Report of Sickness and Accident Insurance Committee of Saskatchewan recommended that permanent disability compensation under its proposed revised Worker's Compensation Act, Automobile Accident Insurance Act, and a new program provide an income replacement benefit and a disability component. Manitoba's 1977 White Paper on Accident and Sickness Compensation considered the three basic approaches — that is, (a) a "wage-loss" approach (compensation on basis of actual loss of earnings alone); (b) a "whole person" approach (compensation based on medical assessment of degree of disability), and (c) a "loss of wage-earning capacity" approach (estimates loss of earnings capacity taking into account a variety of factors), but did not reach a conclusion.
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  61. The California Employee Selection Guidelines, 1972, gives an idea of the comprehensive nature of equality in employment legislation in the United States. See also Guy, Jana H., "The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and Analysis of the Major Issues" *University of Baltimore Law Review*, Vol. 7 (Spring 1978).
  62. Bona Fide Occupational Requirements Guidelines, *Canada Gazette*, Part II, Vol. 116, Note 1, January 13, 1982. These regulations have been superseded by recent amendments to the Act and the Commission is developing new policy with respect to BFORs and bona fide justifications.
  63. See *Policy Guidelines*, supra, note 51.
  64. "Fitting the Job to the Handicapped Worker" *Journal of American Insurance*, 52 (Winter 1976-77), at page 26-27.
  65. See *Policy Guidelines*, supra, note 51.
  66. Mental disabilities include both mental illness and mental retardation.
  67. Nicolai, Don E., and Ricci, William J., "Access to Buildings and Equal Opportunity for the Disabled: Survey of State Statutes" *Temple Law Quarterly*, Vol. 50 (1977).
  68. *Ibid.* This article outlines these issues and the state of the law in the U.S. See also the following section of this paper that deals with Tax and Economic Incentives. Appendix A outlines the building codes in effect across Canada.
  69. See the section of this paper on Anti-Discrimination Policies: Human Rights Legislation for a discussion of the concept of reasonable accommodation.
  70. *Supra*, note 67.
  71. *Supra*, note 64.
  72. *Ibid.*, at page 26.
  73. Stillman, Nina G., "The Law in Conflict: Accommodating Equal Employment and Occupational Health Obligations" *Journal of Occupational Medicine*, Vol. 21, No. 9, September, 1979.
  74. *Supra*, note 62.
  75. *Supra*, note 48.
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  77. Details of the laws in different countries are outlined in Reubens, *ibid.*
  78. *Supra*, note 76, at page 141.
  79. *Ibid.*, at page 147.
  80. Nikias, Angelo, "Quotas, Perhaps the Solution to the Employment of the Disabled" September, 1979, n.s.
  81. *Supra*, note 33. This Commission concluded that the quota system had not been as effective as "one would wish". However, it recommended equal opportunity legislation and "that any measure designed to improve employment opportunities for disabled persons should include a quota or quotas element that is enforced".
  82. *Ibid.*, at page 11.
  83. *Supra*, note 7, at page 9. Emphasis in original.
  84. See Hood, Michael A., "Federal Laws Barring Discrimination Against the Handicapped: An Overview" *EEO Today*, Vol. 6, No. 4 (Winter 1979-80); Pati, Gopal C., and Atkins, John I. Jr., "Hire the Handicapped — Compliance is Good Business" *Harvard Business Review* (Jan-Feb. 1980); Paquette, Suzan, "Jobs for the Handicapped" *Canadian Labour*, Ottawa International Press Association, 20.4 (December 1985); Jackson, Diane P., "Affirmative Actions for the Handicapped and Veterans: Interpretative and Operational Guidelines" *Labour Law Journal*, 29 (Feb. 1978); Guy, Jana H., "The Developing Law on Equal Employment Opportunity for the Handicapped: An Analysis and Review of Major Issues" *Baltimore Law Review*, Vol. 7 (1978); Cook, Timothy M., "Nondiscrimination in Employment Under the Rehabilitation Act of 1973" *The American University Law Review*, Vol. 27.1 (1977); Vaccaro, Patrick, and Kaplan, Roger S., "Employing the Handicapped: A Look at the New Regs" *American Health Care Association Journal*, 3 (November 1977); President's Committee on Employment of the Handicapped, *Shifting Into Higher Gear*. Washington, D.C., Delury, Bernard E., "Equal Job Opportunity for the Handicapped Means Positive Thinking and Positive Action" *Labor Law Journal*, 26.11 (Nov. 1975); Linn, Brian J., "Hire the Handicapped: New Trends in Employment Discrimination Litigation" *Trial*, October 1978; *DePaul Law Review*, Summer, 1978. The entire issue is devoted to a symposium on the employment rights of disabled persons.
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  89. *Supra*, note 7.
  90. *Ibid.*, at page 8.

## APPENDIX A

### Building Standards Across Canada, 1983

#### 1. NATIONAL BUILDING CODE

- Can be adopted by municipalities but is not mandatory.
- Defines public buildings as "a building to which the public is admitted but does not include apartment buildings, houses, boarding houses or buildings of Group F major occupancy." "Group F" includes factories, warehouses, television stations, service stations, salesrooms, etc.
- First floor only needs to be accessible.
- Access defined as wheelchair accessibility.

#### 2. BRITISH COLUMBIA Building Code, Part 10

- Applies to public buildings covered in the *National Building Code*.
- Considers visual and hearing impaired, but accessibility is generally defined in terms of wheelchair accessibility.

##### British Columbia Human Rights Act

- Requires all places of employment and public accommodation to be accessible.

#### 3. ALBERTA Building Code

- Applies to public buildings as defined in the *National Building Code*, but also includes apartments over four storeys.
- Access defined as wheelchair accessibility.

##### Alberta Individual Rights Protection Act

- Buildings open to the public are to be accessible. However, owners are exempt from Sections 3 and 4 of the *Individual Rights Protection Act* if their building falls within the definition of the *Alberta Uniform Building Act*.

#### 4. SASKATCHEWAN

- Has adopted the *National Building Code*. Any city or town adopting a building code must adopt the *National Building Code*.

##### Saskatchewan Human Rights Code

- All buildings open to the public must be accessible. The Commission has adopted the *Accessibility Standard* as formal interpretive guidelines on what constitutes accessibility.

#### 5. MANITOBA Building Code

- Applies to public buildings as defined in the *National Building Code*.
- Access defined as wheelchair accessibility.

##### Manitoba Human Rights Code

- All buildings open to the public are to be accessible, but those built prior to 1977 and those governed by other legislation are exempted.

#### 6. ONTARIO

- Applies to places of assembly, government, and offices, retail, commercial, and residential (with some qualifiers).
- Access defined as wheelchair accessibility.

#### 7. QUEBEC — Code du bâtiment

- Applies to public buildings as defined in the *National Building Code*.
- Access defined as wheelchair accessibility.

##### Bill 9 — An Act to Secure the Handicapped in the Exercise of their Rights

- All buildings built before 1976, public transportation and telephone services are to develop programs to ensure access to the handicapped within a reasonable time.

#### 8. NEW BRUNSWICK

- Has adopted the *National Building Code*. Any city or town adopting a building code must adopt the *National Building Code*.
- Has an Inter-Departmental Accessibility Committee looking at proposed legislation.

#### 9. NOVA SCOTIA — Building Access Standard

- Applies to public buildings as defined in the *National Building Code*.
- Access defined as wheelchair accessibility.
- Has a Legislative Advisory Committee for Disabled looking at proposed legislation.

#### 10. PRINCE EDWARD ISLAND — Access to Public Buildings Act

- Applies to public buildings as defined in the *National Building Code*.
- Access defined as wheelchair accessibility.

##### Prince Edward Island Human Rights Act

- Requires all buildings open to public to be accessible, and those built prior to amendments are not exempt.

#### 11. NEWFOUNDLAND — The Building Accessibility Act

- Applies to public buildings as defined in the *National Building Code*.
- Access defined as wheelchair accessibility.



## APPENDIX B

## Human Rights Law and Disability Across Canada, 1983

|                                                                                                               | Employment              | Housing/<br>Rental<br>Purchase | Public<br>Accommodation | Trade<br>Unions &<br>Associations | Application<br>Forms/<br>Advertise-<br>ments | Public<br>Notices | Contracts  | Education  |
|---------------------------------------------------------------------------------------------------------------|-------------------------|--------------------------------|-------------------------|-----------------------------------|----------------------------------------------|-------------------|------------|------------|
| Canadian Human Rights Act<br>(Physical and<br>Mental Handicap)                                                | Section 7               | Section 6                      | Section 5               | Section 9                         | Section 8                                    | Section 12        |            |            |
| British Columbia Human<br>Rights Act (Physical<br>and Mental Disability)                                      | Section 8               | Sections<br>4 & 5              | Section 3               | Section 9                         | Section 6                                    |                   |            |            |
| Alberta Individual<br>Rights Protection Act<br>(Physical Characteristic)                                      | Section 7               | Section 4*                     | Section 3*              | Section 10                        | Section 8                                    | Section 2         |            |            |
| Saskatchewan Human Rights<br>Code<br>(Physical Disability)                                                    | Section 16              | Sections<br>10 & 11            | Section 12              | Sections<br>17 & 18               | Section 19                                   | Section 14        |            | Section 13 |
| Manitoba Human Rights Act<br>(Physical Handicap)                                                              | Section 6               | Sections<br>4 & 5              | Section 3               | Section 6                         | Section 6                                    | Section 2         | Section 7  |            |
| Ontario Human Rights Code<br>(Physical and Mental<br>Handicap)                                                | Section 4               | Section 2                      | Section 1               | Section 5                         | Section 22(1)                                | Section 12        | Section 3  |            |
| Quebec Charter of Human<br>Rights and Freedoms<br>(Handicapped Persons,<br>Physical and<br>Mental Disability) | Section 16              | Section 12                     | Section 15              | Section 17                        | Section 18                                   | Section 11        | Section 13 |            |
| New Brunswick Human<br>Rights Act (Physical<br>Disability)                                                    | Section 3               | Section 4                      | Section 5               | Sections<br>3 & 7                 | Section 3(4)                                 | Section 6         |            |            |
| Nova Scotia Human Rights<br>Act (Physical Handicap)                                                           | Sections 8,<br>11 B & C | Sections<br>11A, B & C         | Sections 11A,<br>B & C  | Sections 9,<br>10, 11 B & C       | Sections 8, 11                               | Section 12        |            |            |
| Prince Edward Island<br>Human Rights Act<br>(Physical Disability)                                             | Section 6               | Sections<br>2 & 3              | Section 2               | Sections<br>8 & 9                 | Section 6 (3)                                | Section 12        |            |            |
| Newfoundland Human<br>Rights Act (Physical<br>disability)                                                     | Section 9(1)            | Section 8                      | Section 7               | Section 9(3)                      | Section 9(4)                                 | Section<br>11(1)  |            |            |

\* Section 4.1 of *The Individual Rights Protection Act* exempts the owner of buildings from complaints under Sections 3 and 4 if their building falls within the definition of *The Alberta Uniform Building Standards Act*.

Source: Saskatchewan Human Rights Commission, "Human Rights For Persons With Disabilities", August, 1981, updated 1984.

## APPENDIX C

### Selected Reference Works on Accident and Sickness Compensation

#### NEW ZEALAND

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2. *Personal Injury*, A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand, a Government White Paper, 1969.
3. *Report of Select Committee on Compensation for Personal Injury in New Zealand*, G. Gair, et al., November, 1970.
4. Reprinted Act, *Accident Compensation*, reprinted as on 1 January, 1976.

#### AUSTRALIA

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## THE CONCEPT OF RACE AND RACISM IN SOCIETY

Wilson A. Head

### Sommaire

La confusion à l'égard des expressions «race» et «racisme» fait qu'il est de plus en plus nécessaire de clarifier et de comprendre ces termes controversés. Le document analyse les origines historiques, économiques et politiques des théories raciales contemporaines, eu égard aux progrès réalisés et à la situation dans les sociétés occidentales industrialisées.

Ensuite, il aborde l'évolution de la notion de race en tant que phénomène social qui a servi à justifier l'imposition d'un statut inférieur à divers groupes de la société. Des constatations biologiques, génétiques et anthropologiques sont présentées de manière à réfuter toute thèse d'infériorité raciale.

Enfin, on fait valoir que les études réalisées par des chercheurs pour le compte des Nations Unies et d'autres organismes doivent être diffusées à une grande échelle de manière à démythifier les stéréotypes, les préjugés et la discrimination manifeste à l'égard des groupes dits «inférieurs», notamment, mais pas exclusivement, dans les sociétés occidentales industrialisées.

### Summary

Confusion regarding the terms "race" and "racism" has led to increasing recognition of the need for clarification and understanding of these controversial terms. This paper attempts to explore the historical, economic, and political origins of modern racial theories in relationship to past and present developments and conditions in Western industrial societies.

Second, it attempts to examine the development of the concept of race as a social phenomenon that has been utilized to justify the imposition of inferior status and subjugation on various sub-groups in human societies. Biological, genetic, and anthropological findings are presented which refute ideological justifications for the concept of racial inferiority.

Finally, it is argued that the results of scientific research, as developed by scientists working under the auspices of the United Nations and other bodies, must be widely disseminated. This is necessary to counteract and undermine the myths still used to justify stereotyping, prejudice, and overt discrimination against so-called "inferior" groups, particularly but not exclusively in Western industrial societies.



## THE CONCEPT OF RACE AND RACISM IN SOCIETY

Wilson A. Head\*

### I. HISTORICAL BACKGROUND AND DEVELOPMENTS

Historical and anthropological studies clearly indicate that men and women have been aware of and interested in the considerable differences that exist among members of various human societies. There is no debate regarding the fact that differences exist; the most casual observation of human populations in various parts of the world provides conclusive evidence of the variety of colours, sizes, shapes, and interests of individuals living in different regions of the world. The meaning and implications of these differences, however, have not been so obvious, and have been characterized by debate and controversy over the past two centuries.

Why, it may be asked, the intense interest and controversy regarding the mere fact that human populations reflect certain physical and cultural differences? Should differences be regarded as intrinsically "bad" and thus condemned? Or should they be regarded as "interesting and desirable"? These and other similar questions assume increasing importance when we contemplate the vast amount of injustice and even oppression to which members of many human groups have been subjected during the past four centuries.

It is important to point out, at the outset, that race and racism have not been a characteristic of the relationships between different population groups throughout human history. In fact the concept of "race" did not exist in early Greece and Rome. The Hellenic Greeks, notes Cox (1948), "had a cultural rather than a racial standard of behaviour. Their basic division of peoples were Greeks and barbarians". The barbarians were considered to be anyone who did not possess Greek culture, and particularly the Greek language. Colour was not a factor. The Greeks, when they founded cities and other settlements on the shores of the Mediterranean and Black Seas, freely intermarried with the local population and easily accepted them as Greek citizens when the natives learned the Greek language and culture. Later, and following his conquests of the then known world, Alexander the Great married a Persian woman and encouraged his soldiers to do likewise. Race had not been discovered.

The emergence of the Roman Empire was the next great historical development in Europe following the fall of the Greek city states. The Romans, like the Greeks, captured thousands of slaves during their conquests. Slavery, however, was not restricted to non-whites. Social and cultural superiority in Roman society was based on cultural/class characteristics, and the basic requirement was Roman citizenship. All non-Romans, of whatever colour or ethnic group, were considered as barbarians unless and until they were accepted as Roman citizens. The Germanic tribes who invaded Rome and finally destroyed the Roman Empire, although white Europeans, were nevertheless considered inferior in learning and culture.

Religion also played a major part in the development of racial attitudes, particularly in Europe and in the Near East during the Middle Ages. As Christianity became the dominant European religion, non-Christians were increasingly considered "infidels" and therefore inferior. Much of the early oppression of non-Europeans, for example the native peoples of Africa and the Americas, was justified on the basis that the natives were not Christians. Acceptance into western European societies was dependent on the readiness of the native individual to give up his or her indigenous religion and to accept Christianity.

Although authorities differ in respect to the emergence of "race" as a concept, it is generally agreed that colour was not a dominant feature of early Western civilization. This is not to state that people were not conscious of differences. Eminent authorities such as the Greek philosopher Aristotle were worried about the inferior people who comprised so large a part of the Greek population. But "inferiority" had not, at that time, been equated with colour.

### II. "RACE" AS AN EMERGING CONCEPT

Although colour was not, as indicated above, a factor in the early development of Western civilization, it began to evolve as a significant factor with the emergence of European colonialism. This aspect will be developed in more detail later in this discussion. But equally as important was the development of scientific thought during the period of the "enlightenment"—roughly during the fifteenth and sixteenth centuries. As Osborne (1971) points out, the most important factor in the development of the concept of race was the fact that the scientific revolution was under way and required cataloguing and classification of natural phenomena, including organic and inorganic matter. Human populations were also brought under systematic observation. The attempt to classify human beings was merely one aspect of the general scientific interest in systematic and objective observation. Much of the credit for this approach must be given to Francis Bacon, who formulated the philosophy and principles of scientific observation and inductive reasoning (Osborne, 1971).

While early observations had been subjective and arbitrary, some scientists began to develop more objective methods. For example, Carl Linnaeus, a Scottish botanist, was responsible for bringing some degree of order into the arbitrary observations made by other scientific observers. This general interest in classifying and labelling was, *inter alia*, a major factor in the emergence of what is now known as the human race and its sub-species.

A close examination of the development of the "race concept" clearly indicates that its logical determinants are to be found in what has been labelled as the "superiority/inferiority" syndrome. As indicated earlier, the Romans and Greeks were not interested or concerned about colour as a phenomenon for classifying human populations, but they were

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interested in the question of which was the superior group. And as Klineberg, an anthropologist, has noted, "whites have, almost without exception argued that their own group was somehow superior and to be glorified". He continues by noting that from this fact, one cannot hope for objectivity in discussions of race. Other groups are generally considered inferior and even outcasts. The frequency that one group is highly praised may be merely a matter of an accidental majority of those who write books and "the truth is not necessarily on the side of the most articulate" (Klineberg, 1934).

The early theorists on racial inferiority, i.e., Aristotle, believed that northern Europeans were brave but lacking in intelligence and thus unfit for political organization. Asians were considered inventive and intelligent but lacking in "spirit". The Greeks, according to Aristotle, were of "a superior breed and by nature, fitted to rule the earth".

### III. RACIAL THEORIES

A French nobleman, the Count de Gobineau, is generally regarded as the father of modern racial theories. Gobineau attempted to prove the superiority of the "white" population over all other "races", and of the Aryans over even other "white" groups. Many other writers and theorists, i.e., Chamberlain, Madison Grant, an American, and a number of German writers, including Baur, Fisher, and Lens, also accepted the theories of Gobineau and insisted on the superiority of "Nordic" or "Aryan" racial groups. The ideas of these and other theorists became more or less fixed in the literature, folklore, general culture, and institutional structures of modern Western societies. The concepts of "race" and "racism" were given birth by the need to prove the superiority of the groups to which these writers belonged. There is no evidence that any of the early theorists ever attempted to prove the superiority of other groups. All others were considered inferior except as they exhibited characteristics similar to their own.

Given the subjective basis of much theorizing about "race," we still are faced with the fact that the concept is in common use and has achieved widespread recognition and acceptance as valid in modern Western societies. Considerable confusion still exists concerning the actual definition of what is a "race". Many national, geographic, linguistic, and cultural groups are frequently labelled as "racial groups". For example, in Canada we frequently speak of the two "founding races", namely, the English and French. These groups may be more accurately described as national groups. Or we speak of the "Jewish race," which again is not a racial group at all. Jews are basically a religious and cultural group. What then is a more scientific definition of race?

### IV. HUMAN CLASSIFICATION

Human groups have been and are still classified in many different ways by different observers—anthropologists, biologists, genetists, and sociologists. Each of these disciplines view the concept of race from its own perspectives. There is, however, general although not unanimous agreement that human beings belong to one of three major population groups, namely, European or white, Asiatic or yellow, and African or Negroid (black). While convenient, this classification, based on no more than various shades of skin colour,

has serious limitations. In a biological sense, it has less justification than classification based on blood type.

Many attempts have been made to identify measurable physical characteristics that clearly differentiate the various human groups. None of these has been satisfactory. The differences in measurable characteristics among individuals within a given group are greater than those of individuals belonging to a different classification. For example, South Asians from the Indian sub-continent are classified as Caucasian. But few Indians are "white", and many, particularly those born in the southern region of India, are often darker in complexion than many African blacks. The physical characteristics of the Chinese population is also quite varied, ranging from dark brown to a shade of yellow. And even the skin colour of Europeans except in broad limits is not entirely similar. Southern Europeans tend to be considerably darker in complexion than northern Europeans.

In addition, as Cruz (1971) points out, there are striking differences in the physical, intellectual, and other genetically based characteristics among individuals of even the most homogeneous groups, even among brothers and sisters. All human races, according to Mayr (1971), are mixtures of human populations and "the term 'pure' race is an absurdity". Livingston (1962), a proponent of the importance of geography stated: "There are no races, only climates."

### V. DEFINITION OF "RACE"

Following the conclusion of two very important meetings of scientists attempting to develop a scientific definition of "race", the United Nations (1951-64) issued a statement indicating the general agreements that had been reached after long and arduous intellectual effort. These biological and social scientists generally agreed that, "All human beings belong to a single species, *Homo Sapiens*, and are derived from a common stock". The statement notes, however, some difference of opinion as to when and how different groups diverged from this common stock. The concept "race" is "merely a classificatory device providing biological framework in which the various groups of mankind may be arranged" (Cruz, 1971).

Race, from a biological viewpoint, is defined as one of "the sub-groups of *homo sapiens*, capable of interbreeding with one another but, by virtue of isolating barriers which in the past, kept them more or less separated exhibit certain physical differences". For all practical purposes then, "race" is not so much a biological phenomenon as a social "myth" (Cruz, 1971). Yet that myth has, over the centuries, created an enormous amount of human and social damage.

However, the biological factor is only one of many that must be taken into account. Physical anthropologists have a major interest in the classification of human groups and have established a number of categories into which they place these populations. In general, anthropologists recognize as races only those major population groups that are marked off from others by extensive physical differences, such as the native peoples of Asia, Europe, and Africa. These physical differences are most certainly due to lengthy geographical isolation and lack of close contact with other groups. This situation is further complicated by the fact that these major physical differences are not sharply delineated. Groups living

in close proximity to each other tend to exhibit physical characteristics that overlap with those of neighbouring groups.

The history of human populations appears to involve periods of relative isolation during which inter-marriage, that is, marriage within the group, tends to perpetuate some hereditary factors that are different from other isolated groups. But with the movement of populations across considerable distances, and the inter-mixing of individuals with each other, the racial or incipient racial groups inter-marry and develop new characteristics that become fixated, thus forming a new "race". Physical differences among human groups are caused by two main factors: hereditary and environment. The sub-groups resulting from inter-group contact may be described as ethnic groups, or as sub-divisions of the major "racial" groups. However, there is no general agreement on this matter. What we can say, however, is that the process of inter-mixing continues and will continue to produce new racial forms. The human populations, states Hulse (1964), "has changed over time and will continue to do so". He continues by suggesting that this is true of its component parts, the so-called "races".

## VI. PREJUDICE AND RACISM

The term "racism" refers to the negative evaluation of one individual or group because of the colour of skin. It is, according to Toynbee (1934), based on the "firm belief in the extraordinary value of the superiority of one's own group, and the inferiority of others". But racism goes even further; it indicates that inferior individuals or groups should be subjected to negative evaluation and treatment. Racism, states Segal (1971), has come to mean "the division of mankind by colour and that it is justified in possessing negative attitudes toward another simply because of colour alone". Negative treatment or discrimination may emanate from racial prejudice, a state of mind giving rise to the practice of discrimination. Racial prejudice is defined as a deep seated and negative aspect of the cultures of many regions in the modern world.

Racial discrimination is often a manifestation of the existence of prejudice. Discrimination has been described as "negative and differential treatment of individuals belonging to a particular group". It should be noted, however, that prejudice is an attitude and can exist without discrimination. Likewise, systematic and other forms of discrimination may be the result of structural arrangements that lead to discrimination and not necessarily of prejudicial attitudes.

Racial prejudice and discrimination have not always been characteristics of human societies. As indicated earlier in this paper, older cultures were not characterized by negative evaluations and discrimination on the basis of skin colour. Religious discrimination was more prevalent at a time when the church was a dominant factor in human life. Slavery was based on the fact that non-Christians were considered as heathens or infidels, and thus not worthy of civilized treatment. Roman and Greek slaves could, in many instances, achieve their freedom and become citizens when they accepted Christianity. However, this phenomenon did continue beyond the breakdown of religious influence and the interest in foreign exploration and trade.

## VII. EUROPEAN DOMINATION

The First Crusade, according to Cox (1948-1970), may be taken as the starting point that led to European contacts with non-whites and eventually to European domination of the modern world. We have no evidence, however, that Europeans initially held prejudicial attitudes based on race or colour. In fact, many of the Spanish, Portuguese, and other explorers were astonished at the wealth and civilizations they encountered on their travels. Africans who converted to Christianity were considered as equal, if not superior, to many Europeans in culture and civilization.

The evolution of racism, however, began with the rapid exploration and invasion of foreign nations by European merchants and explorers. The intense competition of European businessmen, the development of nation states, and the declining influence of the Catholic Church were major factors in the development of racial hostility in western Europe and later in North and South America (Cox, 1948). Racial antagonism, Cox notes, "attained full maturity during the latter half of the nineteenth century when the sun no longer set on British soil". The changing attitudes and practices were succinctly indicated by Lord Grey, a British nobleman, when he stated that throughout the British Empire the coloured people are generally looked upon as an inferior race whose interests ought to be systematically disregarded and who ought to be governed mainly with a view to the advantage of the superior race (Cox, p. 333). The economic interests of "superior" races is clearly seen in these comments. Even the former discrimination against the "infidels" often reflected an economic motivation. "Heresy hunting", notes the anthropologist Ruth Benedict "was often very profitable. Those who sought riches eagerly seized on the opportunity to brand those who were different as 'guilty of treason against the Almighty'."

The final factor that led to the development of the concept of "superior and inferior races" was the utilization of gun powder for military purposes and the superior organizational ability of the Europeans. The use of gun powder by its military organizations gave the Europeans an unbeatable advantage which led to the easy conquest of native peoples in all parts of the world. This development, coupled with the increasing need for exploitation of resources by the powerful merchant classes of Europe, signalled the end of independence of non-European peoples. It also signalled the beginning of rampant racism in Europe and, to an even greater extent, in South and North America. The beginning of slavery was a natural outgrowth of this process.

## VIII. RACISM AND SLAVERY

Racism has obviously been a driving force in the political, economic, and cultural development of the Americas, largely because of the legacy of slavery in both continents. Slavery and the exploitation of resources has been a wealth-creating force, and has at the same time been a source of extreme concern and ambiguity. The concept of equality has, on the one hand, existed uneasily side by side with inequality, exploitation, and racism. On the other hand, these factors have been challenged by religious and political concepts which emphasize the essential equality of human beings. While Gobineau and his followers attempted to prove the biological inferiority of non-Europeans, others were stressing the central fact of human equality regardless of skin colour or

other arbitrary distinctions. The ringing declarations of the American and French revolutions gave birth to new ideas of human brotherhood and equality. The Americans fought a civil war partly in order to remove the blot of slavery from their body politic. More recently various agencies of the state, particularly in Britain and North America, have enacted human rights codes in an attempt to remove the considerable amount of racial prejudice and discrimination that stubbornly persists in modern societies. The United Nations has entered the fray with declarations against racism and for promoting racial equality.

But powerful forces in the business, political, and cultural life of nations, particularly in North America, continue to reflect negative racial stereotypes that support racism. While the mass media, including both print and electronic, are perhaps the worst offenders, they are not alone. The concept of racial inferiority and its accompanying racism are deeply embedded in the basic institutions of North American society and will require a sustained and intelligent effort to effect their removal.

In summary, it can be stated with confidence that anthropologists and biologists are generally agreed that all living "races" belong to a single species, *homo sapiens*, and have been derived, by slow evolutionary changes, from a common stock.

- a) For all practical purposes "race" is not so much a biological phenomenon as a social "myth".

- b) Racial classifications differ but are usually based on skin colour, although neither skin colour nor any other single factor is a sufficient basis for adequate classification.
- c) It is impossible to regard any so-called race as superior or inferior because of skin colour or any other characteristic.
- d) Measurable differences in physical characteristics within so-called racial groups are frequently greater than differences between human groups. These differences are related to climate, geography, and other environmental factors, and frequently overlap when groups live in close proximity.
- e) Anthropologists reserve the term "race" for those human groups that regularly exhibit extensive physical differences. Race therefore becomes a device for describing and classifying in simple terms the great diversity existing in human populations.
- f) Racism is defined as a negative evaluation and treatment of individuals or groups based on skin colour.

The dissemination of scientific knowledge and a determination of nation states to, firstly, reduce and, secondly, eliminate racism, sexism, and other forms of arbitrary discrimination must become national and universal goals. Individuals and groups subjected to various forms of discrimination are no longer willing to quietly accept the inferior status to which they have been assigned in the past. Meaningful progress in this direction is essential. The need for effective and sustained action is urgent.



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## VISIBLE MINORITIES IN CANADA

Lorna Lampkin

### Sommaire

Un Canadien sur dix fait partie des minorités visibles et ce nombre est appelé à augmenter au fur et à mesure que les immigrants en provenance du Tiers-Monde augmenteront au dépens de ceux des pays d'Europe.

Des allégations de racisme, de violence raciste et de discrimination ont accompagné cette augmentation des minorités visibles dans la société canadienne. Des enquêtes révèlent que les préjugés sont moins répandus depuis quelques années, mais que la discrimination n'a pas diminué au même rythme. Cependant, comme la discrimination raciale manifeste a été remplacée par une nouvelle forme subtile de discrimination institutionnalisée, il n'est plus si simple qu'auparavant de l'analyser.

Déjà, dans les années 60, il était évident que la société canadienne était non seulement multiculturelle, mais aussi multiraciale, multilingue et multireligieuse. Toutefois, les institutions canadiennes ont mis du temps à reconnaître l'évolution ethnique et raciale du Canada. Des études réalisées dans diverses régions du Canada viennent confirmer les impressions des groupes de minorités visibles, à savoir qu'ils n'ont pas le même accès aux institutions, n'y sont pas toujours représentés et n'en tirent pas toujours les mêmes avantages que les autres.

La discrimination sur le marché du travail est une des préoccupations principales de tous les groupes, et quoique ceux chargés des enquêtes se penchent sur cette question depuis peu, les données confirment les impressions des groupes concernés.

Les organismes de surveillance comme les commissions des droits de la personne ont jusqu'ici eu des moyens limités pour régler ce genre de discrimination. Quoique les minorités visibles reconnaissent les efforts qui ont été déployés pour éliminer la discrimination, elles estiment qu'il n'existe pas d'approche globale et coordonnée pour sensibiliser la population aux différences ethniques et culturelles.

### Summary

One in 10 Canadians is a member of a visible minority group, and their numbers are likely to continue to grow as the sources of Canadian immigration continue to shift from European to Third World countries.

Allegations of racism, racially based violence, and discrimination have accompanied these increases of visible minorities in the social fabric of Canadian society. Some surveys show that prejudice has actually declined in recent years, but that discrimination has not lapsed at the same rate. However, since open racial discrimination has given way to a new subtle institutionalized form, assessing discrimination is no longer as simple as it used to be.

By the 1960s it was evident that Canadian society had become not only multicultural, but more clearly multiracial, multilingual, and multireligious. However, Canadian institutions have been slow in recognizing the changing ethnic and racial diversity of the country. The perceptions of visible minority groups are reinforced by research studies carried out in various parts of Canada which show that visible minorities are not obtaining equal access, opportunity, or representation across a wide cross-section of institutional areas.

Of major concern to all groups is discrimination in the job market, and although it is only recently that researchers have been addressing the question, the data clearly support the concerns of the groups.

Monitoring agencies such as human rights commissions have, so far, been limited in dealing with this type of discrimination. And while recognition is given by visible minorities to current efforts to deal with discrimination, they feel that a comprehensive, coordinated approach to ethnic cultural sensitivity is lacking.





## VISIBLE MINORITIES IN CANADA

Lorna Lampkin\*

### INTRODUCTION

This report focuses on the historical experiences and problems of visible minorities in Canada. "Visible" refers to all non-white Canadians, with the exception of native Indians and Inuit. Included are: blacks, Chinese, Japanese, South Asians, Southeast Asians, and Latin Americans.

The purpose of the study is to examine the treatment of visible minorities in Canada, with special reference to the causes and impact of discrimination. Key social problems have been considered, and many of the practical problems faced by minorities relating to discrimination in general and employment in particular have been documented. The study also looks at the role of some of the monitoring agencies and their impact on discrimination. Of major importance was an attempt to gain insights into the perceptions of visible minority groups with regard to the principal areas of discrimination, as well as their current views of monitoring agencies.

Information was gained through extensive library research covering a period dating from the early seventeenth century to the present time. Several books dealing with the history of blacks, Chinese, and Japanese in Canada were examined, as were many recent major reports. Current reports of human rights commissions were studied, and numerous documents and reports on meetings, conferences, and symposia were helpful. Eleven survey reports on race relations across Canada submitted in 1982 to the Multiculturalism Directorate, Department of Secretary of State, were also useful.

In addition to the written material, a number of organizations and individuals in ethnic communities were contacted and informal interviews arranged. Much of the information on the most recent immigrant groups was gained through these sources. The three-day conference on "Visible Minority Women and Employment", which was sponsored by the Ontario Ministry of Labour at the end of September, 1983, provided insights into perceptions of the various groups.

The report is divided into five sections. Section I commences with a review of the history of discrimination in Canada from slavery to contemporary Canada. Section II follows with an historical overview of visible minority groups, starting with the entry of the first blacks as slaves and ending with the arrival of immigrants from Latin America, many of whom are non-white. The earlier groups, i.e., blacks, Chinese, and Japanese, are dealt with in greater depth, but each group is handled in its own unique way.

Because slavery undoubtedly left an indelible imprint on discrimination and has been such a strong influence on its practice even in contemporary Canada, the history is stressed of those who bore the brunt of prejudice and discrimination, and whose descendants have quietly but unceasingly striven for change. Early blacks had significant

settlements in every province, except for Newfoundland and Prince Edward Island and in the Northwest Territories. The period of slavery is traced across the provinces in an attempt to reiterate that, although overwhelmingly weighted by events in eastern and central Canada, the phenomenon is not limited to that part of the country.

The history of the early Chinese is largely confined to western Canada and is examined in the light of major events that had a profound impact on the community. For the Japanese, a generational approach seemed appropriate. The rest of the section takes us through the post-World War II period up to the 1960s and 1970s and the arrival of Latin Americans and Southeast Asian refugees.

Section III examines some of the effects of post-World War II immigration and the tensions created in educational institutions, in employment, and in the legal system. It points out some of the positive steps taken by major institutions in an effort to combat discrimination.

Section IV surveys group perceptions and is divided into two parts. Part one summarizes the feelings of visible minorities with regard to discrimination in general. Mainly in point form, this section also summarizes, according to issue, group perceptions in a number of key areas. Part two of this section is an attempt to break down issue areas according to individual groups.

Section V concludes the report with a brief discussion of the social support for discrimination that exists in Canada. It also stresses the importance of social data, particularly the perceptions of both minority and majority groups, in determining evidence of such discrimination.

### I. HISTORY OF DISCRIMINATION

Starting with the earliest slaughter of Indians, racism and discrimination have always been serious problems in Canada. Slavery, which degraded humanity across the country and involved both Indians and blacks, was another early manifestation of discrimination.

Until recently there was widespread ignorance of Canada's own black history and a mistaken notion that there were only isolated cases of discrimination and that this was entirely an American import. It was not until the 1950s and 1960s that Canadians began to be aware of the extent of discrimination practised throughout the country.

Although for various reasons it never assumed the proportions of the American institution, slavery was a fact in Canada beginning in 1628, when the first slave was brought to New France from Madagascar. In the St. Lawrence and Niagara regions of Upper Canada, slaves were brought by United Empire Loyalists during and after the American Revolutionary war, and at least six of the 16 legislators in the first Parliament of Upper Canada owned slaves. But it was in Nova Scotia and New Brunswick that the litany on slavery was sung.

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Besides permitting slavery, Nova Scotia from the start discriminated against blacks in other ways. For example, when the first group of free black Loyalists arrived there in 1776, it was suggested that they be used as a ransom for British prisoners who were being held by the Americans.

Promises of treatment equal to their white peers failed to materialize in other ways. There was, for instance, blatant discrimination relating to land grants. The British promised to all Loyalists settling in Canada, black or white, land grants of 100-acre lots. Most blacks received no land at all, and those who did were given barren one-acre lots on the fringes of white Loyalist townships. Nor were the black Loyalists ever truly secure. They were deprived of such rights of British subjects as trial by jury, and they lived in constant fear of punishment. Minor offenses such as stealing food or clothing resulted in severe whippings and even hangings.

When slavery was finally abolished in 1833, black Canadians found very little improvement to their lot; they existed while coping with exploitation and discrimination in many areas of their lives as they applied minimal farming skills to the barren lands on which they settled. The utter hopelessness of a situation unfavourable to their growth and development caused many blacks to return to the United States at the end of slavery. Open hostility and segregation in churches and schools was a fact of life; for example, it was not until 1965 that the last segregated school in Ontario was closed.

Chinese, Japanese, and South Asians fared little better. While they did not suffer the extreme degradation of slavery, their experiences in many instances varied very little from the black slaves. Each group can trace its origins to the end of the 1800s, when they were brought into the country as labourers to build railroads, man lumber mills, etc. in the developing West. After their work was done, they were poorly treated in Canada.

A frequently used technique was denial of the right to vote. In 1895, for instance, the government of British Columbia denied the right to vote to taxpaying Chinese, Japanese, and East Indians. This denial effectively barred them from the federal franchise, since the Dominion Elections Act automatically denied the vote to anyone who did not have it provincially. It also barred these groups from certain occupations involving licensing for which it was necessary to have one's name on the voters' list. These restrictions were not lifted for Chinese and South Asians until 1947 and for Japanese until 1948.

While every visible minority group in Canada has been subjected to a variety of discriminatory practices and other forms of violence, there have been similarities and differences. From the eighteenth century right up to the 1960s immigration has been a commonly employed tactic of discrimination, disallowing immigration of certain racial groups, then indirectly setting up criteria that militated against non-white immigration. At a time when immigration of white people from America and Europe was being encouraged, crude efforts were employed for stemming the flow of blacks fleeing injustices in the U.S. Once slave labour was no longer a viable proposition, blacks were considered unsuitable immigrants for a variety of reasons including ethnicity, the economy, and the climate.

As late as 1952 "climate" was raised as an issue by the then Minister of Citizenship and Culture as one of the conditions for admission to Canada, as "it is a matter of record that natives of ... (tropical and semi-tropical countries) ... are more apt to break down in health than immigrants from countries where the climate is more akin to that of Canada".

For many years, although able-bodied Chinese males capable of hard physical labour were permitted entry, no Chinese women were admitted. In 1904 Chinese were subjected to a \$500 head tax, and by 1924 legislation barring their entry altogether was passed, and was maintained until 1947.

Shortly after the turn of the century, the number of South Asians who might enter Canada was severely limited by Orders in Council. When the Supreme Court of British Columbia found the initial order invalid, special injunctions were sought and approved for that province alone. To be admitted, anyone coming to Canada from India had to do so by "continuous passage". In 1914, when 376 South Asians fulfilled this requirement, arriving in Vancouver harbour aboard the *Komagata Maru*, the ship was made to wait in the harbour for three months. When immigration officers and police, with deportation orders, attempted to board the ship to transfer its passengers to a vessel for Hong Kong, the Asians resisted violently, but were eventually taken away under naval escort.

With very slight differences, Japanese Canadians suffered the same indignities as did the Chinese in British Columbia. But the height of their experience with Canadian discrimination was reached in 1942, when the Canadian government in the name of wartime security uprooted thousands of Japanese and imprisoned them in work camps. Japanese who had been here for several generations had their properties confiscated and sold at ridiculously low prices.

Discrimination in housing and public accommodation has been legendary. Today, despite federal and provincial legislation against discrimination on racial or ethnic grounds, the problem continues. For example, in the 1981-82 period, 12 per cent of the total case load of the Ontario Human Rights Commission cited discrimination in housing and public accommodation, services, and facilities.

Such overt forms of discrimination, however, have been easier to deal with than the more subtle forms of institutional discrimination that continue to plague Canadian society, most noticeably in business and education. While racial segregation no longer exists in schools, forms of discriminations exist that are much more difficult to combat. Up until the 1960s no effort was made to see that textbooks and curriculum reflected the reality of Canada's racial and ethnic minorities. The models the teachers presented to their students, and the models personified by the white, middle-class teachers themselves, seldom reflected circumstances with which non-white students could identify. An examination of textbooks in several parts of Canada found this to be true, and further found that many textbooks were in fact actually guilty of teaching prejudice. For example, "Teaching Prejudice", a 1971 report on a study of 143 textbooks in Ontario, revealed that non-white groups were frequently referred to as bloodthirsty, primitive, cruel, and savage, while often contrasted with saintly and refined Europeans. Further, with only a few passing exceptions, no reference was made to all



those non-whites who had contributed to Canada's development. Nor were major events in the mistreatment of minorities dealt with in any depth.

Recent developments are, however, seeking to make corrections. The responsibility for overall policy in Canadian education is vested in the provincial governments and legislatures. Volume IV of the Royal Commission's Report on Bilingualism and Biculturalism recommended that languages as well as cultural studies, other than English and French, should be incorporated into provincial school systems, and some provinces have implemented legislation and educational directives and regulations in keeping with the concept of a multicultural Canada. In some instances the central educational authority has issued programs and studies, curriculum guides and model-teaching units aimed at encouraging and assisting teachers to incorporate the view of cultural pluralism in the daily classroom experience.

The Ontario Ministry of Education has been active in special teacher training programs in multicultural education and in promoting bias-free texts and curriculum materials. Of major importance was the implementation of the Heritage language program providing for the teaching of languages other than English and French. The Ministry has also developed a "Black Studies" resource guide for teachers of the intermediate division. Also included in the Ontario policy are schemes for continuous evaluation of existing curriculum resources and textbooks, in-service professional development, consideration for racial and religious minorities, and general citizenship education.

By far the major area of institutionalized discrimination involves the job market. While the intention might not necessarily be discriminatory, the results often are.

Data on the extensiveness and on the specifics of discrimination in employment against racial minorities are not readily available. Indeed it is only recently that researchers began addressing the question. And though there is widespread acceptance that discrimination exists, there is little acceptance that discrimination is widespread. A glance at the 1981-82 Annual Report of the Ontario Human Rights Commission, for example, would seem to illustrate systematic discrimination against racial minorities.

Of the 893 cases brought before the Commission in 1980-81, 747, or 84 per cent, were complaints of discrimination in employment. Almost half of all cases were on the grounds of race, and 58 per cent on the grounds of nationality or ancestry. Thus, 40 per cent of all cases handled by the Ontario Human Rights Commission in 1980/81 were on the grounds of racial/ethnic discrimination in employment. And since 1974-75, allegations of racial discrimination in employment and other areas have constituted 36 to 50 per cent of all complaints resolved.

## II. VISIBLE MINORITIES IN CANADA—HISTORICAL OVERVIEW

### A. Blacks

#### Slavery and Early Settlement

Blacks in Canada can be divided into three broad groups. First, there are the Canadian-born descendants of those who entered the country with the slave masters more than 300 years ago. They constitute a large element living principally in

Nova Scotia, New Brunswick, and Ontario. Secondly, there are those blacks who migrated from the United States during and after the Civil War to work on the construction of railroads, such as the Canadian Pacific, and to perform personal services in connection with the operation of the railroads. Thirdly, there are blacks from the West Indies who came in search of employment during and after World War I and in major waves in the 1950s, 1960s, and 1970s. They now comprise the major group of blacks and are to be found in the principal cities across Canada, especially Toronto, Winnipeg, Montreal, and Vancouver.

The earliest records of blacks in Canada go back to 1606, when Matthew Da Costa arrived in Nova Scotia as a member of the Poutrincourt-Champlain expedition. These early explorers settled at Port Royal just below the mouth of the Annapolis River and established Canada's oldest social club, the Order of Good Cheer, some say with Da Costa as one of its earliest members. This black pioneer was an interpreter of the language spoken by the Micmac Indians of the Atlantic region. Although no one seems to know how he acquired this knowledge, speculation is that he must have visited these shores prior to the summer of 1606, when he learned the language of the Micmac. He died at Port Royal and is said to be buried there.

### Quebec

The history of black residence in Canada, however, generally commences in 1628, when a black child from Madagascar arrived in New France as the property of David Kirke, leader of an invading force, who upon his return to England sold the child to a French family. Although there was a small importation of blacks into New France from that time on, it was well into the century before a lack of labour stimulated the importation of slaves from the West Indies. Within a few years black slaves were used in a variety of occupations — clearing forests, constructing forts, etc., from Quebec to the western trading ports. Well before this period there were Indian slaves in Canada. When Halifax was settled in 1749, the English brought black slaves with them mainly for the construction of ships for fishing and shipping. However, although a lively interest in slavery developed throughout Canada, many of the practices in connection with slaveholding developed without the official sanction of the French government. It was not until 1709 that a royal decree sanctioned slavery. The French were relatively unenthusiastic about slave labour, viewing free labour as more productive. Moreover, since there was no plantation system of agriculture, and gang labour was not relevant to the fur trade, the cost of maintenance in a cold climate discouraged would-be owners from extensive investment in expensive human chattel.

However, the demand for slaves continued to the extent that in 1763, when the first British governor of Quebec sent a request to New York for a shipment of slaves, he stressed that nothing could be done without a larger supply of labour and that "...black slaves are certainly the only people to be depended upon". But even though agriculture was stressed in the request for slaves, few worked in fields or mines. Most went as servants to the merchant class, the gentry, the governors, notaries, doctors, the military, and the clergy, few of whom possessed more than two or three slaves. The lot of these house slaves was slightly different from field slaves, since they were expensive and intimately connected to the

household as domestics. Further, their status was regulated by the informal Code Noir, which extended some protection to them, as well as certain privileges normally reserved to free men. For example, they could serve as witnesses at religious ceremonies and could even petition against a free person.

Even though it condoned slavery, the Roman Catholic Church tended to temper the conditions of slavery, modifying the slave-master relationship and giving it something of the nature of a contract. Slave status was not accepted as being inherent in man but seen as a temporary condition arising from the accident of events. The fact that the church admitted the slave to equality in some sacraments such as baptism, communion, and burial encouraged their owners to think of them in more humane terms. Marriages were permitted with the masters' consent, on occasion being accompanied by a clause granting freedom. Christian burials were often attended by French owners. Nor was the practice of slavery in Quebec limited to one race. Although the black slaves were preferred, the Indian "panis" slaves were very much in use.

Despite its benevolent expression in early Quebec, slavery remained the harshest form of discrimination which the slaves themselves recognized and from which they constantly attempted to escape.

Slavery can hardly be viewed as an institution in New France, but rather as an unsystematic, spasmodic approach to solving labour problems. Although given full legal support in 1709, after 1713, when New France fell into decline, so also did slavery, though not permanently.

It was later vigorously revived by the British. When Canada fell to England during the French and Indian War, those Frenchmen who owned slaves were allowed to keep them, and at the end of the war the English settlers coming into the province in numbers brought their slaves with them. When France ceded the whole of its North American territory east of the Mississippi River to Great Britain in 1763, one side effect was to strengthen the institution of slavery both legally and religiously. British officials and Protestant sects supported slavery, and governmental authorities, by encouraging the immigration of Loyalists with their slaves, substantially increased black slavery in Canada. Very soon they supplanted Indian slaves, and the English law, which made quite a clear distinction between servants and slaves, now stripped them of the privileges they had enjoyed under the informal French Code Noir, such as marital, parental, and proprietary rights.

### **Nova Scotia**

The first major wave of black immigration took place with the Loyalist migration to Canada. Although the rich lands of Quebec attracted many Loyalists who were engaged in agriculture, by far the greatest number went to Nova Scotia, taking their slaves with them. In addition, some 3,000 blacks who had been emancipated in the American colonies in exchange for supporting the British entered Canada in 1783. Most of these found their way to Nova Scotia, which was to become the centre stage of black drama in Canada.

From the start Nova Scotia discriminated against blacks. The black Loyalists had been promised treatment equal to their white peers, but the British pledge of 100-acre grants of

land to each black failed to materialize. Sixty per cent are not recorded as having received any land at all. And while almost 500 black Loyalists did receive land grants, they were mainly barren one-acre lots on the edge of white Loyalist townships, where they were set apart from the main population.

In every instance, black settlers, after much red tape and reluctant officialdom, received far less than white settlers. Not only was the quality of the land allotted to the blacks insufficient to support them, but special hardships attended them, since they had arrived virtually empty-handed. After a lifetime of slavery these black Loyalists abruptly encountered the first experience of land-owning and management. For while British wartime policy did grant these slaves their freedom, unlike British regulars, they were virtually cut adrift and deprived of many British rights. Destitute, they scrambled to survive, working on their own or other men's lands for part of the crop, hiring out as labourers and artisans or indenturing themselves as servants. Most of the black settlements eventually failed, and these freed blacks continued to work as hired or indentured servants, very little removed from slavery.

The last two decades of the eighteenth century was a difficult period for Nova Scotia, with a constant threat of physical suffering for all. For the black Nova Scotians as a group, the threat was even greater and more frequently realized. Of great significance was a fundamentalist religious revival that clashed with established religion. For this group, alienated by the circumstances of colour and the practices of religion, only the church was black and pure. Thus their chapels took on an importance in their lives beyond a place of religious worship. In many ways the community itself was defined by its chapel, and the leaders of those communities were the preachers.

The foundation of their society was religion. It dictated the activities of their daily lives and determined their attitudes toward themselves and other people. Even more than their sad experiences with land, religion made them aware of race and bound them together as a selected all-black group. Their greatest desire was for spiritual and temporal security, which many of them had come to doubt would ever be fulfilled in Nova Scotia.

By 1792 general disillusionment prompted some 1,200 of them to accept an offer by the Sierra Leone Company (underwritten by the British government) to sail for Africa. How many more might have accepted remains a question, for the company's offer was not widely circulated, and blacks in the most poverty stricken and most isolated areas never heard of the offer.

While their departure had economic repercussions, such as loss of cheap labour and depressed trade, the loss to the black community was even greater, since most of the black teachers, preachers, and community leaders left.

The black Loyalists were runaway slaves who deliberately sought the British and offered their services to the Loyalist cause in exchange for their freedom. The object of their freedom was to become self-sufficient and secure through British justice as subjects of the Crown. Thus passage to Nova Scotia was seen not merely as an escape from slavery, but as an entry into a new world where the dignity and independence that came of equal citizenship would be theirs. Fundamental to this idea was the acquisition of land.

Nova Scotia authorities did not concede any mishandling in the settlement of black Loyalists, but rather attributed their discontent to the harsh climate and a desire for the steaming sunshine of Africa. This assumption was denied by many historians, who claim that the Nova Scotia climate was never the subject of complaint by the ex-slave.

The emigration of the Loyalists was offset by the arrival of another group of blacks — the Maroons of Jamaica — who because of their attempts at independence in Jamaica were sent to Nova Scotia in 1796. These descendants of fugitive West Indian slaves of the seventeenth and eighteenth century had fought a long series of battles against the British and local Jamaican forces in order to preserve their independence. These wars demonstrated a spirit of defiance, military organization, and love of freedom on the part of the Maroons. Eventually, however, they were overcome and exiled to Nova Scotia, where they were enthusiastically welcomed by the governor and the military personnel, who were impressed by the military bearing and overall physique of the Maroons. The fact that they had resisted for so long over overwhelming military odds impressed the officials, who saw in them important additions to the workforce and defence of the colony. They were offered immediate employment, and though they willingly accepted, offering their services free of charge, they were paid at the going daily rate. Because of their military prowess they were enrolled in the military as a unit.

With their eagerness to serve the cause of the colony against French forces, as well as their ability to spend money in the community, the Maroons were initially very popular. However, when they began to demonstrate that independence of mind and spirit through which they had enjoyed 150 years of freedom, they were viewed as a menace to society. They were also criticized for holding on to their own religion and customs. Their self-confidence, determination to preserve their own lifestyle, and refusal to be exploited were seen as arrogance and resulted in several movements to expel them — four years after they had been brought to the country against their own wishes. In 1800 the entire Maroon colony was shipped under military escort to Sierra Leone.

After the War of 1812, Nova Scotia again received a large influx of blacks. Several thousand blacks had sought the protection of the British during the war and some 3,600 of these slaves were brought into Canadian ports, the large majority going to Nova Scotia. Most of the "refugee blacks" were sent to the depopulated and deserted towns of the black Loyalists, where they also were unable to support themselves on the small plots of marginal land.

The refugee blacks entered the country at the worst possible time. There was high unemployment among both blacks and whites. Further, unlike the blacks of the Loyalist era, virtually none were trained in any particular skill. Most had been field hands who did not have the indoor slaves' familiarity with domestic chores, nor had they learned to live side by side with whites. Originally from the South, they suffered more than the northern Loyalist blacks from their sudden injection into a new climate. Not having been permitted their own plots of land, they knew little of independent agriculture.

The plight of the refugees was further emphasized by natural disasters that destroyed crops, and the period 1815-1861 gave rise to the so-called "negro question". Many were

forced to become berry pickers and casual labourers. Others migrated to large cities, some reduced to petty thievery and begging. Their numbers attracted the attention and hostility of officials and the general Nova Scotian population as never before. They were further demoralized by the derision, pranks, and jokes that the white population directed at them.

Particularly hard were the discriminatory practices in education by which School Acts from 1811 to as late as 1954 ensured that some black children in many communities received no schooling at all and others only inferior schooling in separate black schools.

Most of these blacks were Baptists, and the one strong organization that emerged was the African Baptist Association. Although this centralization of religion united the refugee blacks, its effect was to further segregate them from the mainstream of white society. By the mid-nineteenth century almost all blacks retreated from the white churches, joining the Baptists.

Hostilities also existed between black Loyalists and refugee blacks. Loyalists were largely Anglican and Methodist and many were not slaves, while the Baptist refugee blacks were all slaves and not nearly as skilled. In time, however, discriminatory policies in education, employment, and housing, which were applied to both Loyalists and refugee alike, united their communities into one poverty-stricken oppressed group. Thus the descendants of Loyalist and refugee blacks merged, forming a new community devoid of Loyalist tradition.

These historical factors gave rise to the creation of some 45 black communities in Nova Scotia ranging in size from a few families to units of about 2,000 people. Although difficult to categorize because of differences in size, subsistence patterns, poverty levels, ecological areas, and general lifestyle, three broad categories are distinguishable. There are urban communities located either within the city or in small enclaves on the fringes of smaller cities; semi-urban communities located some distance away from the urban centres; and rurally based, but essentially non-agricultural communities.

Rural and semi-urban communities are located in areas that are difficult to reach, with dusty roads that become muddy in rainy periods and during melting of winter snow. Substandard housing is characteristic and furnishings are minimal. Some families own their homes and the small parcels of land around them, but in some cases land titles are obscure.

Urban areas frequently see blacks and whites intermixed in typical lower-class housing. Usually the houses are larger, with more furnishings and appliances than rural homes have. Subsidized, low-income housing developments have recently replaced some of the worst areas in Halifax, but there are still areas where black enclaves exist lacking all basic amenities. Today there are approximately 12,000 blacks in Nova Scotia, dispersed in communities throughout the province, including Cape Breton. But whether rural or urban, it is this pattern of enclaves that is the group's most prominent demographic characteristic.

Within recent decades there have been substantial changes in the black population. There has been a decline in the rural population as a result of migration to major urban cities not only in Nova Scotia but out of the province to Montreal, Toronto, and the northeastern United States.



### New Brunswick

The history of black settlements in New Brunswick almost parallels that of Nova Scotia. There is early evidence that blacks lived in the part of Canada that eventually became New Brunswick from the early seventeenth century. However, the largest number of black people arrived in the years 1783-84 with the United Empire Loyalists, some as slaves, others as free blacks. After the War of 1812, black refugees arrived. Since this time there has been no major influx of blacks into New Brunswick. While given the same legal rights as whites, they faced many types of discrimination, and because of hostility to black people in Canada many returned to the United States after emancipation. In later years other black people arrived from the United States and the West Indies. But the black population of New Brunswick has not changed significantly since the arrival of about 1,500 blacks with the Loyalists. Of these, about 500 left the province for Sierra Leone in 1791.

At the time of the province's first census there were 1,513 black people living in all eight New Brunswick counties. In 1861 the black population was given as 1,581 living in 12 of the now 14 counties. By 1881 there were 1,638. It is therefore obvious that there were no considerable changes throughout the nineteenth century. There was actually a decline in the population in the twentieth century. By 1911 the black population was 1,079, rising only slightly by 1961 to 1,273. For decades New Brunswick blacks have been moving to cities in Ontario, Quebec, and the United States.

Early in the nineteenth century black people lived in all the counties of the province, and in almost every major settlement. Over the years they moved out of areas with only a few black people to communities with a larger black population, with the result that the majority live in Saint John, York, and Sunbury Counties — over half in the city of Saint John. There are also fairly large communities in the vicinity of Fredericton, at Elm Hill and Lakeville Corner.

In the first half of the nineteenth century most of the black people in New Brunswick continued to work as domestic servants and labourers. Later in the century some blacks in Saint John established businesses, such as restaurants, tailor shops, barber shops, and cartage firms. There were also a few black teachers. Most of the businesses closed during the Depression.

Although there was never opposition to fugitive slaves settling in New Brunswick, they faced the same broken promises about land grants as the Nova Scotia blacks. For example, in 1816 it was suggested that land in the vicinity of Loc Lomond might be suitable for the formation of a settlement for black people. Not only were those whites who owned land in the vicinity consulted as to their feelings about black settlement near their lands, but the small 50-acre lots were to be surveyed at the black refugees' expense. Most of the refugees had arrived with the clothes on their backs and could not realise the necessary funds. Even where the refugees did pay the costs of the surveys, they were still not to be given title to the lots. Instead they were issued licences of occupation for a three-year period, which denied them security of ownership. This insecurity eventually led to a number of quarrels between blacks and whites over ownership of certain lots.

Meanwhile, as in Nova Scotia, white settlers were granted 100 acres, 200 acres, and even larger blocks. After several petitions the blacks were issued 99-year leases, and their continued persistent struggles resulted in 74 black refugees eventually receiving titles.

In the churches they were relegated to the special pews reserved for blacks or forced to sit in balconies. For many years blacks in the Saint John area had their own churches. They were refused admission to many theatres, restaurants, and barber shops. Clubs and societies prohibited blacks from becoming members. Separate schools existed well into the twentieth century. Where black children were admitted to white schools, they were often forced to sit at the back of the classroom or in special rows. Many labour unions refused to accept black tradesmen as members.

Through the efforts of organizations such as the New Brunswick Association for the Advancement of Coloured People, which was formed as late as 1959, much was changed. In the schools today, for example, there is no discrimination based on colour. But the difficulty of obtaining equal opportunity in employment still discourages many young people in New Brunswick.

### Ontario

Although slavery was never instituted by statute in the Maritimes, it was practised for five decades, laying the ground work for the subordination of blacks as a people in eastern Canada. Yet despite the experiences especially of the black Loyalists and refugees, blacks from the United States continued to view Canada as a bulwark, not only against slavery but also against prejudice and discrimination. Thus the trickle on the "Underground Railroad" grew into a swell by the late 1820s, and the Fugitive Slaves Act of 1850, which made northern states no longer safe for runaways, ensured that the swell became a flood.

Soon after the War of 1812, Upper Canada's Attorney General declared that residence in Canada made blacks free and that Canadian courts would uphold that freedom. Word that their freedom and rights would be protected by British law spread rapidly in the American border states. Soon the Underground Railroad with its mythical "trains" transported hundreds of runaway slaves from the northern states to terminals in Canada.

When these early fugitives arrived in Upper Canada, they usually stopped quite near the border. Without funds they could not venture deep into the land. As fugitives they also felt they might some day return. Thus settlements quickly developed at Welland, St. Catharines, Colchester, Windsor, Amherstburg, London, Chatham, and Dresden, and more slowly in Toronto, Oro, and the Queen's Bush. Amherstburg was the most important of these early settlements in Ontario, and the slaves were instrumental in introducing and developing a thriving Canadian tobacco culture.

Black settlers eventually went further afield to Chatham, Dresden, and near Hamilton, where they named their own settlement Colborne. Others settled in small numbers as far north and east as Penetanguishene, Oro, Collingwood, Owen Sound, and Barrie. While the great majority settled in the southwestern part of Ontario, in Essex and Kent Counties, others did go to New Brunswick, where there were two important settlements at Willowgrove and on Lake Otonabog,



and to Montreal. Some fugitives chose to settle among the Indians.

Not all who fled the United States left their property behind. Some brought horses, wagons, and other personal property. Some had sufficient money to buy farms. Several communities were organized, and some enjoyed a measure of success. For example, one of the earliest settlements at Wilberforce, near London, grew rapidly, and most of the families owned land.

One of the most famous black settlements in Ontario was the one at Buxton. It was controlled by the Elgin Association and was incorporated in 1850 by William King, who emancipated his slaves and brought them to Canada for settlement. Within three years the young settlement had attracted 130 families; many buildings were erected and successful businesses started. A mission school was established, open to all children and adults at Elgin and nearby communities. Several excellently trained young teachers from Knox Presbyterian College in Toronto gave the pupils a classical education and, in time, both blacks and whites from Ontario and the United States were competing for places in the school. The settlement enjoyed economic independence and security, and many of the descendants of the early settlers are still living in or near Buxton.

As the black population increased, however, so did the level of prejudice. It got progressively worse until some blacks complained of more prejudice in Canada than in the United States. One of the early manifestations was the interpretation some officials put on the law that would establish separate schools for black children and exclude them from the common schools. Some blacks preferred the separate schools because of prejudices experienced in the common schools, and further felt that separate schools would give blacks an opportunity to develop leadership and intellectual independence. All settlers demonstrated a keen interest in education and a strong desire to establish schools. One of the first tasks undertaken was the establishment of a school community. In some instances, such as in the case of the Dawn Industrial Institute, the school actually preceded the settlement and attracted colonists to it.

Religion was also of paramount importance to the refugees. The church was the only social organization that American slave owners had allowed blacks. Christianity, which was compatible with slavery, converted the slaves but excluded them from white congregations. Blacks formed their own Christian groups, which were strengthened when Black Codes and other regulations disallowed them to gather in groups of more than five, except in church. This force for unity was transplanted to Canada.

Among the earliest and most important institutions in black Upper Canadian communities were the churches. In the early years when there were too few to organize and support their own churches, blacks worshipped in white churches, such as the Anglican. While the vast majority of Canadian blacks were Baptists and Methodists, other churches supported missions to refugees, seeing in the growing fugitive settlements opportunity for their work. But the Baptist and Methodist denominations were the popular ones on the slave plantations. In Canada the preference of blacks for passionate sermons, hymn signing, and other expressions of spiritual

religion that provided a natural outlet for feelings of frustration and despair actually provided a rationale for segregation.

Blacks also preferred churches of their own not only because of the types of service they appreciated, but, even more important, they saw the path to leadership through the establishment of their own churches. By the mid-nineteenth century, the first organized black institution in a Canadian community was a church.

### **British Columbia**

It is true that most blacks entered eastern Canada — primarily Quebec, Nova Scotia, and Ontario — but blacks from California and other American western states, as well as from the West Indies and Africa, settled in British Columbia from the 1850s.

The blacks who came from California were not fugitives. They were mostly skilled, literate people who were dissatisfied with the injustice and bigotry that was developing in the United States and the energies spent in achieving basic human rights. Emigration seemed a viable alternative, and the West Coast of Canada seemed attractive. While most had been born in the United States, some came from the West Indies, from Britain itself, and from Africa. But though their origins were diverse and their social backgrounds varied, these pioneers were, in general, tough, resourceful, aggressive, and ambitious. These early pioneers settled first in Victoria at the time of the Fraser gold rush, which transformed Victoria from a fortified village into a bustling frontier town of gold seekers, traders, and speculators from all parts of the world. Later they fanned out to other parts of British Columbia. Many of these blacks did not arrive empty-handed, and within a very short time they were engaged in work at every level of the colony's economy. Those who were businessmen in California immediately went into business in British Columbia, and the black community provided Victoria with some of its most prominent businesses. Perhaps the most outstanding example was the firm of Lester and Gibbs, which was the first mercantile establishment to provide serious competition for the Hudson's Bay Company store in that locality.

Other blacks worked as carpenters, bakers, cooks, farm labourers, and draymen; many entered the service industries, particularly as barbers. Victoria at that time was also experiencing an acute labour shortage, and blacks were in great demand as farm workers and labourers. They formed part of the 500 volunteers who constructed the road from Harrison Lake to Lillooet and the upper regions of the Fraser River, working in exchange for food and transportation and each depositing \$25 as a bond to be of good behaviour.

Some blacks entered the gold mining industry as prospectors, while others preferred to provide goods and services to miners. It was a former slave from Tennessee who supplied the miners with one of their most essential services — water to wash the samples.

On the whole the blacks were accepted by the white population of British Columbia and enjoyed the closest approximation to equality for Canadian blacks in the nineteenth century, especially on Salt Spring Island and in the Cariboo gold fields. While racial prejudice and stereotyping did exist,

blacks and whites shared accommodation, invested together, and partied together. What anti-black prejudices existed surfaced in Victoria and became very pronounced when repeated threats of violence forced the government to remove black police officers after they had served only a few weeks. Strong racist opposition and discrimination also led to the disbanding in 1866 of the African Rifles, the first military unit in the history of British Columbia.

Anti-black feelings in Victoria coincided with a general hierarchical development in a once rudely democratic colony. Thousands of white American emigrants, including southerners and settlers from California, introduced into the society their assumption about racial propriety and racial distance. As the Americans acquired more property, black holdings became less important. Soon discriminatory remarks began to appear in the Victoria press, and by 1863 suggestions were turning into action.

A major area of racial erosion was the church. Most blacks were deeply religious, and the church was an important part of their lives. When the first Congregational Mission church was established, blacks were invited to attend, but bitter resentment to their presence on the part of some parishioners developed into tedious battles within the church. One of the objections to their presence was fear of intermarriage. The blacks soon realized that equal treatment within the church would have to be fought with political action. They were determined not to open a church of their own, as they felt this would weaken their cause.

Until the twentieth century the black population of British Columbia remained stable, while declining rapidly in number relative to the total population. When the population of blacks in Victoria dwindled to a mere handful, most of them moved to Vancouver and even back to the United States for economic reasons. A few blacks did try unsuccessfully to promote renewed black immigration.

Racial attitudes stabilized and discrimination was permitted no formal entry into the province. As elsewhere in Canada before World War I, a colour line was visible in places of entertainment and in restaurants, but unlike Ontario and Nova Scotia, British Columbia did not bar its blacks from public schools, public office, or the churches.

### **The Prairies**

While there were a few black people scattered across the Prairie provinces during the 1870s, it was not until the turn of the century, when the West was being opened up and the Prairie governments and railroads started inviting settlers to fill up the country, that black homesteaders entered Alberta, migrating in groups from the American West.

The first group arrived in Saskatchewan in October of 1909, but it was Alberta that received the majority of black homesteaders. They had been promised good farm lands, but upon arriving were given very poor allotments and had to create farms from dense bush and swamps. Although the black pioneers demonstrated that they were equal to the challenge, their settlements never grew, since the Canadian government prevented additional groups of Oklahoma blacks from entering the provinces. A few families did, however, survive. Perhaps the most important was headed by John Ware, "the Negro Cowboy", who became a legend in his lifetime. Ware arrived in 1882 in order to help establish the Bar U-

Ranch for one of Canada's wealthiest men. Ten years later he purchased his own ranch, and within the next decade expanded considerably. One of the finest riders in Alberta's range history, he died in 1905, when his horse fell on him. Ware was honoured by having a mountain, a creek, and a coulee named after him, and by having his log cabin and riding gear grace the Dinosaur provincial park. Descendants of John Ware and his wife, Mildred, still live in Alberta.

Feeling was running high against all black men and attempts to block their entry became persistent to such an extreme that a medical officer was dispatched from Ottawa to Emerson, Manitoba, to examine black settlers already in the country to see if the climate was too severe for them. An investigation in 1911 revealed that the medical inspector was offered a fee by the Commissioner for every black he rejected.

"Climate" became a leading issue for those opposing immigration of blacks and justification was found within the Immigration Act, which allowed the making of regulations.

At the beginning of this century, the Canadian-American relationship, which was already strained, was aggravated by the demands of immigration authorities in Winnipeg that American railroads, such as the Rock Island and Southern Pacific, should somehow reduce the attractiveness of Canada to blacks, while at the same time enhancing it for white Americans. In 1912 the Great Northern Railway sent notices to its employees stating that blacks would not be admitted to Canada under any circumstances, and that ticket sales to the Canadian border were to be discouraged. Restrictions on black immigration were later extended to include black visitors, since it was felt they might attempt to remain.

The need for such persistent efforts to curtail black admission to Canada ceased with the outbreak of World War I, when black Americans began moving steadily to northern cities and interest in immigration to Canada waned. It was not until after World War II that blacks again tried to emigrate to Canada, when the flow came from the West Indies.

### **Recent Arrivals**

#### **West Indians**

Slaves from the West Indies were imported into New France and Nova Scotia in very small numbers, the first large group being the Maroons of Jamaica, who landed in Halifax in 1796. Over the next century a mere trickle of West Indians followed the Maroons. A few families settled in Nova Scotia, and some went to what is now Victoria, where their status as British subjects earned them the vote and other privileges denied to the larger number of blacks from America. Others went to Ontario. But it was not until World War I that hundreds landed in the Maritimes, recruited as labourers for the coal mines around Sydney and for the shipyards of Halifax and Collingwood, Ontario.

At the end of the war, when returning Canadian veterans resumed their jobs, many West Indians moved on to Montreal and Toronto in search of employment. They were hired mainly as railway porters, bellhops, and maids. Although they shared the neighbourhoods and general conditions of existing black communities, they maintained separate cultural activities. At the end of the war other immigrants from the West Indies joined the communities, and by 1921 there were

1,200 West Indians in Toronto and from 400 to 500 in Montreal.

In the period between wars widespread fears of racial pollution caused migration from the West Indies to dry up, despite pressures for migration in the West Indies. In 1941 the population of West Indians in Canada was smaller than it was in 1921. Immigration policy in this period deliberately excluded non-Europeans on the grounds that they were unsuitable.

Following World War II, when Canada's economy favoured immigration, there was a significant increase of West Indians over previous decades. After the severe annual quota system was introduced in the United States in 1952, Canada opened her doors a little bit more, so that by the mid-1950s about 1,000 West Indians were arriving each year. However, despite a heavy post-war demand for labour, immigration policy still excluded all those who would "make a fundamental alteration in the character of our population" or who might not be readily assimilated into Canadian society. "Undesirable" was interpreted by the then Immigration Minister to mean "persons from tropical or sub-tropical countries".

During the 1950s a Canadian need for domestic servants allowed small numbers of West Indian women to enter the country. Formally recognized in 1955 with the introduction of the West Indian Domestic Scheme, the plan specified that applicants should be single females between 18 and 35 years of age, in good health, and with a minimum Grade Eight education. After working as a domestic for a minimum of one year, these domestics were granted landed immigrant status and could apply for citizenship after five years in Canada. The scheme was first limited to 100 women per year from Jamaica and Barbados, but later, as it expanded in numbers, included other islands and Guyana. In this way a total of 2,690 West Indian women were admitted, exceeding the total number of West Indian immigrants in Canada before 1945. The majority of these black women were not domestic servants in their own countries, but since at the time this was the only hope of getting into Canada, secretaries, clerks, teachers, nurses, and the unskilled took advantage of the opportunity.

Life for the domestics was far from easy. They were isolated and lonely, and their only social activities revolved around their weekly day off spent in the company of other fellow servants. Most of them reported having personally experienced racial discrimination and rejection. In their work they felt cheated and exploited in numerous ways; many of their grievances surrounded the variety of chores they were expected to perform. Almost everyone left domestic service as soon as their year was up and either enrolled in courses to upgrade their qualifications or found employment in the areas in which they were trained in the West Indies.

Another large group of West Indians in Canada was comprised of students who had been coming to Canada on temporary visas since the 1920s. At the end of World War II their small numbers increased dramatically, and by the 1960s there were several thousand at any one time in sufficient concentrations to establish their own student clubs and social circles. They too remained outside the mainstream of Canadian life and complained of discrimination in student

employment and in housing. Upon graduation many applied for and were granted landed immigrant status.

Although little discussion had taken place in public or Parliament, pressure for immigration reform was mounting. When those reforms came in 1962, placing emphasis on training, education, and skills as conditions of admissibility, they opened the door to immigration from the West Indies as well as other Third World countries. Where previous rules had held highly skilled and professional but "visible" people in reserve, they were now eligible for entering and edged out less-skilled applicants from traditional European sources. The new rules also permitted deliberate recruitment of specific skills, and several English-speaking teachers and nurses from the West Indies filled the demand in Ontario, which was at the time experiencing shortages in these areas. Thus in the years between 1962 and 1966 more than 12,000 West Indians entered Canada. This number exceeded the entire West Indian population in Canada as recorded in the 1961 Census.

When the amended immigration regulations of 1967 introduced a "points system"—assigning specific value to characteristics such as education, employment prospects in Canada, age, health, and language—young, educated, English-speaking West Indians were in an ideal position to benefit from the changes. Immigration offices were soon opened up in Jamaica, Trinidad, Barbados, Guyana, and eventually Haiti. The flow became a flood as the West Indian population doubled from 1966 to 1967 and tripled again by mid-1970, jumping from 14 to third place as a source of Canadian immigration. The 1971 Census showed 68,000 West Indian-born residents in Canada; the decade saw the arrival of 140,000. Toward the end of the 1970s when renewed restrictions stemmed the tide of immigration from the region, the West Indian population was already well-established in Canada. The figures on total West Indian immigration are imprecise, but current estimates put the number at 300,000; 85 per cent have settled in Ontario, the majority of whom live in Toronto.

Various surveys have revealed that the primary motivation for Caribbean migration revolves around educational opportunity (especially for the children of immigrants), political freedom, economic and social mobility, and a simple love for adventure. Contrary to popular belief among Canadians and other immigrants, economic reasons for coming to Canada do not rate high in this group. In a survey testing this aspect of the West Indian presence in Canada, Wilson Head and his group of researchers anticipated that a preference for the more stable racial situation and improved economic opportunity in Canada, specifically Toronto, would be a major consideration to the question, "Why choose Canada?". In fact they found that few respondents indicated that these are major concerns, though respondents frequently indicated that they felt educational opportunities here are advantageous. Many West Indian parents hold high hopes for their children's success in Canadian schools. Their academic aspirations for their children are boundless, and many cherish a longing to see their sons and daughters achieve professional standing as lawyers, doctors, or teachers. In coming to Canada they sincerely believe that their dreams can be realised.

West Indians are younger, better educated and more highly skilled than most immigrant groups. Their percentage of



university graduates is double the immigrant average, and they have the lowest percentage of unskilled labourers.

The majority of West Indians have settled in Toronto, followed by Montreal and Vancouver. There are smaller communities in Winnipeg and Halifax, but almost every industrial city has a substantial number. There is some residential congregation, but settlement patterns are influenced by income and therefore the majority are scattered across cities. They are by no means a homogeneous group, coming as they do from a variety of territories each with its own unique cultural character. However, although it is not a unified community, they have established social and cultural associations and sporting clubs, and are served by West Indian grocers, barbers, hairdressers, several newspapers and magazines, and television and radio shows. Family pattern varies with social class background, and middle-class West Indians exhibit in the main the same nuclear family pattern that predominates in North America. Among working-class West Indians there are much stronger kinship ties not only between immediate siblings but among members of the extended family.

Despite their many advantages, however, West Indians have been disillusioned by the fact that the period during which most new immigrants almost inevitably suffer a loss of status has for them tended to be longer than for other immigrants. Most of them accept jobs that do not fit their qualifications and, according to one survey, even after seven years in Canada, a large percentage feel that they have not improved upon their initial entry status.

### Haitians

Since the late 1950s the political and economic situation in Haiti has led to the immigration of substantial numbers of educated Haitians to Canada and other parts of the world. But there were two successive and distinct waves of immigration that account for the bulk of the population; the first was from 1967 to 1972, and the second began in 1972 (see Table 1).

Until 1967 the Haitian community numbered only a few hundred and was made up almost entirely of voluntary political exiles and professionals working in health services, education, and the social services. Most of them were from the privileged segments of Haitian society, and many were in Canada in a state of waiting, hoping for an improvement in the political climate of their country in order to return home. The nurses, laboratory technicians, and doctors were easily accepted by the hospitals, but to be able to pass an examination in their specialty it was necessary for doctors to obtain Canadian citizenship. Since many had not yet considered becoming Canadian citizens, they chose a long wait instead.

In the early 1960s, when Quebec was introducing educational reform as part of the Quiet Revolution, Haitian interest in Quebec was heightened. As Canada's immigration policy changed during the decade to eliminate racial discrimination, many Haitians who had completed their studies abroad began to immigrate to Canada. Many found teaching positions in the Quebec educational system and settled in the large urban areas. By 1967 other professionals and service employees joined them, and several hundred Haitians were now entering the country annually, directly from Haiti.

TABLE 1

### Total Number of Haitians Entering Canada

| Calendar Year | Quebec | Total in Canada |
|---------------|--------|-----------------|
| 1968          | 563    |                 |
| 1969          | 650    |                 |
| 1970          | 917    |                 |
| 1971          | 1,052  |                 |
| 1972          | 999    | 1,056           |
| 1973          | 2,252  | 2,336           |
| 1974          | 4,853  | 5,035           |
| 1975          | 3,411  | 3,533           |
| 1976          | 3,073  | 3,172           |
| Total         | 17,770 |                 |

Source: Government of Canada, Manpower and Immigration, not available, listed elsewhere. Government of Quebec, Department of Immigration.

Reprinted from Jean-Baptiste, Jacqueline. *Haitians in Canada*. Minister of Supply and Services, Ottawa, 1979.

From 1972 Haitian immigration to Canada rose dramatically, as thousands of artisans and skilled, semi-skilled, and unskilled workers entered the country. The majority found work in the textile and plastic industries, and as domestics (see Table 2).

At the same time, many professionals were experiencing difficulties in being admitted to professional bodies such as dental, agricultural, and engineering associations. Many resigned themselves to abandoning their professions and starting from the bottom in some other discipline. Others simply earned a living by accepting jobs in factories. From among 7,000 personnel files arranged in alphabetical order at the offices of the Haitian Christian Community, one out of every 70 was chosen at random. These 100 samples indicated that 90 per cent of the people arrived in Canada during or after 1972, and that 64 per cent were employed in manufacturing industries.

The Haitian community complains of an inability to integrate into the Quebec community although they are francophone, and various incidents point to an underlying current of racism. Haitian taxi drivers, for instance, have been the object of racial harassment by other taxi drivers. They have also suffered discrimination by members of the public who refuse to ride in their taxis, and by dispatchers who have honoured requests not to send Haitians to their customers.

### Unity within Diversity

Official census figures for Canada's black population are very unreliable and have grown out of inexact categories, such as confusing usages of the concept of "origin", or changing census categories, i.e., changing classifications of the children of mixed marriages. The size of the important West Indian component in the black population is obscure because, for one thing, unlike the United States, Canada had no classification for children of foreign-born blacks. Again, under-enumeration almost certainly resulted from the heavy incidence in the past of black employment on trans-continental railways or as live-in maids. And, of course, within recent



**TABLE 2**  
**Distribution of Workers Arriving from Haiti: Intended Occupation in Per Cent**

| Year | Professions | Office Work,<br>Commerce,<br>Finance,<br>Services, etc. | Mechanical<br>trades,<br>Construction,<br>repairs,<br>Manufacturing | Others,<br>Not Listed | Total |
|------|-------------|---------------------------------------------------------|---------------------------------------------------------------------|-----------------------|-------|
| 1967 | 65 %        | 26 %                                                    | 9 %                                                                 | —                     | 100 % |
| 1968 | 57          | 29                                                      | 14                                                                  | —                     | 100   |
| 1969 | 59          | 29                                                      | 11                                                                  | 1                     | 100   |
| 1970 | 44          | 38                                                      | 17                                                                  | 1                     | 100   |
| 1971 | 29          | 39                                                      | 32                                                                  | —                     | 100   |
| 1972 | 22          | 32                                                      | 44                                                                  | 2                     | 100   |
| 1973 | 12          | 32                                                      | 55                                                                  | 1                     | 100   |
| 1974 | 11          | 21                                                      | 63                                                                  | 5                     | 100   |
| 1975 | 13          | 24                                                      | 59                                                                  | 4                     | 100   |
| 1976 | 6           | 24                                                      | 57                                                                  | 11                    | 100   |

Source: Annual Catalogue, Citizenship Statistics, Ottawa. Twelve Haitians obtained Canadian citizenship in 1962, and 11 in 1963.

times the census ceased classifying people on the basis of race. Community estimates provide more useful data.

As far back as 1931, for instance, the census had difficulty arriving at a count of "Negroes" in Toronto; it reported 1,344. The Home Service Association conducted a sample survey in 1941 with the help of "Negro" churches and the Welfare Council. Four thousand "Negroes" were enumerated during the same year that the census enumerated 2,010. However, the number of blacks in Canada has never risen above two-and-a-half per cent of the population.

The majority of blacks live in Ontario, followed by Quebec and Nova Scotia. With the exception of Nova Scotia, New Brunswick, and, to a lesser degree, Alberta, where there are still pockets living in rural areas, the black Canadian is an urban dweller. Toronto's black population has been estimated at between 100,000 and 150,000. The estimate for Montreal is approximately 55,000, with Haitians accounting for 13,000. The Halifax-Dartmouth area accounts for 24,000 to 25,000.

West Indians and their descendants now compose 80 per cent of the black population, and popular estimates suggest that they number about 300,000. Relatively few newcomers have gone to the West or the Maritimes. While most overseas immigrants tend to head for the larger urban centres where employment prospects are greater, thus swelling the ranks of blacks in Toronto and Montreal, and especially Toronto, Canadians from Nova Scotia and southwestern Ontario have also been increasingly adding an indigenous Canadian element to the black population.

Despite the very heterogeneous nature of the black population in Canada there are obviously strong unifying forces. Perhaps the most important is the common element shared in the total of those experiences related to the colour of their skin: common experiences with racism and discrimination in one or more of its forms.

In post-war Canada, blacks continued to face, in varying degrees, centuries-old prejudice and discrimination embed-

ded in society. Discrimination dictated their hiring, promotion, housing, education, and social interaction. Recent studies within the school system, for example, have consistently revealed evidence of negative racial stereotyping and discrimination against blacks. Many teachers had lower expectations of black students, considering them slow learners incapable of high achievement. Many black youngsters responded by developing negative attitudes about school. Inadequate counselling and advice resulted in considerable "streaming", whereby black students were channelled into trade schools and vocational classes rather than academic studies. High school counsellors steered black students into vocational courses on the basis of aptitude tests, and as Savannah Williams, professor of anthropology at Dalhousie University, reported, the aptitude tests given black students are often culturally biased.

But the black population has not accepted this situation, and within recent decades a number of black educators, parents, and organizations have been successful in verbalizing the discontent of the black population and in influencing changes in educational policy. (These changes are discussed later in this report.)

Discrimination met by blacks in employment might be broken down into two broad categories. One involves application and hiring; the other relates to employment conditions, such as work assignments and denial of promotion. Head (1975) pointed to a federal survey of "Black Workers in the Civil Service" which showed that blacks in Nova Scotia were systematically discriminated against at all levels of employment. The problems are not limited to either the province or to the government service.

Statistical data collected in 1981 revealed that West Indian men and women with median incomes 21 per cent below the national median, respectively, were the lowest paid of any ethnic group. Non-West Indians with similar qualifications enjoy higher incomes and job status than West Indians do.

This suggests that the West Indian perception of discrimination in employment is by no means the result of a "persecution complex". Further, when in 1981 white Canadians were asked their opinion on which group suffers most from discrimination, 79 per cent named West Indians. This figure was almost identical to the West Indians' own perceptions. A 1977 study asked a sample of Canadian adults to rank 36 ethnic and religious groups according to their social standing. In both English and French Canada, blacks appeared at the bottom of the list.

A number of factors have contributed to black survival in Canada. Among the most important, however, has been the strength and stability of the railway community. In 1919, for example, the black porters of Canadian National Railways organized a union, the Order of Sleeping Car Porters, and applied to the Trades and Labour Congress for a charter. Their application was rejected, but after a year of persistence the Brotherhood of Railway Workers agreed to remove a racial qualification, restricting membership to whites, from its constitution. This was the first time that a Canadian union had abolished racial restrictions on membership.

From World War II onward, labour unions were in the forefront of the anti-discrimination fight. Primary examples of unions whose committees worked hard in educational programs with their local unions and on advising members on how to deal with discrimination at work include the Brotherhood of Sleeping Car Porters, the Canadian Brotherhood of Railway, Transport and General Workers, and the United Automobile Workers.

Throughout the 1950s and into the 1960s, as Hill (1977) points out, labour continued to play a prominent role in the drive for human rights legislation. Race, colour, creed, and nationality were areas of special concern. At the end of the 1960s, labour had achieved its goal of having human rights legislation passed and commissions established in all jurisdictions in Canada. Some human rights committees then became inactive, and minority groups and religious organizations assumed a higher profile.

These developments were largely the result of sustained organized activity by black organizations, which were first on the scene to battle discrimination and to pressure government to enact legislation forbidding discrimination in employment.

## B. Chinese

### Background to Emigration

Emigration from China to Canada began in 1858 and was part of a much larger Chinese migration to various parts of the world which was closely related to poor economic conditions in the homeland. Most of the early Chinese who migrated to Canada came from the southeastern coastal regions of China. Although an imperial edict imposed heavy penalties on those leaving the empire without a special permit, many in the provinces of Kwangtung and Fukien ventured abroad to seek a better living. Thus, around the mid-nineteenth century, large waves of Chinese immigrants reached Southeast Asia, the Pacific Islands, Australia, and America to work on plantations and in mines. Some of them came to Canada.

Most Chinese emigrants were single men who participated in one of two forms of migration: coolie brokers or chain migration. Through the coolie broker arrangement, Chinese

were recruited as contract labourers by commercial companies which advanced the passage ticket and a small sum of money to them. In return the Chinese accepted employment arranged through the companies, and a portion of the monthly wage was deducted to repay the credit. Generally the Chinese gave bonds to the companies before leaving home to work for a term of five to ten years. After that time they were free to seek employment on their own. This type of labour was normally used to provide gangs for specific construction jobs or resource extraction and was a vital part of Chinese-Canadian history in the late nineteenth century.

After 1900 chain migration to Canada was much more common. Here the immigrant came on his own and worked until he had saved enough for a trip back home. Occasionally, depending on financial status and opportunities, he brought his wife and established a family. If he was single, the immigrant might marry on his first trip back to his village in China, or, if already married, he might arrange to bring back a teenaged son or nephew. On subsequent return trips he might bring other male teenaged relatives. Thus fractional families without women were built up.

Not all of the Chinese who came to Canada during this period, however, were labourers. Some were merchants, students, and miners, all of whom helped to build the economy of the Canadian West. Over the years their communities waxed and waned but remained an integral part of Canadian society.

Born into a society rooted in an agrarian mode of production, most Chinese migrants to Canada, although disadvantaged in many ways, brought with them an inventory of cultural strengths which applied to the process of adaptation to Canadian society. Coming as they did from southeastern China, notable for the elaboration of the principle of kinship, they were familiar with a form of social organization in which economic organization, political power, sources of prestige, and religion were all oriented toward kinship groups.

Although his lot as a peasant entailed a great deal of deprivation, the local social system of which he was a part defined his status clearly. This system was destroyed as the migrant was propelled into a new economic system. But his attachment to traditional forms was intense and he kept as close as possible to his native cultural system.

Voluntary organizations have always been used in China as a way of coping with problems involved in change, especially change arising out of rural-urban migrations. This cultural background fostered a genius for association formation which was transferred to the new Chinese communities.

### Early Migration and Settlement

The first group of Chinese arrived in Victoria in 1858 in response to news of gold on the Fraser River. They did not come from China but were part of a group of earlier migrants to the United States. By the 1860s there were 6,000 or 7,000 Chinese in what is now British Columbia. Many now came from China, but the large proportion were men who had moved forward from California as the boom subsided there and anti-Oriental feelings developed. The majority travelled up the Fraser River into the gold fields. As white prospectors moved up the various tributaries of the Fraser, they tried to

keep the Chinese out of their areas, sometimes even resorting to violent means. Small groups of Chinese could frequently be found working over the diggings deserted by the whites. However, while most sought gold along the Fraser, some collected jade free of competition, as it was not recognized as precious by other prospectors.

Some Chinese went into business, and throughout the 1860s Chinese companies, which by now had been thriving in Victoria, developed a network of subsidiaries in all the towns of British Columbia. There was also heavy entry into service occupations by those Chinese who came mainly from Hong Kong with no prior mining experience.

While it is true that the Chinese who initially came to Canada were attracted by the gold rush, much larger numbers were subsequently recruited to fill the shortage of labour in British Columbia, starting with the building of the Cariboo Wagon Road in 1862. It was estimated that 1,000 Chinese worked on the Cariboo Wagon Road, while another thousand were hired for building dikes and ditches in Victoria and New Westminster. Others worked in coal mines and at the fish canneries and sawmills, and there were numerous domestic servants. Soon Chinese labour became indispensable to a number of industries in British Columbia, especially to the construction of the Canadian Pacific Railway. By the time construction of the CPR began, new industries were also booming in British Columbia, and because labourers were scarce employers eagerly sought Chinese workers because they were in large supply and were paid one-third to one-half less than their white counterparts. Between 1876 and 1880 the number of Chinese arriving at Victoria by ship was 2,326. That number rose to 13,245 between 1881 and 1883.

### The Railroad Experience

Amid growing anti-Chinese feelings in Victoria, about 1,500 experienced Chinese railroad workers in the United States were hired between 1880 and 1881 for work on the construction of the CPR. During 1882, 8,000 Chinese arrived by ship from Hong Kong, many suffering from scurvy when they disembarked; one report estimated that nearly 10 per cent had died of the disease in transit. After a brief stay in Victoria most of the new arrivals went to work on the railway.

The 1885 Royal Commission on Chinese Immigration reported that a total of 17,000 Chinese immigrants entered Canada during the four years of railway construction, 10,000 of whom had come directly from China. The Commission also reflected the alarm with which the white population at large viewed their growing number as well as the pressure from employers and industrialists for their cheap labour. As Sir Matthew Begbie, Chief Justice of British Columbia, argued:

*I do not see how people would get on here at all without Chinese men. They do, and do well, what white women cannot do, and do what white men will not do. (Royal Commission, 1885:75)*

Nor was repeated pressure from the provincial government of British Columbia effective in introducing a federal anti-Chinese bill, as long as the CPR was under construction. Prime Minister Macdonald expressed his reluctance to entertain such a bill at that time.

*It will be very well to exclude Chinese labour, when we can replace it with white labour, but until that is done, it is better to have Chinese labour than no labour at all. (House of Commons Debates, 1883:905)*

In 1885, when the CPR was completed, that time had come, and the first anti-Chinese bill was passed, though not before hundreds of Chinese had suffered and died working on the railroad.

Very little is known about life in the railway camps to which Chinese workers were sent, since very little has survived by way of Chinese diaries or records. But there appears to have been little organization apart from the economic structures of work and commerce. There were no secret societies, no clan associations, and, of course, no unions. The *Yale Sentinel* was at the time the most sympathetic paper to the Chinese and was largely responsible for exposing their conditions of work and suffering.

Accidents were frequent, with many more Chinese than whites as victims, but the company frequently issued accident figures that excluded the Chinese. Many died from sheer exhaustion, not only from the hard work on construction, but because of the added burden of long walks between camp and work site. Some died in rock explosions or were buried in collapsed tunnels, or drowned in the river after falling from an unfinished bridge. In one instance a collapsing tunnel buried a dozen workers.

Their living conditions were poor. Medical attention was minimal, and so many died at Yale during the first year that the townspeople mistakenly feared a smallpox epidemic, when in fact it was scurvy. In 1883 another epidemic killed more than 200 Chinese workers at Port Moody. In that year the *Yale Sentinel* cried out, "Here in British Columbia along the railway, the Chinese workmen are fast disappearing under the ground". While the exact number who died is not known, conservative estimates place the figure in the vicinity of 600. What is known is that in 1891 the Chinese Consolidated Benevolent Association of Victoria arranged for the collection of more than 300 unidentified corpses from the Fraser and Thompson canyons and returned them to China for decent burial.

### Early Communities

By 1885, after 25 years of immigration, the Chinese population in Canada numbered over 10,000 and was limited to British Columbia, where it could be divided into three sorts of communities. One type involved a large number of Chinese working for non-Chinese companies (railway construction, coal mines, sawmills). Then there was the community functioning as a core of commerce and service for a large body of independent miners in the Cariboo, in the Okanagan at Lytton, and at Lillooet. And finally, there were communities of workers in several occupations that served the white population—servants, tailors, vegetable sellers, etc.—as well as providing services for the Chinese population itself—for example, barbers, teachers, doctors, etc. This last community was centred in Victoria with the structure repeated in New Westminster and Nanaimo, and later in Vancouver.

### Anti-Chinese Bills

The completion of the Canadian Pacific Railway in 1885 heralded the passing of the first federal anti-Chinese bill. It



took the form of a head tax of \$50 imposed with few exceptions upon the Chinese entering the country. This tax was raised to \$100 in 1900 and \$500 in 1905. By 1923 another federal Act sought to exclude all Chinese from entering the country. The Chinese Immigration Act, which was not repealed until after World War II, required all Chinese in Canada, irrespective of citizenship, to register with the government and obtain a certificate.

The province of British Columbia in addition passed numerous anti-Chinese bills aimed at stifling the political and civil rights of Chinese in the province. They were disenfranchised in British Columbia in 1875 and subsequent legislation continued to bar them from voting in provincial and municipal elections. They were not allowed to acquire crown lands and were barred from certain occupations. The Coal Mines Act of 1890 prevented Chinese from working underground and from performing skilled jobs in coal mines. They were not entitled to liquor licences, were excluded from nomination for public office, and were barred from the professions of law and pharmacy. British Columbia was not alone in removing the franchise from the Chinese. By this time there were insignificant numbers of Chinese living in Saskatchewan and Alberta. The Saskatchewan Elections Act of 1908 disenfranchised the fewer than 1,000 Chinese in that province. The possibility was also discussed in Alberta but not well supported.

#### Anti-Oriental Animosity

The decades following the completion of the CPR were marked by anti-Oriental animosity directed at both Chinese and Japanese, but they did not experience discrimination in the same way. Prior to World War II the Japanese were more effective than the Chinese in defending themselves against persecution. They were reasonably well-organized in Canada and could call upon the government of their homeland for a certain amount of support. Indeed, after the Japanese Empire became an ally of Great Britain in 1902, its treaty relations with the British Empire were an effective bulwark against a variety of statutes passed by the British Columbia legislature.

There was not even consular representation between China and Canada until 1909, and the local Chinese organizations were mainly mutual aid societies, with little political influence. However, severe and prolonged anti-Oriental outbreaks in the general population did not discriminate between Chinese and Japanese.

During the first and second decades of this century there were strong efforts on the part of British Columbia school boards to keep Oriental children out of the public schools. Education policies were closely tied in with severe criticisms of Canada's immigration policy, demands that the flood of immigrants be stemmed, calls for a quick eradication of "foreign" cultures and their exclusion in the future by stricter immigration policies. In particular, this attitude was directed toward the Asian population, where the main school issue was one of segregation. One of its strongest proponents was the Asiatic Exclusion League. On September 7, 1907, latent hostility erupted into savage violence when a public meeting called by the Asiatic Exclusion League got out of hand and hoodlums and others invaded Chinatown and the Japanese quarter, smashing and destroying property. The years following the riot were marked by sporadic outbursts as segregation of Oriental students from white students continued.

#### Population Growth

Various legislative controls on Chinese immigration affected the size of the population in Canada. The population almost doubled between 1881 and 1891, and again between 1891 and 1901, and continued to rise in every census year thereafter.

Raising the head tax from \$50 to \$100 had no effect on immigration. In fact the 5,000 arrivals in 1903 marked the largest ever for a single year. However, when the head tax was raised to \$500 in 1903 there was a momentary pause in new Chinese arrivals. By 1907, with increased earning power, the head tax was no longer a deterrent, and there was a population upswing once again. The men were married, bachelors, or separated from their wives and children in China whom they maintained with regular remittances. According to the 1941 Census, more than 80 per cent of the Chinese males in Canada were married. Yet, in that year, second-generation Chinese represented no more than 20 per cent of the Chinese population. And as late as 1971 more than 60 per cent of the Chinese in Canada were foreign born. By 1931 the effects of the 1923 Act, which totally excluded Chinese from entering Canada, were noticeable in a population decline that lasted for the next 25 years. Not until after World War II, when the restrictive immigration law relating to the Chinese was repealed, did the population begin to increase again.

The absence of women in the Chinese population undoubtedly affected, among other things, the growth of the population. It was not until the 1960s that many wives and children who were separated from their husbands and fathers joined them in Canada. Of the 21,877 Chinese immigrants entering Canada between 1947 and 1962, the sex ratio was 98 males per 100 females. The change in immigration law in 1962 permitting independent immigrants resulted in an increase of women over men during the next five years. Between 1968 and 1976 the sex ratio had finally almost balanced.

Chinese immigration to central Canadian cities coincided with the completion of the Canadian Pacific Railway, and their occupational history took two parallel directions: they either entered the general labour market as labourers, domestic servants, cooks, gardeners, and waiters, or they became self-employed entrepreneurs in laundries, restaurants, import and export houses, and food stores. With the immigration reforms of 1962, which allowed for admission regardless of nationality, and the sharp increase in Chinese immigration, a marked change in the population was seen.

First of all, unlike earlier immigrants who came to Canada to make money and then return to China, these new immigrants came to settle permanently and gradually changed the structure of the Chinese community in Canada. The new immigration policy favoured wealthy, skilled, and educated Chinese, many of whom were urban dwellers from Taiwan and Hong Kong, where they were educated in the British school system. Thus they were not forced into traditional Chinese occupations but were distributed in a variety of occupations in all sections of the labour force. According to the 1971 Census, 28 per cent of Chinese remained in the service occupations, while 40 per cent were in the non-manual section—18 per cent in professional and technical occupations, and 22 per cent in clerical and sales occupations.



With the emergence of middle-class professional and white-collar workers, other changes occurred in the Chinese community across Canada, such as the formation of new ethnic associations representing the interest of the more heterogeneous population. At the same time conjugal life, disrupted by early patterns of immigration, was restored, decreasing the importance of those ethnic associations. Conjugal life also gave rise to a larger second generation. The geographic boundary of Chinatown also began to fade as Chinese branched out into the larger society.

### Religion

In marked contrast to other overseas Chinese settlements, traditional Chinese religious organization was never prominent among migrants to Canada. Christian churches, however, did make a substantial impact.

At the turn of the century, Presbyterian and Methodist missionaries strongly defended the Chinese cause. They converted many Chinese and often attempted to make their buildings into centres of Chinese community life. At about this time young Chinese who had graduated from mission schools in China started arriving. They were fluent in English and became leaders in Canadian Chinese communities.

Missionary influence on the new generation was substantial. Protestant missions had begun working in earnest in the 1880s; Presbyterians and Methodists were especially active. Most of their activities were directed at young men in the Chinese community.

Especially popular was the YMCA organizations, which were spawned as soon as a mission was organized. The movement had reached China by the 1880s and by 1911 was enjoying its greatest popularity among young Chinese intellectuals. In Canada its modernizing optimism appealed to idealistic young Chinese who were concerned about their own community and about the future of China. Of even greater appeal was the fact that the YMCAs were organized and run by the young Chinese themselves. The desire for

autonomy by some Christian Chinese is evident in various independent associations they established in Montreal, Vancouver, and Toronto.

Christian influence was particularly strong in Toronto. In 1905 the Chinese Presbyterian Church was established and 15 years later missionary work in Toronto and in other areas east of Manitoba was administered by the Eastern Canada Mission, with headquarters in Toronto. Toronto also became headquarters for the Canadian Presbyterian Missions and later the United Church Missions to China.

By the 1930s many churches were led by Chinese ministers, who were linguistically and culturally well-equipped to help both Chinese-born and Canadian-born members of the congregations. These ministers provided a significant portion of community leadership. The proportion of avowed Christians in the Chinese community rose from 16 per cent in 1931 to nearly 30 per cent in 1941, and the geographic pattern of Christian influence among Chinese bears some similarity to that of naturalization. Where there were older and larger communities—Victoria and Vancouver—the influence of Christianity was relatively light. Even so, by 1941, 20 per cent of that population was counted as Christian. In the Maritimes, the majority were Christians, and half the Chinese in the urban centres of Ontario were listed as adherents to the Christian faith. By this time the United Church was easily the leader throughout Canada, with almost half the Chinese church members being affiliated with it. The Roman Catholic influence was strong in Quebec, where nearly half of the Chinese Christians were professed adherents.

The church continued to develop during the 1950s and became conscious of the social needs of new immigrants. They took a very active role in providing English classes for newcomers and also moved into social issues, anticipating developments in the post-1962 period. After 1962 there was a substantial growth in church activities, especially among the numerous fundamentalist churches that now serve the Chinese community.

TABLE 3  
Provincial Distribution of the Chinese Population in Canada, 1941-1971

| Province         | 1941   | %      | 1951   | %      | 1961   | %      | 1971    | %      |
|------------------|--------|--------|--------|--------|--------|--------|---------|--------|
| Newfoundland     | —      | —      | 186    | (0.6)  | 445    | (0.8)  | 610     | (0.5)  |
| P.E.I.           | 45     | (0.1)  | 35     | (0.1)  | 43     | (0.1)  | 25      | —      |
| Nova Scotia      | 372    | (1.1)  | 516    | (1.6)  | 637    | (1.1)  | 935     | (0.8)  |
| New Brunswick    | 152    | (0.4)  | 146    | (0.4)  | 274    | (0.5)  | 575     | (0.5)  |
| Quebec           | 2,378  | (6.9)  | 1,904  | (5.8)  | 4,794  | (8.2)  | 11,905  | (10.0) |
| Ontario          | 6,143  | (17.7) | 6,997  | (21.5) | 15,155 | (26.0) | 39,325  | (33.1) |
| Manitoba         | 1,248  | (3.6)  | 1,175  | (3.6)  | 1,936  | (3.3)  | 3,430   | (2.9)  |
| Saskatchewan     | 2,545  | (7.3)  | 2,144  | (6.6)  | 3,660  | (6.3)  | 4,605   | (3.9)  |
| Alberta          | 3,122  | (9.0)  | 3,451  | (10.6) | 6,937  | (11.9) | 12,905  | (10.9) |
| British Columbia | 18,619 | (53.8) | 15,933 | (49.0) | 24,277 | (41.6) | 44,315  | (37.3) |
| Territories      | 3      | —      | 41     | (0.1)  | 134    | (0.2)  | 200     | (0.3)  |
| Total            | 34,627 |        | 32,528 |        | 58,197 |        | 118,815 |        |

Source: Census of Canada, 1941, 1951, 1961, 1971.

### C. Japanese

The first Japanese immigrant set foot in British Columbia in 1877 and for the next 20 years small numbers followed him. Migration did not begin in earnest until the mid-1890s, increasing from the small trickles of the early years to large clusters during the last few years of the century. Almost 30,000 Japanese entered the country by World War I, representing three-fifths of the total number of Japanese who have ever come to Canada from Japan. There were two great peaks of migration, one in 1899-1900 and the other in 1906-7. Each period introduced about 11,000 newcomers. In 1908 there was strong opposition to Japanese immigration in British Columbia and, through diplomatic agreements reached with Japan, the flow of migrants to Canada was curtailed. In the 1920s and 1930s the number of immigrants dwindled to a mere 250 per year. World War II totally interrupted the migration from Japan to Canada, and it was not until the mid-1960s that immigration increased to levels approaching those that prevailed early in the century. However, since the turn of the century their numbers have not constituted as much as one per cent of total immigration in any one decade.

Most early Japanese came from largely agricultural and fishing villages in the thickly populated prefectures in the southern end of the main island of Honshu and the south island of Kyushu, where they lived on the edge of poverty. Except for small craftsmen and petty traders, most had farming and fishing backgrounds, and after a settling in period they usually followed the same occupation in Canada.

By the year 1900 Japanese were entering the major industries involving heavy labour and some skill, such as the fishing industry, coal mining, and lumbering. Railroad construction also drew Japanese in increasing numbers, and several hundred were specifically imported as contract labourers on the Canadian Pacific, Canadian Northern, and Grand Trunk Pacific Railways.

The majority of early emigrants left Japan for economic reasons, intending to work temporarily in Canada and to return to Japan with their accumulated savings. And many did. One estimate places at 13,000 the number of Japanese who had returned home by the late 1930s—one in three of all who had come to Canada by then.

Before 1910 most of these temporary migrants were single, young male speculators who had left home in a "chain migration" pattern very similar to the Chinese. They were followed by other young men who were recruited through the process. Still others were sent abroad in a similar manner to the "coolie-broker" system operating out of China, whereby Japanese companies made a business of facilitating emigration supplying labour to employers in Canada. The Japanese government restricted the number of migrants allowed to leave for Canada by registering outgoing citizens and supervising the activities of emigration agencies.

After 1910 there was a dramatic change in the nature of Japanese migration to Canada. While the young, single males continued to come in significant numbers, for the next 30 years the majority of new arrivals were women, some of whom were brought by husbands who had returned to Japan for a wife. But the vast majority came through the "picture bride" system, whereby alliances were arranged through

relatives in Japan who would send a picture of the prospective bride for approval by the groom in Canada. Whereas in 1910 the ratio of men to women was 10 to 1, by 1931 it was 2 to 1. The married Japanese established roots in their new homeland and became permanent residents of western Canada. Until the mass evacuation of 1942, 97 per cent of the Japanese in Canada resided in British Columbia. As the years passed this concentration was to be maintained, consolidating itself in the several highly populated areas of British Columbia.

#### The Issei

The Issei were the first generation of Japanese immigrants and initially settled in Vancouver and at Steveston, a nearby fishing village at the mouth of the Fraser River. As their employment pattern broadened they dispersed themselves somewhat more widely in British Columbia, along the northern coast of Vancouver Island or in the Okanagan Valley. On the eve of World War II, after half a century in Canada, more than two-thirds of the Japanese still lived within a 40-mile radius of Vancouver. Ninety five per cent lived in British Columbia, with only a few small clusters on the Prairies and in southern Ontario.

Although they entered a broader range of occupations, most of their jobs were low-skilled, low-paid tasks for which they were frequently paid only half to two-thirds of what white labourers earned. A 1931 survey revealed the following job distribution:

|                          |   |     |
|--------------------------|---|-----|
| Agriculture              | — | 9%  |
| Fishing                  | — | 19% |
| General unskilled labour | — | 19% |
| Lumbering                | — | 12% |
| Personal services        | — | 11% |
| Commerce                 | — | 5%  |

The remaining were scattered throughout all other economic sectors. One attractive occupation to Japanese was private fishing. A man who owned a boat and gear could, with hard work and good luck, earn a substantial sum. After 1922, however, at the insistence of white fishermen, the federal Department of Fisheries limited the number of fishing licences issued to Japanese, thus partly closing the door to this lucrative occupation.

The Issei lived in separate districts, married other Japanese, established friendships within their group, and attempted to keep alive many of their cultural traditions. They formed a wide range of voluntary associations, numbering at least 230 by the 1930s. There were Buddhist temples, vernacular newspapers, trade unions, businessmen's associations, as well as social, cultural, and philanthropic organizations.

In many respects the Issei shared experiences common among first-generation immigrants, but culture and pronounced physical differences set them apart from the majority and complicated their integration process. Disabilities already imposed on the Chinese were quickly extended to them, such as being barred from the provincial franchise—and, as a result, losing the federal franchise in British Columbia as well. They were subjected to discriminatory housing covenants, segregation in schools and public places,

and immigration restrictions. Some of these acts were a matter of public policy, others were based on private agreements, while others were merely casual acts of petty discrimination.

### The Nisei

Most second-generation Japanese Canadians were born during the 1920s and 1930s. Their parents, the Issei, tried to pass on to their children the full range of Japanese cultural tradition. For example, after school and on Saturday mornings thousands of Nisei, or second-generation Japanese, were instructed in language, history, and the culture of their parents in Japanese vernacular schools. However, the Nisei spoke English, played Canadian games, enjoyed popular pastimes, and shared much of the outlook of their white contemporaries.

The traditional family system—the central social institution of Japan—was altered in western Canada in large measure due to the Nisei. The extended family model brought to Canada by the Issei was stripped to its nuclear core as a result of disruptions due to migration. But they tried to maintain the patriarchal, authoritarian, honour-bound traditions of Japanese family life. For the Nisei, who grew up in an atmosphere of liberal individualism, the democratic and permissive nuclear family of twentieth-century Canada was much more attractive. Amid inter-generational conflict and tension, the Nisei adopted the practices of the country of their birth. During the 1930s the Nisei became acutely conscious of themselves as a separate social group and formed voluntary associations to articulate their situation, discuss mutual problems, and seek common goals.

But the total acculturation of the Nisei, which seemed inevitable during childhood and adolescence, did not entirely materialize. It was when they looked for jobs that the second generation of Japanese encountered the boundaries limiting their success at upward social and economic mobility. The second generation soon discovered that the doors to many desirable jobs were closed to them, even to those few who had earned university degrees. Few businesses would employ Nisei young men in white-collar occupations and they were denied access to most of the professions. What this second generation faced were the same blue-collar occupations with modest wages and low status that their parents had held. This situation was compounded by the Depression, with the result that the Nisei seldom achieved their vocational goals, but rather wound up, like their parents, taking work wherever it was available in the resource, agriculture, and service sectors of the British Columbia economy.

In the late 1930s anti-Oriental agitation, which had been dormant for more than a decade, was fanned into flame by Japan's invasion of China. Anti-Japanese feelings swept western North America, and many British Columbia whites viewed the Japanese community as a potential threat to security. In 1938, RCMP surveillance was established and maintained over the community, and although no subversive activity was revealed, the federal government in 1940 establishing a standing committee on Orientals in British Columbia to allay general fears and promote public calm. When the attack on Pearl Harbour came in 1941, a new chapter in the history of Japanese-Canadians was introduced. Twenty thousand people of Japanese ancestry, 13,300 of them Canadian

born, were uprooted from their homes and sent to relocation camps under federal supervision.

The great majority of the evacuees were sent to live in relatively isolated areas. Twelve thousand went to detention camps in the interior of British Columbia; 4,000, because of an acute labour shortage brought on by the war, were dispatched to southern Alberta and Manitoba to work in the sugar beet farms; 2,000 were sent to interior road construction camps, though by the end of the summer of 1942 had rejoined their families in detention camps; 2,500 either remained self-supporting or were given special permission to work outside the camps. Not only were the Japanese uprooted and detained, but their property and accumulated savings were confiscated, or they were given very little compensation. For example, George Yasuzo Shoji, who was crippled fighting in World War I, was given \$39.32 for 19 acres of fertile land in the Fraser Valley, a two-storey house, four chicken houses, an electric incubator, and 2,500 hens and roosters. In 1945 the Japanese were forced to begin all over again. Although Shoji eventually received a further \$2,209.70 after an appeal to the 1947 Royal Commission, which was set up to deal with Japanese claims for compensation, the settlement did not approach the value of the property confiscated. The Royal Commission received 1,434 claims totalling more than \$5 million, but after three years of hearing had awarded a total of \$1.2 million.

### The Sansei

The Sansei are third-generation Japanese-Canadians who were born after World War II into an entirely different community, knowing little of the sacrifices of their grandparents or the hardships of their parents. Immediately after the war, thousands of Japanese moved east of the Rockies, some settling in the Prairies, but the majority moving into Ontario, especially Toronto, and into Quebec. By 1951 almost half of the Japanese lived in central Canada, only one-third remaining on the Pacific coast. Immediately after the war those who remained went back to Vancouver and Steveston, but their once cohesive community was now destroyed.

Toward the end of the war the federal government offered assisted passages to Japan after hostilities ended. Nearly half of the entire Japanese population accepted, but after the war 6,300 changed their minds. Their initial acceptance of the offer was viewed as disloyalty, however, and the federal government refused to accept their revocations and attempted deportations. In 1946, a courtroom battle ensued regarding the legality of the deportation orders. This was resolved in favour of the government. In the face of bitter opposition from Japanese-Canadian activists and some white sympathizers, the federal orders were cancelled. Only those who wished to go (about 2,000 Issei) were transported to Japan.

The departure of these Issei reduced the size of an already dwindling element in the community—those most closely tied to the homeland. They were now only a small, aged, and shrinking proportion of the immigrant group, overwhelmingly dominated by the Canadian born. The remaining Issei never re-established the tightly knit communities of the pre-war era. Increasingly, the population came to be absorbed into the social fabric of Canada as a whole. Nevertheless, the aftermath of the war and especially the repatriation program fostered a defensive movement in the community, bringing together a coalition of Japanese-Canadian civil rights groups.



They sought and won increased compensation for property losses sustained in the war, campaigned for an early relaxation of federal wartime controls in the post-war era, and lobbied Ottawa and Victoria for an end to disenfranchisement.

Legal discrimination against Asians ended by 1950, but in light of the *de facto* colour bar that prevailed in Canadian immigration law until 1967, only very few Japanese entered Canada in this period—about 100 per year. From 1967 to 1978 Japanese immigration averaged just under 700 per annum.

The new immigrants have been highly skilled, well-educated urban men and women who have merged relatively easily into the social fabric of twentieth-century Canada, distributing themselves throughout major Canadian metropolitan centres and throughout the labour force. At least half of the Sansei have intermarried with whites, in sharp contrast with the Issei and Nisei, who married exclusively within their racial group. They have in general, adopted the customs, values, and institutions of post-war Canada, and are undoubtedly a part of mainstream Canadian life. Some distinctive elements of culture are still, however, to be found among the Nisei and Sansei. The Japanese Canadian Cultural Centre, which opened in Toronto in 1963, provides an important focal point for the continuing cultural life of the community.

The most important element in the modern Canadian identity is the evacuation. The remembrance of past injustices is the common bond uniting Issei, Nisei, and Sansei. They remember, for instance, that as late as 1961, Louis St. Laurent, who had been in the Mackenzie King cabinet that brought in the Orders in Council, continued to defend the measures with an assertion that Japanese-Canadians' loyalty created an apprehension of threat to national security. Yet no such measures were taken against Italian and German Canadians.

**TABLE 4**  
**Japanese Immigration to Canada**

|              | Total Japanese<br>Immigrants | % of Total Canadian<br>Immigration |
|--------------|------------------------------|------------------------------------|
| 1896-1900    | 12,788*                      | 8.20%                              |
| 1901-1910    | 13,441                       | 0.80                               |
| 1911-1920    | 7,242                        | 0.42                               |
| 1921-1930    | 4,099                        | 0.33                               |
| 1931-1940    | 987                          | 0.62                               |
| 1941-1950    | 32                           | 0.01                               |
| 1951-1960    | 1,056                        | 0.07                               |
| 1961-1970    | 4,216                        | 0.30                               |
| 1971-1978    | 5,233                        | 0.44                               |
| <b>Total</b> | <b>49,094</b>                |                                    |

\*Arrivals as distinguished from immigrants. Many soon departed for the U.S. or perhaps returned to Japan, as the 1901 Census figure (4,738) suggests. No record was kept of Japanese immigration before 1896, but an estimated 1,000 Japanese arrived between 1877 and 1895.

Today, the Japanese community strongly desires redress. Surviving internees, with the support of younger generations, are trying to reach consensus on how the wrongs against them should be set right.

**TABLE 5**  
**People of Japanese Origin in Canada**

|      | Total Japanese<br>Population in Canada | % of Canadian<br>Population |
|------|----------------------------------------|-----------------------------|
| 1901 | 4,738                                  | 0.09%                       |
| 1911 | 9,021                                  | 0.13                        |
| 1921 | 15,868                                 | 0.18                        |
| 1931 | 23,342                                 | 0.22                        |
| 1941 | 23,149                                 | 0.20                        |
| 1951 | 21,663                                 | 0.15                        |
| 1961 | 29,157                                 | 0.16                        |
| 1971 | 37,260                                 | 0.17                        |

Tables 4 and 5 are reprinted from Ward, W. Peter, *The Japanese in Canada: Canada's Ethnic Groups*, Canadian Historical Association, Ottawa, 1982.

#### **D. South Asians**

The term South Asian refers to people who were born or whose ancestors were born in the Indian subcontinent. Included are people from India, Pakistan, Sri Lanka, and Bangladesh.

There are now about 200,000 South Asians living in Canada. Although immigration to Canada has been relatively recent for the majority of the population, the history of migration from the subcontinent to Canada dates back to the turn of the century.

In June, 1897, when Queen Victoria celebrated her Diamond Jubilee, among the troops from every part of the world who took part were troops from India. At the end of the celebration, some of these soldiers wended their way home across British Columbia, and saw in this sparsely populated green land some similarities with the Punjab, the region from which the majority had come. A few remained in British Columbia. Some Sikh soldiers who had helped stem the Boxer Rising in China also came across to British Columbia, and by 1904 there were 250 East Indians—almost all males—in British Columbia. They were basically labourers and found jobs in logging camps, lumber mills, mines, and railway camps.

At that time there was general antagonism to Asian immigrants in British Columbia, and as their numbers steadily increased their presence was viewed as a Hindu invasion. Unemployment in the province increased, hostility to the East Indians grew, and legislation was enacted to control economic and social mobility of the group and to prevent others from coming.

Even though, by right of their membership in the Empire, they were British subjects, the provincial government of British Columbia in 1907 disfranchised East Indians. Less than a year later, the "continuous journey" regulation was introduced, whereby all immigrants, unless covered by special



treaty, were required to come to Canada by a continuous journey from their country of origin. Since India had no treaty with Canada, and since there was no direct route to India, this regulation seemed directly aimed at stopping immigration from India. Controversy raged.

On January 13, 1911, the *Vancouver Province* splashed across its front page the news that the first "Hindu" baby had been born in New Westminster. This news increased agitation among whites; when two men on their return from India the next year brought their wives and children, they were immediately ordered deported and were arrested pending deportation. After much pleading by the East Indian community and intervention by some liberal whites, the men and their families were released and allowed by the federal government to remain in Canada as "an act of grace without establishing a precedent".

This did not appease the East Indian community, and their anger and frustration were later compounded by a series of discriminating incidents. Most notable was the *Komagata Maru* affair, in which 376 East Indians, testing the "continuous journey" legislation, arrived in Vancouver harbour on May 23, 1914, having fulfilled all the requirements. The ship was escorted by gunboat from Burrard Inlet on July 23 with a cargo of disappointed immigrants.

World War I effectively cut off all emigration from India. The East Indian population in Vancouver became scattered and grew smaller over the years. Following the war, the Canadian government by Order in Council in 1919 implemented a policy decided upon by Commonwealth leaders in 1918 that East Indians already domiciled in other British countries would be allowed to bring in one wife and her children. A 1927 Report on Oriental Activities in the province showed that between 1906 and 1925 45 women and 41 children had entered Canada, compared to 4,909 men.

During the 1920s and 1930s the size of the East Indian community remained static. At the outbreak of World War II it was estimated that there were only a few East Indian families living in Vancouver. This small group continued to struggle for enfranchisement, but it seemed there was little they could do to win equality with immigrants from Europe. The fight for franchise was finally won in 1947, but immigration regulations limited to a few hundred each year the numbers of East Indians entering the country. It was not until after Canadian immigration laws removed the distinction between white and non-white Commonwealth immigration that the number of South Asian immigrants reached a thousand in any one year. When the laws were further liberalized in 1966, and selection was based on qualifications rather than country of origin, there was an immediate marked increase in the South Asian population. In 1963, for example, 737 immigrants entered the country. In 1973 that number had risen to 9,203, and by the following year a peak of 12,868 had been reached. A marked demographic change was also noticed at the time of the 1971 Census. Of the 67,925 people of South Asian origin in Canada, only 18,795 resided in British Columbia—historically the province of main concentration. Recently arrived immigrants changed the composition of the community, as almost half chose Ontario as their new home, the majority settling in Toronto.

While India and Pakistan supplied the majority of these immigrants, a substantial number of South Asians came to

Canada in the early 1970s indirectly from Uganda, Tanzania, and Kenya as refugees from political and economic persecution. Some have also come from the United Kingdom and from the West Indies—especially Guyana.

Most South Asian immigrants belonged to the educated, urban, middle class in their homeland, and the majority spoke English upon arrival. According to the Green Paper on Immigration, the average years of schooling of a South Asian immigrant is higher than the national average for Canada. Prior to 1956, one-third of South Asian immigrants were professionals—accountants, auditors, architects, dentists, doctors, engineers, and teachers. About 50 per cent belonged to the labour force. After 1960, the percentage of South Asians in the labour force declined, and the number of professional, white-collar, technical immigrants increased.

The South Asian community is quite heterogeneous, being composed of different racial, ethnic, cultural, linguistic, and religious backgrounds reflecting the diversity of the population of the subcontinent. There are more than 15 different spoken languages and 400 dialects in addition to English, which is one of India's official languages. Many religions are practised in South Asia, at least seven of which have adherents in the South Asian community in Canada—Hindu, Sikh, Muslim, Jain, Christian, Buddhist, and Zoroastrian. The racial groups of India are Mongoloid, Caucasian, and Dravidian.

Diversity in religion, language, and culture is reflected in a diversity of dress, social customs, and dietary laws, as well as in the numerous organizations and associations within the community. There are more than 40 organizations in Toronto alone.

Forty-five South Asian organizations sponsored an investigation into the concerns of the South Asian-Canadian community regarding their place in the Canadian mosaic. This followed a meeting of representatives from the Ontario Human Rights Commission, the Metropolitan Toronto Police Department, the South Asian Canadian community, and the Ministry of the Attorney General. The quick response by the South Asian population to the government's request that they outline the problems faced by their communities resulted in a comprehensive report, in which the concerns of the South Asian population were analyzed and interpreted. The findings were reported, together with policy recommendations.

The basic concerns of South Asians are similar to those of other Canadians and include "...a decent home at a fair price, steady income for the breadwinner from a job appropriate to his skills and a good education and fair opportunities for their children, together with the building of a better Canadian Society" (Ubale, 1977.)

Violence, employment, and education are the major areas of concern among South Asians. Conclusions reached by the report are that racial violence involving South Asians is much more widespread than generally assumed, but that the increase is not immediately noticeable because it is diversified. Very few cases are reported by victims, and very few incidents are reported in the press. There exists also the probability that South Asians now make less use of public places out of fear. Indeed, the report found that fewer South Asians use subways at night; that women are afraid of going out alone to shopping plazas; and that families tend not to go out in the evenings.

Racial slurs and physical violence are also common in the schools, and this form of violence is a major issue in the community.

It was found that there was a general consensus among South Asians that the police were not protecting them, and that a deep mistrust of the police had developed. The police were blamed for not responding quickly to their requests for assistance, for not taking action, and for not serving summonses on their attackers. Moreover, the police were accused of displaying a hostile attitude toward South Asians.

In a symposium on race relations and the law held in Vancouver in 1982, Israel Ludwig illustrated how police officers can be embroiled in controversy for not properly handling a racist incident. He recalled the story of how a group of Sikhs had complained to the police in Vancouver that their temple was being desecrated nightly by a group of vandals. The police advised the Sikhs that they could not charge the offenders until they were apprehended while committing the act. The Sikhs were advised to catch the offenders while they were desecrating the temple, and the police officers would be pleased to go down and lay charges.

A trap was set and when the offenders came along and started to desecrate a temple they were set upon by the Sikhs and held until the police came. When the police arrived, however, they let the offenders go and charged the Sikhs with assault. The case had to reach an appeal stage before the Sikhs were acquitted.

Udale in his report also found that other forms of discrimination, such as racial slurs, hate messages, and harassment, had increased considerably and surmised that one reason might be the realization that there is little or no legal remedy against them.

In the area of employment, the findings of the report were that both in the private and public sector South Asian Canadians suffer relatively greater hardships and face greater obstacles in securing proper employment than their white counterparts.

As for the provincial government, the report found that "...in spite of the fact that there are hundreds of well qualified and capable South Asian Canadians who have had wide experiences of the working of democratic institutions, not a single individual has been appointed to a high position in provincial institutions or government departments".

Discrimination in employment extended to the universities and is considered the most "alarming" aspect of the phenomenon, since universities by their very nature are expected to uphold and nourish the principle of universal brotherhood. In institutions of higher learning, the expectation is that the academic acknowledgement of the applicant's qualifications should be the only criterion for selection.

In the private sector, discrimination against South Asians still takes the form of rejection on the grounds of being "overqualified" and, when they are not, of being told that they lack Canadian experience.

TABLE 6

**Immigrants to Canada and Ontario having India as the Country of Last Permanent Residence, 1949-1976**

| Year      | Canada | Ontario |
|-----------|--------|---------|
| 1949-1950 | 52     | 4       |
| 1950-1951 | 93     | 2       |
| 1952-1953 | 173    | 16      |
| 1953-1954 | 170    | 45      |
| 1954      | 175    | 50      |
| 1955      | 245    | 49      |
| 1956      | 330    | 79      |
| 1957      | 324    | 105     |
| 1958      | 451    | 85      |
| 1959      | 716    | 157     |
| 1960      | 673    | 151     |
| 1961      | 744    | 181     |
| 1962      | 529    | 154     |
| 1963      | 737    | 257     |
| 1964      | 1,154  | 456     |
| 1965      | 2,241  | 924     |
| 1966      | 2,233  | 979     |
| 1967      | 3,966  | 1,740   |
| 1968      | 3,229  | 1,479   |
| 1969      | 5,395  | 2,409   |
| 1970      | 5,670  | 2,351   |
| 1971      | 5,313  | 2,284   |
| 1972      | 5,049  | 2,134   |
| 1973      | 9,203  | 4,662   |
| 1974      | 12,868 | 6,371   |
| 1975      | 10,144 | 4,980   |
| 1976      | 6,733  | 3,048   |

Source: "Ontario Ethnocultural Profiles: East Indians", Ontario Ministry of Culture and Recreation.

### E. Southeast Asians

Filipinos, Koreans, Vietnamese, Cambodians, and Laotians make up the bulk of the Southeast Asian population in Canada, numbering about 140,000. Of these, Filipinos comprise the largest group.

#### Filipinos

Filipinos belong to some 55 distinct ethnic groups, principally Malayan, Chinese, Spanish, and American. Their culture reflects the influences of more than 300 years of Spanish occupation and 40 years of American rule. The Philippines is the only Asian state that is almost entirely Christian, chiefly Roman Catholic. Eighty-seven languages and dialects are spoken, but English is spoken by more than 40 per cent of the population.

Filipinos have a long tradition of emphasis on higher education, and no sacrifice seems too great for the family in order to achieve this for their children. This has been a most valuable asset to countries hosting Filipino immigrants, particularly the United States and Canada.

Filipino immigration to Canada is closely tied in with movement to the United States. The Philippines ranked third among Asian countries in sending immigrants to Canada in the period 1967 to 1976. This recent, sudden influx was an

outcome not only of changes in Canadian immigration regulations in 1966 but of the presence of Filipinos in major American cities and changes in visa policies affecting their stay in the United States.

After World War II, many Filipinos entered the United States for post-graduate studies on five-year visas. On the expiry of these visas, a small number, almost all of them nurses and medical technicians, came to Canada instead of returning home. They gravitated chiefly to the large cities: Toronto, Montreal, Winnipeg, and Vancouver. From 1958 to 1962 the number admitted was 243. In 1960 the American visas were reduced to two years. Most Filipinos did not want to return to the Philippines so soon, and thus started an earnest migration to Canada.

The vast majority were single women. They were employed by the six major teaching hospitals in Toronto, around which they readily acquired living accommodation, more often than not sharing apartments in small groups. They were almost all from the same middle- and upper-middle-class, college-educated background and came from the urban centres in and around Manila. This highly homogeneous group with a strong centralizing tendency had limited interaction with other Canadians, and established a settlement pattern that is still evident today.

Table 7 shows that Filipino immigrants admitted to Canada increased substantially from between 1958-1962 to between 1963-1967. The increases more than tripled again from between 1963-1967 to between 1968-1973.

**TABLE 7**

**Philippine Migration to Canada, 1958-1973**

|           |        |
|-----------|--------|
| 1958-1962 | 243    |
| 1963-1967 | 7,558  |
| 1968-1973 | 23,802 |

Source: Canada Department of Manpower and Immigration. *Immigration and Population Statistics*, 1974, p. 36.

The period 1970 to 1975 accounts for fully 72 per cent of the total number of Filipino immigrants, the peak years being 1973, 1974, and 1975, when the effects of favourable economic conditions in Canada and of martial law in the Philippines contributed to pull Filipinos to Canada. In 1974, Filipinos ranked sixth among immigrants entering Canada, making them one of the fastest growing ethnic cultural groups in the country. A uniformly heavy concentration of immigrants within the 20-29 age group was evident, and while males in this age group did fit into this basic pattern they continued to be outnumbered by females until 1976, when there was a distinct levelling off. One study at this time estimated that one out of every four foreign nurses entering Canada came from the Philippines.

The later waves of migrants were accompanied by more children. Though the age group 0-19 tripled from 1968 to 1971 and tripled again from 1971 to 1974—strong evidence of a distinct pattern in family migration—it must also be noted that there were marked increases among the elderly.

Another change in the population structure resulted from an increasing number of clerical workers among the later immigrants. In 1968 the occupational distribution was heavily in favour of the professional category. There were large numbers not only of nurses but also of medical and dental technicians, and physicians and surgeons. The 1971 distribution shows a decline among those in the professional group and a considerable increase in the clerical and manufacturing categories, reflecting the demand for more clerical workers in Canada at that time.

Estimates for 1979 put the total population over 60,000, concentrated in large urban centres in Manitoba, British Columbia, Quebec, Alberta, and especially Ontario. It is estimated that 40,000 Filipinos have settled in Ontario, of which 30,000 reside in Toronto and can be found in many of the high-density areas in the city core and around hospitals and medical centres.

Their long history of cross-cultural relationships with various eastern and western civilizations have made them inherently multicultural, and this aids in their quick and easy integration into Canadian society.

#### **Koreans**

Koreans are a distinctive group in the Far East; they have their own language, their own distinctive family structure and society, and their own intimate knowledge of their historical past. Post-World War II division of Korea has been a tragedy for Koreans, as it destroyed the very core of Korean distinctiveness—their remarkable homogeneity and great pride in being one people.

Almost all immigration to Canada has been from South Korea, and in 1973 Canada ranked third among countries in which Koreans settled, after Japan and the United States. In 1977, the total number of Korean immigrants in Canada was estimated at 25,000. Immigrants came directly from South Korea as well as indirectly from West Germany, and from Vietnam, South America, and the United States. The majority have settled in Toronto, Vancouver, and Montreal, along with a few hundred in other major centres such as Winnipeg, Edmonton, and Calgary.

Most Canadians of Korean origin are highly skilled workers or professionals. Several hundred work as nurses in hospitals across Canada. A few are factory workers in Toronto and Brampton; others are bank clerks, dentists, accountants, engineers, university professors, and miners. Korean ministers of religion and social workers are located in some of the larger cities.

It is perhaps through the large business population, however, that Canadians in general most often come into contact with the Korean family, as they operate most of the neighbourhood variety stores in large cities. Other popular small businesses among Koreans include restaurants, boutiques, trading companies, income tax services, printing shops, auto repair shops, Tae kwon-do clubs, insurance agencies, travel agencies, and real estate agencies.

One of the key organizations in the life of Koreans is the church. A large percentage of Koreans in Canada are Christians; about 50 per cent are Protestants, mainly of the United Church and Presbyterian Church, and a small percentage are Roman Catholics. The high percentage of Korean Christians is rather interesting, since in Korea itself the percentage of



Christians is a mere 10 per cent. It would seem that either a large percentage of Christians migrated or there was large-scale conversion after migration. One explanation is that the church offers vital social services to every age group and has evolved as the place where new immigrants meet old friends and make new ones. Within the church body there are youth, senior citizen, and women's groups active in recreational, cultural, and educational programs.

### Vietnamese

Southeast Asian refugees are among the most recent arrivals in Canada. The first group of these refugees were the Vietnamese, who started coming at the end of 1975, following the fall of Saigon in May of that year. Before that time there was a small Vietnamese community in Canada, most of whom were students at universities in Quebec or highly trained professionals. Under the refugee relief program, 4,528 Vietnamese entered the country from April, 1975, to the end of 1976. But there are deep-rooted ethnic and socio-economic differences between the two waves of Vietnamese refugees who came to Canada.

The first immigrants in 1975 were a relatively homogeneous group. These Vietnamese came from the urban middle class; they were educated and most of them were proficient in French.

The second wave, after 1975, was composed of "boat people", who were for the most part Sino-Vietnamese. They were also called "Hoa", and were mainly shopkeepers from the cities of South Vietnam, notably Cholon, the Chinese district of Saigon. When the Communist regime assumed power they were under great pressure to leave Vietnam.

From 1977 until mid-1978, the flow of refugees still continued, but was now limited to about 50 families each month. Most of them were people who had escaped from their homeland by boat and had been in refugee camps before coming to Canada. The majority of Vietnamese refugees, most of whom had facility in the French language, settled in Quebec, principally Montreal.

Vietnamese students with Canadian degrees have had no great difficulty adapting to Canadian society. Ninety per cent of them hold professional positions in the industrial and commercial sector and in the civil services. Most are engineers. Among the newcomers in 1975 were doctors, pharmacists, lawyers, professors, officers of the South Vietnamese army. While doctors and pharmacists had relatively few problems finding jobs in their profession after an initial qualifying period, engineers have had more difficulty. Lawyers and professors have had to change their fields, since the Canadian market in their professions was saturated. Further, their degrees and qualifications were not recognized, and they were obliged to accept manual jobs as pastry cooks, painters, waiters, barmen, janitors, delivery men, or machine operators in factories. Some went back to school to learn new specialties, especially in the electronics field and computer science.

Many Vietnamese refugees, however, found that their level of fluency in the two official languages of Canada was inadequate in technical terms. Through Canada Manpower, most of them received minimum income while looking for jobs or while taking language training. However, unemployment and underemployment remain their major problem.

The Vietnamese community has quickly organized in Montreal, Toronto, Quebec City, and Ottawa. Various fraternal associations and clubs help in the resettlement of refugees, publish newsletters, and in other ways serve the community. Some organizations have a religious orientation—either Buddhist or Roman Catholic—others are political.

### Cambodians

Cambodians and Laotians started entering Canada in 1979 as part of a two-year program authorizing the acceptance of 60,000 Southeast Asian refugees.

The majority of the Cambodian refugees speak French and have settled in Quebec. A large number also settled in Ontario and are dispersed in small groups in a number of cities.

The Cambodian community is still in the process of organization. Perhaps more than other Southeast Asian refugees, Cambodians are eager to preserve their traditions. Older Cambodians express the fear that their children will forget their traditions and customs, or even their mother language. They still embrace the precepts of Buddhism, though many young Cambodians do in fact question their religion.

Five years of war in Cambodia destroyed the country completely and with far greater rapidity than in South Vietnam. Most refugees have experienced untold miseries. After endless nightmares, those who got to Canada consider themselves extremely lucky and are grateful to their sponsors. The most frequently expressed concern is for their relatives left behind who are unaccounted for, or too sick or old to join them in Canada.

Cambodians are still in a survival pattern. For them, culture shock has been severe, thus exaggerating their frustrations, especially in relation to employment. Though willingly accepting low-paying, short-term jobs, many Cambodians frequently express anxiety at the prospect of being locked into these jobs.

### Laotians

Laotians represent about 15 per cent of the total Southeast Asian refugee population in Canada. Their average age is under 40 and some who arrived during 1979-1980 were bachelors. They are from various ethnic groups, including ethnic Chinese, and from every walk of life. There are a great many people from minority groups, notably those mountain tribesmen who are called Meo by other Southeast Asians, but who prefer to call themselves Hmong, which means "free". The Hmong fought alongside the Americans and under the new regime were singled out for reprisal and became victims of genocide. Almost all of the Hmong in Canada have been sponsored by the Mennonites, who had agents in the refugee camps in Thailand. Because of their preference for an extremely rural lifestyle, the Hmong were directed toward rural-type settlement in Ontario.

The majority of Hmong in Ontario were sponsored by 112 Mennonite groups. Although families are dispersed throughout Ontario in and around areas such as Sudbury, Ottawa, Hamilton, Elliot Lake, London, and Toronto, the majority are concentrated in compact Mennonite communities in three major Mennonite areas; Waterloo-Perth-Oxford, Leamington, and the Niagara Peninsula. Many families are thus close enough for visiting one another, or at least in telephone contact with other families. There has not been much movement

within the province, but some interprovincial relocation has taken place as families from western provinces have moved to Ontario to join their friends.

The main problems encountered by Laotians in most Canadian communities are related to employment. For those who have higher than secondary education, finding jobs to fit their background has been difficult. Many engineers, nurses, professors, and economists were forced to take whatever jobs were available, working as dishwashers, car jockeys, or in factories. However, Laotians are very proud and eager to be self-supporting, and those who have accepted low-paying jobs and are having difficulty supporting themselves are impatient.

Laotian ethnic groups have preserved their cultural distinctiveness, and the Lao have developed over the course of their 2,700-year history a value system that derives from several different cultural traditions: Brahminism, Theravada Buddhism, and Western cultural influences derived from the French presence. They bring to Canada a code of ethics in which social relationships are clearly defined, and a sense of security derives from the fact that each individual knows what is expected of him and others.

**TABLE 8**  
**Southeast Asian Refugees**  
**Intended Occupations**  
**January 1, 1979 — April 18, 1980**

|                            | Number        | Percentage   |
|----------------------------|---------------|--------------|
| New Worker                 | 6,672         | 16.8 %       |
| Entrepreneur               | 3             | .01          |
| Managerial/Admin.          | 98            | 0.3          |
| Science/Engineer & Related | 297           | 0.7          |
| Religion                   | 6             | .02          |
| Teaching & Related         | 454           | 1.1          |
| Medicine-Health            | 541           | 1.4          |
| Arts/Sport/Recreation      | 210           | 0.5          |
| Clerical & Related         | 992           | 2.5          |
| Sales                      | 451           | 1.1          |
| Service                    | 668           | 1.7          |
| Farming                    | 282           | 0.7          |
| Fish/Forest/Mines          | 88            | 0.2          |
| Processing                 | 749           | 1.9          |
| Machining & Related        | 478           | 1.2          |
| Fabricating & Repair       | 4,919         | 12.4         |
| Construction               | 795           | 2.0          |
| Other Workers              | 1,071         | 2.7          |
| Students                   | 4,475         | 11.3         |
| Housewives                 | 3,686         | 9.3          |
| Other Non-Worker           | 12,680        | 32.0         |
| <b>Total</b>               | <b>39,615</b> | <b>100.0</b> |

Source: Indo-Chinese Refugees—Southeast Asian Refugee Program. *Preliminary Statistical File*, prepared by Ontario Welcome House, based on data from Canada Employment and Immigration Commission.

**TABLE 9**  
**Southeast Asian Refugees**  
**Education**  
**January 1, 1979 — April 18, 1980**

|                          | Number        | Percentage   |
|--------------------------|---------------|--------------|
| No education             | 10,392        | 26.2 %       |
| Secondary or less        | 25,415        | 64.1         |
| Formal Trade Certificate | 1,625         | 4.1          |
| Other Non-University     | 458           | 1.2          |
| Some University          | 1,133         | 2.9          |
| Bachelor Degree          | 461           | 1.2          |
| Some Post-Graduate       | 27            | .07          |
| Masters Degree           | 39            | .19          |
| Doctorate                | 57            | .1           |
| <b>Total</b>             | <b>39,615</b> | <b>100.0</b> |

Source: Indo-Chinese Refugees—Southeast Asian Refugee Program. *Preliminary Statistical File*, prepared by Ontario Welcome House, based on data from Canada Employment and Immigration Commission.

#### F. Latin Americans

The 1950s was marked by large-scale migration of Latin Americans to the United States. In 1963, when immigration laws in the United States became more restrictive, many South Americans looked to other countries. About seven years later they discovered that Canada was in need of unskilled workers, and since that time immigrants have arrived from Mexico, Argentina, Brazil, Chile, Peru, Uruguay, Venezuela, Ecuador, and Colombia. A large number of Latin Americans entered the country as visitors before the change of immigration policy in 1973. This change prevented visitors from applying for landed immigrant status after they arrived in the country.

Not all Latin Americans can be included in the category of "visible minorities", but very many people are, especially from the two larger groups—Ecuadorians and Colombians. For the purposes of this paper we shall be focusing on these groups.

#### Colombians

The Colombian population is descended from three racial groups—Indians, blacks, and Spanish—that have mingled throughout the 400 years of the country's history. The population reflects the kaleidoscopic permutations of people living together for centuries. The language itself has words to describe the major kinds of crossbreeding, for example *mulatto* (black and white), *zambo* (black and Indian), *pardo* (white, Indian and black), and, most important of all, *mestizo*. This term, originally meaning a white and Indian combination, today has been broadened to describe the man of tomorrow, the race that is emerging as a synthesis of many races. In 1976, mestizo made up 50 to 60 per cent of the population.

Colombians in Canada have settled in Vancouver, Winnipeg, Edmonton, in Saskatchewan, and, in a few instances, in the Maritimes. They have been attracted primarily to the

provinces of Ontario and Quebec, where the majority live in the two major cities. The population is made up almost entirely of manual workers, some of whom are skilled and semi-skilled. The majority have completed elementary school, and some have secondary education. They are generally dispersed throughout the metropolitan areas.

The population is young—most are between 20 and 30, and almost all are under 50. They are mostly young families with elementary-school-age children and younger, and there are some single young men and women. They differ from other Latin Americans in that they come almost entirely from urban centres. While they form part of the larger Latin American community, perhaps more than any group they operate as individuals and have very few problems coping with their highly urbanized setting.

A number of active organizations meet the needs of the Latin Americans in Canada. They offer a wide variety of services, which include orientation, counselling, and referral services, translation and interpreting services, citizenship courses, general assistance with respect to social and cultural adaptation, guidance in marital, family and personal problems, and so on. But Colombians tend to use the services of such organizations much less than other Latin American groups, their needs being mainly limited to translation, interpreting services, and assistance with legal documents.

Sports clubs, especially soccer, enjoy capacity membership. In Ontario alone there are 50 soccer clubs in three Latin American leagues that have a representative Colombian membership. It is not unusual to find one soccer team attracting as many as 500 people in an afternoon.

### Ecuadorians

The great bulk of Ecuador's population is made up of Indians and mestizos (descendants of Spaniards and Indians); there are also whites and a relatively small number of blacks who are descendants of slaves. The various racial groups lived in the same territory under common rule for more than four centuries, but they have not formed a single people with a single language and shared way of life. Poor communication has caused the societies of the Sierra and Costa to develop in relative isolation from one another.

In 1972 about half the population lived in the rural Sierra, but there was a growing tendency to migrate to the industrialized Costa in search of employment. During this period of internal migration, large numbers of Ecuadorians, including a significant percentage of highly skilled and professional people, emigrated to the United States. This movement lasted until 1963, when U.S. immigration laws became more restrictive. Ecuadorians then looked to other countries. In the early 1970s they started entering Canada in much larger numbers in response to a need for unskilled workers in the Canadian market. Unofficial estimates for the first three years of the 1970s place the number of Ecuadorians entering Canada at 20,000, and by the mid-1970s their presence began to be felt in Montreal and Toronto.

Table 10 shows that in the years 1973-1977, a high percentage of immigrants to Canada from 19 Spanish-speaking countries came from Ecuador, most of which chose Ontario for their new home.

**TABLE 10**  
**Spanish-Speaking Immigration in Canada,**  
**1973-1977**

| Year | Total numbers from Spanish-speaking Countries* | Numbers from Ecuador | Numbers in Ontario |
|------|------------------------------------------------|----------------------|--------------------|
| 1973 | 6,774                                          | 1,177                | 1,098              |
| 1974 | 9,285                                          | 1,841                | 1,721              |
| 1975 | 9,743                                          | 1,698                | 1,624              |
| 1976 | 8,368                                          | 1,128                | 1,038              |
| 1977 | 6,325                                          | 548                  | **                 |

Source: Department of Manpower and Immigration.

\*Represents totals from 19 countries excluding Spain, Haiti, and Brazil.

\*\*No data available for Ontario residents.

Ecuadorians form part of the larger Latin American communities in such centres as Hamilton, Guelph, Kitchener-Waterloo, Burlington, Oakville, Mississauga, Brampton, Oshawa, and Sudbury. The greatest concentration is in Toronto, where they live in the central area and in the City of North York. In Ecuador, most of them were unskilled workers with secondary and technical education; about 25 per cent were skilled workers with secondary and technical education including welders, mechanics, electricians; a small percentage were teachers, social workers, and office workers. In Ontario there is hardly any distinction. Because they lack Canadian certification and experience, more than 90 per cent of the entire population find employment in low-paying factory jobs and in service industry jobs that are avoided by other Canadians.

Ecuadorians are still very new to Canada. Most of them worked the land in Ecuador and experienced a vastly different lifestyle. The transition to a highly industrialized foreign land is not an easy one, but the population is young and full of vitality. In 1977 it was estimated that more than one-half of Ecuadorian immigrants were under 30, a large proportion of whom were school-aged children and younger. Community leaders devote much energy to reaching the children and teenagers and in encouraging parents to participate in developing special programs for their needs.

### III. POST-WORLD WAR II TENSIONS IN CANADIAN SOCIETY

The effects of post-war immigration have had a profound impact on Canadian society. Most major urban areas were quite unprepared for the alteration in population that magnified the presence of visible ethnic groups, their rising social status, and their determination to resist discrimination.

By the 1960s it was clear that Canadian society had become not only multicultural, but more clearly multiracial, multilingual, and multireligious. It was also evident that, because new immigrants were screened differently under a procedure that emphasized the factors of education and skills, their expectations and demands were much higher



than those of earlier immigrants. Tensions arose from the stress placed on housing, education, and employment, as well as from inter-cultural fear and suspicion.

During the 1970s, when the effects of the oil crisis and increasing global economic recession affected Canada, and rising inflation and unemployment created social stresses and strains on the society, visible minorities were blamed. Most Canadians see all visible minorities as newcomers. They blamed them as newcomers for the unemployment situation, inflated housing costs, and whatever else ailed society. Resentment traced an uneasy pattern across Canada, and acts of racism increased against visible minorities not only in the cities but in the suburbs and remote communities of many provinces.

Meanwhile, Canadian institutions were slow in recognizing the changing ethnic and racial diversity of the country. Research carried out in various parts of Canada clearly showed that visible minorities were not obtaining equal access, opportunity, or representation across a wide cross-section of institutional areas. Furthermore, as a federal document stated, it was evident that the justice system and certain laws and policies in many instances functioned against the needs and concerns of visible minorities.

At one time in Canadian history, visible minorities and Jews were victims of restrictive covenants that prevented the sale of houses and land to non-Caucasians. Such restrictive covenants are now illegal on the basis of court decisions in Ontario and Manitoba. Federal law also sought to eliminate discrimination by amendments to the National Housing Loan Regulations under the National Housing Act, prohibiting discrimination based on race, colour, religion, or national origin for property covered by loans insured by the Central Mortgage and Housing Corporation. In addition, the provinces now have human rights codes prohibiting discrimination in multiple-dwelling units. The question is, how effective is such legislation?

One survey held in Toronto in the 1970s revealed that 75 per cent of West Indians felt there was housing discrimination in that city. That this discrimination is racially motivated is suggested by the fact that darker-skinned "black" West Indians reported almost three times the number of cases as fairer-skinned "brown" West Indians, and more than 10 times the number reported by white immigrants.

The same survey found that 80 per cent of West Indians perceived discrimination in finding a job or in gaining a promotion. Ten years later, another survey showed very little change. Seventy-two per cent of West Indians found employment discrimination "very serious", the highest of the eight immigrant groups included (Walker, 1983). And yet there is legislation such as the human rights codes to guard against such discrimination.

Alan Borovoy, general counsel of the Canadian Civil Liberties Association, has remarked on the overwhelming number of cases brought before the Ontario Human Rights Commission that get resolved at the level of conciliation and settlement. His view is that the simple psychology of human rights legislation is that most people, regardless of their prejudices, are not so hopelessly and unalterably bigoted that they would put themselves through all the trouble and inconvenience of a public hearing just to keep out a few members of

minority groups. However, as society moves on, new techniques have developed, and employers who want to keep out certain minority groups need not now do it themselves, but can hire specialists to do it for them. Many of them have used employment agencies.

During the last seven or eight years, the Canadian Civil Liberties Association has conducted three surveys of employment agencies randomly selected throughout Canada. The results have always been the same. Agencies were contacted on the telephone by a fictitious American firm planning to locate in their community and wanting to get an idea of what service they could look forward to. Among the services requested was, "Can you keep out non-white people for me? Refer white only?" The results of one such survey showed that out of 25 agencies telephoned, only three flatly said "No"—as the law requires them to say. Five gave vague answers and 17 left little doubt that they were quite prepared to cooperate—with someone they had never met, years after human rights legislation had been enacted rendering such a response unlawful.

Thus it can be seen that human rights commissions are limited in dealing with this type of discrimination. More often than not, the victim does not even realise he is being discriminated against and cannot come forward to file a complaint.

In response to surveys by the Canadian Civil Liberties Association, discussions were held by the Ontario Ministry of Labour in December, 1982, and a number of remedial measures suggested for addressing the problem. These included education, self-regulation, record-keeping, testing, and counsellor licensing. Some combination of these might constitute a set of reasonable solutions.

Mass media advertising has been another major area of discontent in every visible minority group. In 1971, in response to complaints by visible minorities, especially black performers, that they were not being considered for jobs in mass media advertising, a study on the Employment of Visible Minority Groups in Mass Media Advertising was undertaken for the Ontario Human Rights Commission. With regard to newspaper advertisements, a sample survey revealed that the total number of advertisements was 509; the number with models was 75; and the number of models an estimated 225. Of these models, only two were non-white, and these were non-Canadian. Both were photographs of black performers on the covers of long-playing records.

Similar surveys by the Kitchener-Waterloo Religious Society in the *Guelph Daily Mirror*, and of magazines and department store catalogues, showed that visible minority groups fared no better. An analysis of television commercials presented the same basic picture. Many commercials were of American origin, but in some instances the soundtrack or voice-over was Canadian. In some instances the performers were black or Asian. In general the surveys presented in the 1971 report portrayed an image of Canada as a country populated by whites.

Eleven years later, at a conference on "Visible Minorities and the Media", sponsored by the Multiculturalism Directorate, the then Minister of State for Multiculturalism, the Honourable James Fleming, commented, "I believe that more and more Canadians recognize that Canada is a multicultural

and multiracial nation .... It is evident in our restaurants, discotheques, theatre audiences. I wonder why, then, the people who decide what we see on our television screens every day don't take advantage of this attitude."

The fact is, despite the realization that the role of the media is critical in combating racism, resistance to hiring visible minorities is still very evident. A few commercials now use visible minorities in a creative and non-stereotypical way, and in casting and hiring one does see "a black sportscaster, a Chinese Canadian cast as a typical nurse, a South Asian academic explaining the problems of acid rain in the Great Lakes". Nevertheless, as Mr. Fleming confirmed, the overwhelming image presented remains seriously out of whack with reality.

The federal government has taken a leading role in representing the reality of a multi-ethnic society in government advertising and communication. In 1982, Cabinet approval was given to "Guidelines for the Representative Depiction of Visible and Ethnic Minorities in Government Advertising and Communications". These guidelines apply to all internal and external federal government communications either produced by the federal government or contracted for or purchased from the private sector. The guidelines reflect the commitment of the government to the policy of fair and representative depiction as to race and ethnic origin in all government communication.

Under-involvement and under-utilization of visible minorities is also reflected in other sectors of the economy. For example, a recent survey by the Civil Liberties Association of the upper echelons of the Ontario government revealed that of 235 positions from chairman and executive director up, only three were occupied by visible minorities. Of the three, two were of Japanese origin and one was black.

In the corporate sector, the *Financial Post* was selected a few years ago as a good barometer of the sector. All promotions that were being advertised with photographs were noted. Of more than 1,900 such announcements, only six went to visible minorities. The pattern is repeated over and over in a number of sectors of the community.

Professionals and tradesmen also encounter serious problems in carrying out their vocations. South Asian and Southeast Asian immigrants in particular have been faced with many restrictions that inhibit the utilization of their skills because of licensing legislation and union practices under which certain professions and trades operate in Canada. Because licensing legislation and union practices are geared almost exclusively toward the recognition of the qualifications acquired through the "Canadian type" of formal education or apprenticeship, South Asian and Southeast Asian immigrants find it extremely difficult to gain entry into certain professions and trades. At one stage the Ontario Department of Labour did issue temporary certificates of qualification to immigrant tradesmen with some documentary evidence of their trade qualifications. This procedure was later changed to a practical trade test before the issuance of a temporary certificate. However, in order to prepare for professional or trade examinations, immigrants need to have some training facilities available to them. In many cases such facilities are not available.

Counteracting these trends were greater demands from visible minorities for recognition as contributors to Canadian

society, emergence of heritage programs, and a new articulation of human rights by the federal and provincial human rights commissions. As it became virtually impossible to resist visible minority group complaints and causes in Canada, different levels of government (federal, provincial, and municipal) established mechanisms to develop policy and program responses to address urgent and pressing issues in the area of race relations. For example, the Ontario government established the Cabinet Committee on Race Relations and a number of urban areas created race relations committees at the municipal level. A national program to combat racism was launched in the summer of 1981 by the Minister of State, and a race relations unit was established in the Multiculturalism Directorate with race relations as a priority. Key areas that have addressed the problem of inequitable treatment experienced by visible minorities are:

#### A. Education

Neither Canada nor its major cities were prepared for the impact that post-War II immigration would make on the schools. The vast majority of the new immigrants with a high proportion of school age children settled in the major urban centres of Toronto, Winnipeg, Montreal, and Vancouver. Not only was the system confronted with students for whom the English language was completely alien, but it faced an entirely different character and configuration of cultures than experienced in previous waves of immigration. A most significant change was that large numbers of immigrants were now recognizable by the colour of their skin. In 1950 the Toronto Board of Education set the population of immigrant students at 1,000; by 1975 the number was set at 50,000, or 50 per cent of students enrolled in schools. The West Indian population for example, suddenly increased to well over 60,000, with about 30 per cent of these being children of school age. Although English is the first language of these immigrants, the problem of dialect, together with the fact that cultural and educational experiences differ from those of Canadian society as well as from non-English-speaking immigrants, produced near-crisis situations in many schools, marked by demoralization, failure and violence.

In Vancouver, racism in the schools created severe tensions, and there were frequent confrontations between the South Asian community and the school boards.

Because society recognizes the key role of institutional education in the socializing process, it is not surprising that schools are the principal arenas in which the battles against racism and discrimination are fought. Evidence of prejudicial attitudes and overt discrimination in schools was generated in four major studies: Adair, 1976; Henry, 1978; Ubale, 1977; Pitman, 1977. These reports clearly pointed out that prejudicial attitudes and discriminatory behaviour consistently resulted in the denial of human rights. Concern about the role of the school in multicultural education increased sharply as teachers tried to find out about prejudice, its origins, its nature, and, most importantly, what could be done about it in the context of the school.

Volume IV of the Royal Commission's Report on Bilingualism and Biculturalism recommended that languages as well as cultural studies, other than English and French, should be incorporated into provincial school systems. Major conferences, particularly in Ontario, put forth the same recommendations. Steps have been taken by the Ontario Ministry of

Education to eliminate bias and prejudice in the textbooks and to prepare teachers at the Faculty of Education at the University of Toronto by the introduction of courses in cross-cultural education. Several provincial departments of education now screen textbooks for ethnic prejudice and stereotype and have introduced various approaches to implementing new curriculum reflecting the ethnic reality of Canadian society. In the light of tensions, some boards responded by appointing community relations officers. Innovative programs being tested include Multicultural Multiracial Leadership Training Programs, Race Relations Training Programs, Positive Plan Culture Programs, and Heritage Language Programs.

However, in terms of real power and the position of racial minorities within the educational system, the picture is not quite so rosy. For instance, an examination of the Toronto system in 1982 revealed that there were 8,404 people working for the Toronto Board, of whom 665, or about eight per cent, were non-whites. This is extremely low considering that Toronto has a population of about 25 per cent non-whites. There were three black principals, but no Asians, Southeast Asians, or native Indians at the principal level. Of the 36 highest positions at the Board, with salaries paying between \$60,000 and \$80,000—director, area superintendents, assistant superintendents, school superintendents, special education coordinators—there was only one black and no Asians—and, incidentally, just four women.

#### B. Police

The police have begun to respond to changing needs of a multi-ethnic/multicultural society. They have added multicultural and sensitivity courses to their training, and in major urban centres such as Montreal, Toronto, and Vancouver have opened channels of communication with visible minorities.

Efforts have been made to represent the ethnic mix of the population, and several cities in Canada now operate ethnic relations programs. Perhaps the most prominent is the Ethnic Relations Unit in Toronto. Training of the ethnic squad officers includes a course in multiculturalism and courses in human rights legislation. The RCMP also includes a course in cross-cultural relations for members of its force. The Metropolitan Toronto Committee on Race Relations and Policing provides a direct forum for communication between ethnic community leaders and police directors. Despite these efforts, however, there is probably not a human rights commission in Canada that has not had complaints by blacks of rough police treatment, or Asians complaining of racist name-calling by police. And, as Hill (1977) points out, the frequency with which these complaints arise, supported by occasional candid admissions from police officers, suggests that racism does exist within the force.

Toronto lawyer Charles Roach feels that Caribbean people have more convictions for traffic offences than the general population. People who write insurance policies for automobile insurance for a largely West Indian clientele find that they are very soon out of business because of difficulties arising out of the demerit point system. This situation, Roach claims, arises out of the overcharging or overprosecution and selective prosecution of Caribbean people by Toronto police.

Roach also feels that among blacks and Asians there is a dramatically high incidence of entering houses without warrants, as well as of beating and brutal treatment of people.

#### IV. PERCEPTIONS OF THE GROUPS

With very few exceptions visible minorities feel that they are subjected to vicious and complex forms of discrimination. In general discrimination is now perceived as being more subtle than overt. Some call it "sophisticated discrimination". Systematic and institutional discrimination is seen as the primary problem manifest in employment, education, media treatment, treatment by the police, governments, and community agencies, and in housing.

Input from literature research, ethnic organizations, and from community leaders also suggests that while recognition is given by visible minorities to current efforts to deal with discrimination and racial tolerance, a comprehensive, coordinated approach to ethno-cultural sensitivity is lacking. Multicultural staff development, especially among helping professionals, is considered to be sadly lacking. And the urgent need is felt for some educative process of staff development that would increase sensitivity to and knowledge about ethnic or racial groups in order to provide social services in a more meaningful way.

The urgent need for ethno-cultural awareness and sensitivity is demonstrated in numerous ways. For example, a sore point with most visible minority groups is that the wider society in general and helping professionals in particular see them as homogeneous masses. The case of blacks is used as an illustration. Blacks, regardless of the wide variety of their ethno-cultural backgrounds and experiences, are considered to be and are treated as one homogeneous group. Informants pointed out that this assumption is frequently demonstrated by the tendency for black West Indian social workers to be called upon to intercede where a white social worker feels helpless in dealing with a dark-skinned client from Africa, South America, or even India. This assumption is viewed as a proclamation that colour overrides all other factors that encompass the human individual. When colour of skin is also associated with lower-class status, ignorance, laziness, poverty, deprivation, and immorality, the maintenance of these destructive stereotypes has widespread implications.

As the historical portraits of the various visible minority groups covered in this report demonstrate, numerous subgroups exist within each major group. And this is particularly marked in the case of blacks who, within a generalized colonial profile, have a great deal of diversity. West Indians, for instance, come from a variety of territories, each of which has certain unique characteristics. They also come from various socio-economic backgrounds, and what is bewildering to the West Indian is the inability of many in the host society to perceive a cultural, class, and status difference.

Translated into the school setting, particularly, they feel that the assumption is made that all blacks belong to a lower working class and that there are thus concomitant expectations about the level of culture at home, about the child's likely degree of interest in books and the arts, and about the support and encouragement he will get from his parents throughout school.



Other visible minority groups particularly dissatisfied at the inability of the larger society to give recognition to their heterogeneous nature are South Asians and Southeast Asians.

### Education

Some school boards seem slow to react to the changed racial composition and climate of their institutions, and there is even an element of resistance. All visible minority groups feel that teachers and teaching staff in general are not sufficiently informed of problems and background of visible minorities. The ethnic composition of the teaching staff does not reflect the ethnic composition of students, nor do the upper echelons of the various boards.

There is a pronounced lack of visible minorities represented in positions of responsibility—i.e., principals, inspectors, superintendents—particularly in those areas where demographic composition of school population justifies such representation.

The role of schools is seen as crucial to the success of the official multicultural policy. All groups recognize that efforts are being made by many school boards, but concern was expressed that both resources and awareness are insufficient.

### Employment

All groups feel that there is discrimination in both the private and public sectors. Apart from technical fields, where expertise counts and qualifications can be objectively measured, there is much more difficulty getting in, staying in, and getting promoted. Visible minorities are represented in support and technical jobs, but are fired more easily. All groups felt that visible minorities reach a ceiling, and that it was almost impossible to get past a "blockage" in the promotional ladder. Blacks and South Asians feel that they suffer most. Specific areas of discontent include:

- Inflated or artificial educational requirements, which are a frequently employed tactic of subtle discrimination.
- Unreasonable height and weight restrictions and artificial language skills required to perform tasks.
- Communication problems cited by employers in a discriminatory fashion, e.g., saying that someone with a "Chinese" accent has a communication problem, and not someone with a deep Scottish or Irish accent.
- The federal government, which is considered guilty of discrimination against new immigrants because citizenship is a basic requirement of many jobs. This requirement creates second-class citizens of new immigrants from the moment they enter and erodes the principle of human rights in letter and spirit.
- Current policy and program activity, which is concentrated in providing low-income job opportunities. The distribution of minority group employment between low- and high-income jobs reflects gross inequalities.
- Alienation and frustration of visible minority youth, which are a direct result of high unemployment (and inadequate access to proper education and recreational facilities). For example, in some areas such as the Maritimes, where the unemployment rate of black youth is close to 50 per cent, the feeling is that the Department of Employment and

Immigration has not acknowledged the problem and does nothing to create opportunities for black youth.

- The province of Ontario was singled out as a major organization guilty of streaming—it appears to hire visible minorities primarily for secretarial and clerical jobs.
- Canada Employment Centres were sharply and consistently criticized by blacks, South Asians, Southeast Asians, and Latin Americans. Job-hunting through these agencies was a demoralizing experience.
- Canada Manpower—dissatisfaction expressed with regard to training. Visible minorities not adequately prepared for the job market.
- Women in particular felt that both Manpower and Immigration offices ignore the skills they brought from their countries of origin.
- Parks and Recreation considered extremely discriminatory in summer hiring.
- Most visible minorities, especially blacks and South Asians, felt that employment agencies were a complete waste of time, that whites with far fewer qualifications were selected ahead of them. Further, that agencies accepted "whites only" job orders.

### Police

Police violence is a particularly pressing issue. Blacks and South Asians perceive police harassment and brutality directed against them, and both complain of name-calling. Areas of pronounced friction between the police and visible minorities involve those investigations and arrests where individual members of visible minority groups are the targets, and those where visible minority communities are the subject of investigations. Blacks in particular express resentment in this area. Other areas of concern include:

- Some groups complain that certain crimes in their areas are not conscientiously investigated.
- Individual members of visible minority groups are often stopped for questioning simply because they look like a suspect who is a member of the same group. The Rastafarians in particular complain about the frequency with which they are stopped and questioned and arrested.
- Some groups—especially blacks and South Asians—complain that police officers often show a lack of interest in undertaking investigations of crimes committed against them, e.g., the desecration of a Sikh temple in B.C. and subsequent prosecution of the complainants themselves.
- The use of police powers of investigation for the purposes of immigration is a particularly sore point. Most groups feel that in situations of arrest they are treated as if they are presumed to be without status in Canada.
- Minor offences committed by visible minorities appear to provoke the use of excessive force.
- Although law enforcement mechanisms have been set up for dealing specifically with the dissemination of hate literature, a phenomenal amount of hate literature is in circulation throughout Canada. Mechanisms have also been set up to deal with racist attacks against visible minorities, but this continues and has even increased during the 12 years since the relevant sections have been adopted. Very few prosecutions have been instituted.

## Media

Complaints include:

- Visible minorities are not hired as reporters, editors, writers.
- Programming of visible minorities on radio and television is negligible.
- Newspaper coverage of visible minorities is narrow. Still tends to reinforce stereotypes, bias, and negative perception of visible minorities.
- Visible minorities are not used widely in advertisements. Where they are used, they are often portrayed in negative terms that reinforce stereotypes.
- The press and radio tend to sensationalize or in various ways legitimize racism.

## Social Agencies

It is felt that social agencies in general and health care agencies in particular are not effective in meeting the needs of people from the Third World. (Some agencies, e.g., the Children's Aid Society, have acknowledged their weakness in this area.) Specific complaints include:

- The staff in social agencies are totally unprepared for dealing with the multicultural society.
- The need for increased services to ethnic populations is low in priority of demands on agency resources.
- There is a complete absence of multicultural skills in staffs of most agencies. West Indians, South Americans, and recent Southeast Asian arrivals have been identified as groups suffering most from lack of communication and traditional health-care methods which fail to meet the needs of people whose "personal" problems are firmly rooted in socio-cultural phenomena.
- The welfare system is of special concern to some groups who view it as creating shame and dependency.

## Human Rights Commissions

### Race Relations, Multicultural Directorate

Complaints in this area include:

- Neither federal nor provincial human rights legislation has sufficient "teeth to bite". In some areas the law is weak. Contract compliance is one alternative that should be examined.
- Some aspects of discrimination in employment are not addressed by the human rights codes, e.g., under-earning in some groups, herding visible minorities into low-paying jobs while high-paying jobs are reserved for whites.
- Present objectives of the monitoring organizations are not publicized sufficiently.
- Although a breakdown by ethnic group shows that West Indians, South Asians, and black Canadians are at the top of the list with almost all cases based on employment, these groups do not express much confidence in human rights legislation. Many cases of discrimination are not reported.
- Prospective complainants feel the commissions are ineffective in dealing with reprisals. Group leaders feel that human rights commissions can do more to eliminate fear of further discrimination.
- It is felt that commissions aggravate frustration by delays in dealing with cases.

- The Quebec Human Rights Commission was criticized for holding only one public meeting in six years dealing with race relations, and for not following up suggestions made at that meeting.
- Commissions do not do enough community relations work. Prevention is seen to be better than cure in race and ethnic relations.
- It was generally felt that efforts in the area of multicultural activity and race relations lacked coordination.
- Too much emphasis was expended by the Multiculturalism Directorate of the Secretary of State Department on cultural displays, dances, and artifacts. The political, social, and economic implications of multiculturalism were not being given sufficient serious consideration.
- Conferences related to issues on race relations, including activities through community groups, service clubs, and religious organizations, were not given enough support.
- Not much has been done to analyze the information fed to human rights commissions.

## Housing

Complaints in this area include:

- The refusal of accommodation by some landlords was noted across the country. This affects more than one visible minority.
- In areas such as Ottawa, with its very tight rental market, Southeast Asian refugees in particular point to housing as a primary problem. Discrimination in this area is a daily reality.

## Issue Areas—Broken Down According to Groups

### Blacks—Discrimination is perceived as a highly significant problem in this group.

#### Education

1. Various levels of education system charged with discriminatory behaviour towards black students and teachers.
2. Negative streaming based on improper testing and lack of cultural awareness.
3. Cultural insensitivity and stereotyping and direct bias still exist in schools, e.g., a slave auction in a Toronto high school in which visible minority group students were selected to play the role of slaves.
4. Despite parental protests, textbooks like *Little Black Sambo* remain on the reading lists in some jurisdictions.
5. The visit by a Ku Klux Klan leader to a Grade 12 class in Toronto without preparation by teacher.

#### Employment

1. Systematic discrimination in the government.
2. Current government administrative procedures perpetuate inequality. This includes hiring from within the Public Service first, as well as citizenship requirements.
3. Access to many types of jobs is slow; promotions are slow; a ceiling is placed on promotion to senior levels.
4. West Indian males "under-earn" compared to majority of Italian and Portuguese males.
5. West Indian males under-earn by \$2,400.
6. West Indian females under-earn by \$4,600.

#### *The Law*

1. Police harassment—vital issue in all major urban areas.

#### *The Media*

1. Blacks are not hired as reporters, editors, writers.
2. Programming of blacks on radio and television is negligible.
3. Blacks are not used widely in advertisements.
4. Negative stereotyping.

### **Chinese—Discrimination is significant to specific spheres of life.**

#### *The Media*

1. The W5 program "Campus Giveaway", which made a racist statement that Chinese students are supplanting "Canadians" in universities. Idea that Chinese cannot be Canadians implicit in show.
2. Negative media portrayal in exchange of letters and articles over Chinese stereotype presented in *Nutcracker Suite* performed by National Ballet of Canada as well as TV show *Dr. Who* and poster at the Ontario Science Centre. (The W5 incident marked a turning point in the history of the Chinese community. It led to the formation of a permanent, new activist organization which willingly defended community interests on several other media-related incidents.)

#### *Employment*

1. Success of the Chinese is overstated. Limited to a small number.
2. Systematic discrimination is greatest in employment, especially in the civil service. Upward mobility is possible in technical areas but not at senior management levels.
3. Chinese are unemployed above the average, especially in centres such as Toronto.
4. Chinese males "under-earn" by about \$500 compared to majority.
5. Chinese females under-earn by \$4,300.
6. Job security is lower than for all others except West Indians.
7. Chinese (and Japanese) in Windsor perceive increased discrimination because of auto industry's playing up of the theme "unemployment made in Japan".

### **Japanese—Discrimination seen as minor social problem.**

1. Some discrimination seen in Windsor—stemming from slump in auto industry and the slogan "unemployment made in Japan".

### **South Asians—Discrimination is a highly significant problem in this group. Physical violence, employment discrimination, and visa restrictions are the major areas of concern.**

#### *Physical Violence*

1. Has decreased but remains just below the surface. Racial attacks are still common in Vancouver and surrounding towns. Name-calling is commonplace.

#### *Immigration*

1. Visa restrictions exaggerated.
2. Treatment by immigration officials dehumanizing.

#### *Employment*

1. Unemployment rates are highest of all groups—double the average.
2. Systematic discrimination in employment.
3. Government is seen to place visible minorities in work ghettos. They are dismissed unfairly, promoted slowly, and a ceiling is placed on their advancement.

### **CONCLUSION**

One in 10 Canadians is a member of a visible minority group, and their numbers are likely to grow as the sources of Canadian immigration continue to shift from Europe to Third World countries. This shift is taking place despite policies that still favour immigration from Britain, the United States, and Europe, as evidenced through the location of numerous immigration offices in these countries. However, as European economies advance beyond Canada, and job security and unlimited job opportunities in Canada diminish, the country is not as attractive to highly skilled Europeans.

Canada remains, however, an attractive alternative to the high unemployment and depressed economic state of most Third World countries. And even though Britain is still a leading source country of immigration, increasingly immigrants from Britain are blacks or Asians.

In an address to the symposium on Race Relations and the Law held in Vancouver in April, 1982, the then Minister of State for Multiculturalism, the Honourable James Fleming, pointed out that 200,000 immigrants a year will be needed just to keep Canada's population at present levels. Over the next 10 years, 600,000 new workers will be needed, up to 100,000 in Ottawa's high-tech area alone. Since Canada's colleges and universities do not turn out enough skilled workers, Fleming predicted that recruiting for those workers will have to continue in developing countries in Africa, Asia, South America, and the Caribbean. Thus the population mix will continue to change.

Increasing allegations of racism, racially based violence, and discrimination have accompanied these increases of visible minorities in the social fabric of Canadian society. Assessing discrimination is no longer as simple as it used to be. There are no longer Acts that empower the federal government to select immigrants on the basis of their racial or national origin. And racial discrimination practised openly because it was seen as a justified and proper defence of Canadian interests is now a thing of the past. Blatant racial discrimination is recognized as such and condemned as inconsistent with current standards of human rights. Human rights codes proclaim the equality of all groups before the law. The official federal policy of multiculturalism is a commitment to fair play for all. But the realization of these principles in the behaviour of institutions is another matter.

Evidence of the existence and extent of discrimination is limited by the ambiguities inherent in the concepts of discrimination. But minority groups feel that statistical surveys and census data on the experience of minorities in the job market should be undertaken to provide information describing the social and economic status of minorities.



At a conference on Visible Minority Women and Employment held in September/October, 1983, for instance, a major concern, particularly of government employees, was that there was no clear picture of whether immigrants who improve their job qualifications and job experience actually reduce their job disadvantages. The general feeling was that they continued to be assessed at their starting qualifications, with no systematic account being taken of their improved qualifications. Promotion, they felt, rested too heavily on the subjective opinion of managers. Up-to-date statistical data and analysis can accurately measure disadvantages and isolate the racial and ethnic factor from others, such as education or work experience.

A Working Paper for Full Employment by the Social Planning Council of Metropolitan Toronto (1982) recognized the importance of such social data in determining evidence of discrimination, but cited as its weakness the fact that such data were limited to interpreting only individual situations.

The role of human rights commissions in dealing with individual job disputes based on racial/ethnic discrimination involves a procedure that does look closely at the job, the employer, the complainant, and all the relevant circumstances. And, since it is sensitive to nuances affecting individual and idiosyncratic aspects of the situation, it is ideal for separating out racial factors from others affecting particular situations. But since, as minority groups consistently report, many cases of discrimination go unreported, and since most of the information about complaints before human rights commissions is not public information and therefore cannot be analyzed, the drawbacks in providing evidence of discrimination are very real.

A very important source of information that until recently has been considered rather "soft" concerns perceptions of the groups—both majority and minority. Muszynski and Reitz

(1982) suggested that if the majority group holds very negative attitudes toward visible minorities it seems highly improbable that discrimination can be avoided. Various recent surveys and reports (e.g., *Race Relations and the Law*, 1982, and 11 reports on Discrimination and Visible Minorities submitted to the Multiculturalism Directorate, Secretary of State) suggest that across this country racism has reached levels not seen since before World War II, and that no part of the country remains untouched. These reports provide evidence of the social support for discrimination.

As this report and other current findings reinforce, it is the perception of visible minorities that they are subjected to vicious forms of discrimination, particularly in the area of employment. While this perception may indeed reflect the occurrence of actual discrimination, it is in itself a very significant problem.

Again, if the majority group perceives discrimination, this may be a vital factor in confirming the existence of discrimination. Muszynski and Reitz (1982) found that the majority of Canadians feel that discrimination in employment exists for ethnic groups in approximately the same proportion as the ethnic group itself. They found, for example, that 80 per cent of the majority of Canadians in Toronto perceived that employees were discriminating against West Indians, and 54 per cent perceived that employers were discriminating against Chinese.

In addition, all visible minority groups covered in this report suffer from such forms of stereotyping as form the bases for discriminatory practice. And since, as Henry (1978) points out, the majority of the white population hold these stereotypes to some degree at least, a case for social support of discrimination can be made.

It is, therefore, not unreasonable to infer that the attitudes of the majority are in turn reflected in discriminatory practices in employment.

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